Printed for J. Worrall at the Dove in Bell Yard Near Lincoln's Inn

T. Stayner Sculp

THE

COMMENTARIES,

OR

REPORTS

OF

EDMUND PLOWDEN,

Of the MIDDLE-TEMPLE, Esq;

An APPRENTICE of the COMMON LAW,

CONTAINING

Divers CASES upon Matters of LAW, argued and adjudged in the several Reigns of King EDWARD VI. Queen MARY, King and Queen PHILIP and MARY, and Queen ELIZABETH.

ORIGINALLY WRITTEN IN FRENCH,

And now faithfully translated into ENGLISH, and considerably improved by many marginal Notes and References to all the Books of the COMMON LAW, both ancient and modern.

TO WHICH ARE ADDED,

The QUÆRIES of Mr. PLOWDEN,

Now first rendered into ENGLISH at large, with References, and many useful Observations.

IN TWO PARTS.

With two new TABLES, more compleat than any yet published; the one, of the NAMES of the CASES, the other of the PRINCIPAL MATTERS.

Quid te vana juvant miseræ ludibria chartæ?
Hoc lege, quod possis dicere jure meum est. MART.

Videte quod non mihi soli laboravi, sed omnibus exquirentibus scientiam. ECCLESIASTICUS, Cap. 24.

In the SAVOY:

Printed by CATHARINE LINTOT, and SAMUEL RICHARDSON, Law Printers to the KING's MOST EXCELLENT MAJESTY, for the TRANSLATOR, and to be sold by the Booksellers in LONDON and WESTMINSTER. MDCCLXI.

MYSEVM
BRITANNICVM

EDMUND BOGMDEN,

OF

KEBOKLS

OR

COMMENTARIES,

THE

W. Plowden the famous reporter was of a good family in Shropshire: & Mr. Plowden of Plowden Hall in that county descended from him, as I understand, is the proprietor of large landed estates which belonged to the reporter.

Ob. Pasch. 11. Jan. 1800.

Mr. Plowden was a reader of the Middle Temple in Dugd. Orig. 5 Edw. 6. & Mary, & was double reader in 3 Eliz. &c. It appears by the date of his preface to the first part of his Commentaries, that he was living 20. Oct. 15 78. His Arms are in Dugd. Orig. Jurid. 227. & he is the gigneur-picture to them, he is stiled Treasurer of the Middle Temple.

THE PREFACE OF Mr. PLOWDEN,

p. 324. a. pl. 1. Hal. Hist. P. C. there is a reference to a learned tract of W. Plowden touching the right of succession of Mary Queen of Scotland.

Newly rendered into ENGLISH.

EDMUND PLOWDEN, to the Students of the Common Law of *England*, and especially to his Companions of the *Middle-Temple*, wisheth Encrease of Learning.

WHEN I first entered upon the Study of the Law, (which was in the twentieth Year of my Age, and in the thirtieth Year of the Reign of the late King Henry the eighth of famous Memory) I resolved upon two Things, which I then purposed earnestly to pursue. The first was, to be present at, and to give diligent Attention to, the Debates of Questions in Law, and particularly to the Arguments of those who were Men of the greatest Note and Reputation for Learning. The second was, to commit to Writing what I heard, and the Judgment thereupon, which seemed to me to be much better than to rely upon treacherous Memory which often deceives it's Master. These two Resolutions I pursued effectually by a constant Attendance at Moots and Lectures, and at all Places in Court and Chancery, to which I might have Access, where Matters of Law were argued and debated. And finding that I reaped much Profit and Instruction by this Practice, I became at last disposed to report the Arguments and Judgments made and given in the King's Courts upon Demurrers in Law, as abounding more copiously with Matter of Improvement, and being more capable of perfecting the Judgment, than Arguments on other Occasions. Upon this I undertook first one Case and then another, by which Means I at last collected a good Volume. And this Work I originally enter'd upon with a View to my own private Instruction only, without the least Thought or Intention of letting it appear in Print. But when upon the Sollicitation of some of the Judges and other grave and learned Men, I had suffered them to see and peruse it, I was earnestly requested to make it public, which I was very unwilling to do, and that chiefly for these two Reasons among others. First, because (as I have been credibly informed) there were anciently four Reporters of our Cases in Law, who were chosen and appointed for that Purpose, and had a yearly Stipend from the King for their Trouble therein; which Persons used to confer all together at the making and collecting of a Report, and their Report being made and settled by so many, and by Men of such approved Learning, carried great Credit with it, as indeed it ought. But these Reports were made and collected by no other than by myself alone, a Man of simple Understanding, and of weak Memory to retain Things uttered, and therefore I thought it more proper to keep them up in my own private Study (with which Design I at first collected them) th to make them public in the World. The second Reason was, because in this Work, and especially in the latter Part thereof (beginning at the Case of *Throckmerton* against *Tracy* and *Nicholson*) I have for the most Part reported Cases in a summary Way, collecting together the Substance (as it ap-

appeared to me) of all that was ſaid on the one Side, and on the other, and oftentimes of all that was ſaid by the Judges themſelves, without reciting their Arguments *verbatim*. In which Caſe I have purpoſely omitted much that was ſaid both at the Bar and at the Bench, for I thought that there were few Arguments ſo pure as not to have ſome refuſe in them, and therefore I thought it beſt to extract the pure only, and to leave the refuſe, then and yet holding that to be the beſt Method of reporting. But this is a Taſk not eaſily accompliſhed, for he who would reject a great Part of what was ſpoken as vain and ſuperfluous, and relate only that which was pure and material, ought to have not only great Underſtanding and Memory, but eſpecially an excellent and diſtinguiſhing Judgment, for otherwiſe he may reject as ineffectual that which is very material, and approve as effectual that which is of no Weight, whereby he would do an Injury to thoſe at the Bar and at the Bench who argued, and would give them juſt Cauſe of Offence, and alſo by ſuch Means the Subject-matter itſelf would be much injured. And this Excellency of Judgment is to be met with in the greateſt Perfection in thoſe who are endued with the greateſt Degree of Reaſon, for it is ſaid that *ratio eſt radius divini luminis*, the greater Degree of which a Man has, the more bright is his Genius, and the more bright his Genius is, the more he pierces and diſpells the Miſt of Ignorance, and the more he diſpells the Miſt of Ignorance, the more perfectly and clearly he ſees the Truth, and the more rightly he judges of it. Which Things when I conſidered with myſelf, and at the ſame Time being conſcious of the Simpleneſs of my own Underſtanding, and of the ſmall Spark of Reaſon with which I am endued, and conſequently of my Want of Excellency in Judgment, I thought it my Duty to decline making public my own Dijudication of the Arguments of Men more learned than myſelf, and to keep the Work for my own private Advantage, and thereby to avoid the Cenſure of affecting a more acute and diſcerning Judgment than I really had. But by and by an Accident happened, which inclined me, and (as I may ſay) forcibly compelled me to make this Work public. For having lent my ſaid Book to a very few of my intimate Friends, at their ſpecial Inſtance and Requeſt, and but for a ſhort Time, their Clerks and others knowing thereof got the Book into their Hands, and made ſuch Expedition, by writing Day and Night, that in a ſhort Time they had tranſcribed a great Number of the Caſes, and eſpecially of the firſt, contrary to my own Knowledge and Intent, or of thoſe to whom I had lent the Book; which Copies at laſt came to the Hands of ſome of the Printers, who intended (as I was informed) to make a Profit of them by publiſhing them. But the Caſes being tranſcribed by Clerks and other ignorant Perſons who did not perfectly underſtand the Matter, the Copies were very corrupt, for in ſome Places a whole Line was omitted, and in others one Word was put for another, which entirely changed the Senſe, and again in other Places Spaces were left where the Writers did not underſtand the Words, and divers other Errors and Defects there were, which, if the Copies ſo taken had been printed, would have greatly defaced the Work, and have been a Diſcredit to me. And beſides this, they had omitted to tranſcribe the Pleadings according to the Records, and had only tranſcribed the Caſes and the Arguments upon them, ſo that the Benefit, which the Reader would have reaped from the Records of the Pleadings in this Book, (which is alſo a Book of Entries of all others moſt ſifted and tried) would have been totally loſt. Wherefore in order to prevent and avoid theſe Defects, I conſidered with myſelf whether it was not better for me to put this Work in Print. During which Conſideration Letters were ſent to me by all the Juſtices of both Benches, and by the Barons of the Exchequer, requeſting and encouraging me to make it public. And at laſt, upon theſe and other Motives, and hoping that it might be of ſome Benefit to the Students of the Law, I reſolved (as you ſee I have done) to put it in Print.

And this Book conſiſts of two ſeveral Kinds of Work, the one is, a Book of Entries, more ſure and ſafe to be relied upon and followed than any other Book of Entries. For other Books of Entries are but Copies of Pleadings written out of the Records, upon which perhaps ſome Iſſue was joined by the Parties, without the Intelligence of the Court, or without Demurrer or other Occaſion given to diſcuſs the Validity of the Pleading. But in this Book there is no Record entered but ſuch upon which there

there was either a Demurrer in Law, or a ſpecial Verdict given containing a Point of Law, in both which Caſes the Matter was thoroughly ſifted and debated at the Bar and at the Bench alſo, and in the End either approved or diſapproved, for the Cauſes ſhewn in this Book, by the Judgment of the Court. So that the Records here entered are moſt ſafe to be truſted to. And ſo alſo are the Matters in Law which are contained in this Book, for there are ſcarce any but what have the Sanction of Judgment one Way or other, ſo that they may be moſt firmly relied upon. And (in my humble Apprehenſion) theſe Reports excell any former Book of Reports in Point of Credit and Authority, for other Reports generally conſiſt of the ſudden Sayings of the Judges upon Motions by the Serjeants and Counſellors at the Bar, whereas all the Caſes here reported are upon Points of Law tried and debated upon Demurrers or ſpecial Verdicts, Copies whereof were delivered to the Judges, who ſtudied and conſidered them, and for the moſt Part argued in them, and after great and mature Deliberation gave Judgment thereupon, ſo that (in my Opinion) theſe Reports carry with them the greateſt Credit and Aſſurance.

And in order that I might execute this Work with the utmoſt Sincerity and Truth, and to the Intent that I might be more able to underſtand the Arguments, and to comprehend the true Cauſes of the Judgments herein contained, let me inform the Reader that in almoſt all the Caſes which I have undertaken to report, before they came to be argued I had Copies of the Records, and took Pains to ſtudy the Points of Law ariſing thereupon, ſo that oftentimes I was ſo much Maſter of them, that if I had been put to it, I was ready to have argued when the firſt Man began; and by this Method I was more prepared to underſtand and retain the Arguments and the Cauſes of the Judgments. And beſides this, after I had drawn out my Report at large, and before I had entered it into my Book, I ſhewed ſuch Caſes and Arguments, as ſeemed to me to be the moſt difficult, and to require the greateſt Memory, to ſome of the Judges or Serjeants who argued in them, in order to have their Opinion of the Sincerity and Truth of the Report, which being peruſed and approved by them, I then entered it into my Book. And further, the Records of the Pleadings, and the Judgments which follow after the Arguments, add great Credit to the Report, and help to aſſure the Reader that he may rely upon any Point of Law.

And as to ſuch Caſes as were argued by others, whereupon no Judgment was given in any Point, (of which Caſes there are many) I have ſtaid and ſuſpended my Notes and Reports of the Arguments made in them, in hearing and writing which I have ſpent many Days, and been at great Pains and Labour, without reaping as great Profit as I expected. Some of theſe Caſes I have delivered to others, but have not entered them in my Book, nor kept any Copies of them. And therefore, leſt theſe ſhould come to the Reader's Hands, or others under my Name, which he may take to be mine, when in Truth they are not ſo, I think it proper to admoniſh him not to accept as mine, or as thought worthy by me to be publiſhed as mine, any other Arguments or Reports of other Men, made before the End of the printing of this Book, but only thoſe which are here contained.

And as to theſe ſummary Reports, alth ugh I have omitted many Things which were ſaid, as being deemed by me leſs material than that which is here reported, yet I have not thereby (as far as I am capable of judging) given juſt Cauſe of Offence to any. For neither in them nor in the others have I ſuppreſſed any Sentence which I remembered and thought to be very material, but I have expreſſed the Matter intended truly, and for the moſt Part in the Words of the Party who ſpoke it, ſometimes indeed in other Words added by myſelf ſhewing the Matter more fully, but never (to the beſt of my Knowledge) departing from the Senſe or Intent of the Party touching the Matter; which Liberty (I think) I and all other Reporters of our Law may take, and eſpecially in all ſummary Reports. And I proteſt before God that I have not of Purpoſe or Malice diſgraced any Man in theſe Reports. And becauſe ſome of the Caſes here reported hung in Argument eight, ten, or twelve Terms, whereby I could not reduce them to any certain Year or Term (as the Reports anciently

ciently were), and becauſe I have ſometimes reported little or nothing in a Year or a Term, ſo that I could not preſerve an uninterrupted Connexion and Dependancy in Time (as is done in former Reports), and thinking it not proper to leave the Book without a Name (for then the Student, hearing a Caſe cited out of this Book, would be at a Loſs where to find it, for Want of a Name to the Book out of which the Caſe was cited), therefore, in order to give the Reader a Knowledge of the Certainty of the Time, I have placed a general Title at the Head of every Caſe, ſhewing the Time, the Nature of the Action, the Names of the Parties, and other particular Circumſtances; and alſo in order to avoid the Inconvenience before mentioned, which would ariſe for Want of a Name, I have given a Name to the whole Work, and have called it my COMMENTARIES or REPORTS, which Word *(Commentary)* in one Senſe ſignifies a Regiſter or Memorial of Acts or Sayings. And ſo, ſeeing this Book contains the Acts and Sayings of others touching the Matters therein treated of, I think the Word *(Commentary)* is a proper Name for it.

Wherefore wiſhing the Reader to reap as much Profit by reading this Work as I did by compoſing it (which, I confeſs, was great), I commit him to God's Direction, deſiring no other Reward for this my Trouble than his candid Reception hereof, and his good Report. Farewell,

Middle-Temple,
20 October, 1578.

EDMUND PLOWDEN.

A TABLE OF THE NAMES OF THE CASES.

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Mich. Term. 2. Edw. VI. Information. Same Precedent Raſt. Entr. 409. pl. 2.

BE *it remembred*, That *Robert Reniger* Eſquire, Comptroller of the Cuſtom and Subſidy of the Lord the King in the Port of the Town of *Southampton*, and in every the Places and Creeks belonging to the ſame Port, came before the Barons of this Exchequer, the 20th Day of *November* in this Term, in his proper Perſon, and took his corporal [a] Oath, that one *Roger Porter* his Servant, and by his Command, the 7th Day of this preſent Month of *November*, at the Town of *Southampton*, in the County of the Town of *Southampton*, ſeized and to the Uſe of the Lord the King, and of the ſaid *Robert Reniger*, arreſted 1693 Kintals of green Woad, of the Goods and Chattles of one *Anthony Fogoſſa* Merchant alien, for that the aforeſaid 1693 Kintals of green Woad, were brought from foreign Parts beyond the Seas into this Kingdom of *England*, to wit, unto the aforeſaid Town of *Southampton*, and there were laid upon the Land and diſcharged by Way of Merchandizing, the Subſidy to the Lord the King therefore due not being paid, nor the Collector of the Cuſtom and Subſidy of the Lord the King in the Port aforeſaid, or in any other Port of this Kingdom of *England*, being in any wiſe agreed with for the Subſidy ariſing from the Merchandize aforeſaid, contrary to the Form of the Statute in ſuch Caſe lately made and provided. Wherefore the aforeſaid *Robert Reniger* prays the Advice of the Court in the Premiſſes, and that he the Moiety thereof may have according to the Form of the Statute aforeſaid.

[a] M. 35. H. 6. 27 b. *Per Nottingham.*

Anſwer.

And hereupon comes the aforeſaid *Anthony Fogoſſa* in his proper Perſon, and prays *Oyer* of the Information aforeſaid, and it is read to him; which being heard and underſtood, he complains that he, by Colour of the Premiſſes in the ſaid Information ſpecified, ſhall be grievouſly vexed and moleſted, and that the ſaid 1693 Kintals will be taken and detained out of his Hands and Poſſeſſion by the aforeſaid *Robert Reniger*, and that by no means juſtly: Becauſe, (by proteſting that the Information aforeſaid is inſufficient in Law, to which he has no Neceſſity, nor is by the Law of the Land bound to anſwer) for Plea nevertheleſs the ſame *Anthony Fogoſſa* ſaith, that long before the aforeſaid 7th Day of *November*, in the Information aforeſaid ſpecified, viz. the 5th Day of *Auguſt* laſt paſt, in the Iſles of *Surrey* in the Parts of *Portugal*, being under the Obedience of *John* King of *Portugal*, he was poſſeſſed of 4500 Kintals of green Woad (whereof the aforeſaid 1693 Kintals of green Woad in the Information aforeſaid ſpecified then were Parcel) as of his proper Goods. And being ſo thereof then there poſſeſſed, he the ſaid 5th Day of *Auguſt* ſhipped on board a certain ſhip called the *St. Maria de Togma*, (whereof one *Manuel Lopus* was then Maſter, under God) lying in the Water at the Iſles aforeſaid, the ſame 4500 Kintals of green Woad, to be brought and carried by Sea in the ſame Ship from thence unto this Kingdom of *England*, that is to ſay, unto the ſaid Town of *Southampton*. And the ſame Ship, with the ſaid 4500 Kintals of green Woad therein freighted, afterwards, viz. the 5th Day of *September* laſt paſt, being oppoſite to the Iſle of *Wight*, in the ſaid County of *Southampton*, in its Paſſage upon the High Sea towards the ſaid Town of *Southampton*, a certain great Tempeſt and Violence of Wind then and there happened upon the Sea, by the Severity and Tempeſtuouſneſs whereof the Ship aforeſaid was in great Danger of ſinking, together with the ſaid 4500 Kintals of green Woad which were therein, inſomuch that the ſaid Maſter and the Mariners of the ſame Ship being in the ſame deſpaired of their Lives; by reaſon whereof, the ſame Maſter and Mariners, for the Safety as well of their own Lives as of the Ship aforeſaid, and of the greater Part of the Goods aforeſaid, which were in the ſame Ship, then and there, in order to lighten the ſaid ſhip, caſt out of it into the Sea a great Part of the ſaid 4500 Kintals of green Woad, then being in the Ship aforeſaid. And afterwards, viz. the 14th Day of the ſaid Month of *September*, the Ship aforeſaid, with the Reſidue of the 4500 Kintals of green Woad which were left in the ſame Ship, (of which ſaid Reſidue the aforeſaid 1693 Kintals of green Woad in the ſaid Information ſpecified then were and yet are Parcel) came unto the Port of the ſaid Town of *Southampton*, by which means he the ſame *Anthony*, at the ſaid Port of the Town of *Southampton* aforeſaid, the ſaid 14th Day of *September*, was poſſeſſed of the ſame Reſidue as of his proper Goods. And becauſe the Certainty of the Weight of the ſaid Reſidue of green Woad left in the Ship aforeſaid was then unknown to the aforeſaid *Anthony*, he the ſame *Anthony*, before that he laid upon Land or diſcharged the ſame Reſidue of green Woad aforeſaid, or any Part thereof, at the Town of *Southampton* aforeſaid, viz. in a certain Houſe called the *Cuſtom Houſe* there, the ſaid 14th Day of *September*, made known to one *Thomas Wells*, then and there a Collector of the Cuſtom and Subſidy of the ſaid Lord the King that now is in the Port of the ſaid Town of *Southampton*, and in every the Creeks and Places belonging to the ſame Port, how that the Ship aforeſaid was come into the Port aforeſaid having in it green Woad; and that the Ship aforeſaid, by reaſon of the Tempeſt aforeſaid, had been in the Danger aforeſaid, whereby a great Quantity of the green Woad, that was at firſt in the Ship aforeſaid (as is aforeſaid) was caſt out of the ſame Ship into the Sea, ſo that he was then ignorant what certain Quantity of green Woad was then left in the ſaid Ship, and deſired

the ſame Collector, that he might make an Entry with the ſame Collector in his Books of Cuſtom and Subſidy of the ſaid Lord the King in the Port aforeſaid, for 2000 Kintals of green Woad, which he then thought would be near the true Certainty or Quantity of the ſaid Reſidue of green Woad that was then left in the ſaid Ship. And he aſked Leave of the ſaid Collector to diſcharge and lay upon Land at the ſaid Town of *Southampton*, as well the ſaid 2000 Kintals, as all the reſt of the ſaid green Woad in the ſaid Ship (if any ſuch ſhould remain) ſaying, and alſo then and there affirming to the Collector aforeſaid, that he the ſame *Anthony* would pay to the ſame Collector, for the Uſe of the ſaid Lord the King, all Manner of Subſidies due to the ſaid Lord the King, as well for the ſaid 2000 Kintals by him then entred (as aforeſaid) as for all that ſhould be over and above the ſaid Number of 2000 Kintals, (whereof the aforeſaid 1693 Kintals in the ſaid Information ſpecified then were and yet are Parcel,) when all the ſaid green Woad ſhould be tried or otherwiſe known by the Beam of the ſaid Lord the King remaining in the ſaid Town of *Southampton* for the weighing of ſuch Merchandizes, which ſaid Collector then and there granted and gave leave to the ſame *Anthony* to do this, and agreed thereunto. And thereupon he the ſame *Anthony*, at the Town of *Southampton* aforeſaid, the ſaid 14th Day of *September*, contracted and agreed with the aforeſaid Collector for all Manner of Subſidies due to the ſaid Lord the King for the ſaid 2000 Kintals of green Woad, and for all the reſt of the green Woad that ſhould then be in the Ship aforeſaid (whereof the aforeſaid 1693 Kintals of green Woad in the Information aforeſaid ſpecified then were and yet are Parcel) after the Rate of 12 *d.* for every 20 *s.* of Value in the ſame, according to the Form of the *Act* of Grant of the ſame Subſidy: And to the ſaid Collector then at the Town of *Southampton* aforeſaid found ſufficient Surety, viz. *John Ellen*, to ſatisfy and pay to the ſame Collector for the Uſe of the ſaid Lord the King all and ſingular Sums of Money, which are or ſhould be due to the ſaid Lord the King for the Subſidy aforeſaid. By reaſon of which ſaid Grant, Licence and Agreement, he the ſame *Anthony* afterwards, viz. the ſaid 14th Day of *September*, as well the ſaid 2000 Kintals of green Woad, as all the reſt of the green Woad that was in the Ship aforeſaid (whereof the aforeſaid 1693 Kintals of green Woad in the Information aforeſaid ſpecified then were and yet are Parcel) at the ſaid Town of *Southampton* laid upon Land and diſcharged, as it was well lawful for him to do. And this the ſame *Anthony* is ready to verify, as the Court, &c. And prays Judgment, and that the aforeſaid 1693 Kintals of green Woad in the ſaid Information ſpecified may be delivered back to him; and that he (as to the Premiſſes) may be diſmiſſed from this Court.

Replication. Vide 4. M. 1. Bro. Attaint. 127. B. N. C. § 479.

And *Henry Bradſhaw*, Attorney General of the Lord the King (who proſecutes for the ſame Lord the King in this behalf) for the Lord the King by proteſting ſays, that the Plea aforeſaid of *Anthony Fogoſſa*, in Manner and Form above pleaded, is inſufficient in Law, to which he has no Neceſſity by the Law of the Land to anſwer: For Replication nevertheleſs ſaith, that the aforeſaid 1693 Kintals of green Woad in the ſame Information ſpecified were laid upon Land and diſcharged, the Subſidy to the Lord the King therefore due not being paid, in Manner and Form as by the Information aforeſaid is above ſuppoſed: Without that that the aforeſaid *Anthony Fogoſſa* contracted and agreed with the aforeſaid Collector for the Subſidy due to the ſaid Lord the King for the aforeſaid 1693 Kintals of green Woad, according to the Form and Effect of the *Act* aforeſaid, in Manner and Form as the ſame *Anthony* above in Pleading hath alledged. All and ſingular which the ſame Attorney of the Lord the King, for the ſame Lord the King, is ready to verify, as the Court, *&c.*

* *Note*, The Party muſt pray the *medietatem linguæ*, for without ſuch Prayer the Court is not *ex officio* bound to award it, nor can take conuſance that he is an Alien-nee. *Per* Dyer, 144. pl. 61. Moor, 557. pl. 758. Cro. Eliz. 869, pl. 3. *Per Gawdy et Fenner.* And it muſt be prayed before the general *venire* is awarded, or at leaſt before it is returned and filed, or elſe he has ſurceaſed his Time: and this holds as well where the Defendant is an Alien, as the Plaintiff. M. 3. Ed. 4. 12. a. Fitz. Inqueſt. 22. M. 22. Ed. 3. 14 pl. 38. Fitz. Trial 71. Dyer, 28. pl. 180. 144. pl. 60, 61. 304. pl. 51. 357. pl. 45. 2. Rol. Abr. 643. P. pl. 1. Cro. Eliz. 869. pl. 3. *Per Gawdy et Fenner.* Jenk. 216. pl. 58. 2. Hawk. pl. Cor. 420. § 40. notwithſtanding the Opinion of *Tremail*, M. 21. H. 7. 32. pl. 23. and St. Pl. Cor. 159. a. See Vin. Abr. tit. Trial, N. b. 9. P. c. —— For the Form of ſuch Prayer, ſee Raſt. Entr. 7. b. pl. 2, 158. b. 159. 264. b. pl. 1. 2. 265. 1. Dy. 144. pl. 60.

And the aforeſaid *Anthony Fogoſſa* ſaith, that he did contract and agree with the aforeſaid Collector for all Manner of Subſidies due to the ſaid Lord the King for the aforeſaid 1693 Kintals of green Woad, according to the Form and Effect of the *Act* aforeſaid, in Manner and Form as he the ſame *Anthony* above in Pleading hath alledged. And of this the ſame *Anthony* puts himſelf upon the Country. And the aforeſaid Attorney of the Lord the King, for the ſaid Lord the King, prays likewiſe that it may be enquired by the Country. Therefore let an Inqueſt be made thereon. And for that the ſame *Anthony* is an Alien born, that is to ſay, at the City of *Oporto* in *Portugal*, under the Obedience of the aforeſaid King of *Portugal*, he prays * a Moiety of his own Language, according to the Form of the Statute in ſuch Caſe lately made and provided, *&c.* *A. R. E. M. B. S.* &c. who to ſpeak the truth touching the Premiſſes being choſen, tried, and ſworn, the ſaid *Anthony Fogoſſa*, in Maintenance of the Iſſue aforeſaid above joined to the Country, and to prove the ſaid Iſſue on the Behalf of him the ſame *Anthony* to be true, produced the aforeſaid *Thomas Wells*, a Collector of the Cuſtom and Subſidy of the Lord the King in the Port and Town of *Southampton*, and *John Smith* then and there a Clerk or Servant of the ſaid *Thomas Wells* in the ſaid Office of Collector aforeſaid, and alſo one *John Davy*, Yeoman, to teſtify that the Premiſſes in the Plea of him the ſaid *Anthony* ſpecified are true.

Which ſaid *Thomas Wells* being examined upon his Oath taken before the Barons here touching the Premiſſes ſaith, that he heretofore, viz. on the 21ſt Day of *November*, in the ſecond Year of the Reign of the ſaid Lord the King that now is, here in Court before the Barons of this *Exchequer* was examined upon his Oath to ſpeak the Truth in the Premiſſes, wherefore the ſame *Thomas* delivered to the Court here upon his Oath aforeſaid, a certain Bill ſigned with the Hand of him the ſaid *Thomas*, touching the whole Truth in the Premiſſes by him known, and prayed that that Bill might be read. And the Barons commanded the ſaid Bill to be read, and at the Requeſt of the aforeſaid Attorney of the Lord the King to be enrolled: The Tenor of which ſaid Bill follows in theſe Words.

* *The Depoſition of* Thomas Wells, *Eſquire, one of the Collectors of the Cuſtom and Subſidy in the Port of* Southampton. *The ſaid* Thomas *examined the 21ſt Day of* November, *in the ſecond Year of the Reign of our ſovereign Lord King* Edward *the Sixth, before Sir* Roger Chomley, *Knight, Chief Baron of the King's* Exchequer, *and other the Barons of the ſame Court, ſaith, that the 14th Day of* September *laſt paſt, at* Southampton *in the Cuſtom Houſe there, one* Anthony Fogoſſa *Merchant Stranger came unto him, and ſhewed him that he had certain Woad upon the Sea, in a Ship called the* Manuel Lopus, *green and unpacked, but to what number he could not tell. For becauſe the Ship being in great Danger on the Sea, he was fain to throw over much of the ſaid Woad, and ſo made Entry with the ſaid Collector for the King's Subſidy due to his Majeſty of* 2000 *Kintals of Woad then being in the ſaid Ship as he eſteemed. And becauſe he knew not how much more there was in the ſaid Ship, he deſired of the ſaid Cuſtomer, that he might have Licence to lay all on Land and to have it weighed at the King's Mayeſty's Beam there. And then he to pay for the Subſidy of the Reſidue of the ſaid Woad after the Rate, if it came above the Number of* 2000 *Kintals, and brought in ſufficient Surety for to perform the ſame. Whereunto the ſaid Collector did agree, and gave him Licence ſo to do. And further the ſaid* Thomas Wells *ſaith, that afterwards one* John Thomas, *Deputy to him, and* William Thorpe, *one other of the Collectors of the ſaid Cuſtom and Subſidy in the Port aforeſaid at* Portſmouth, *which is a Creek to the ſame Port belonging, notified to the ſaid Collectors, that the ſaid* Anthony Fogoſſa *came likewiſe to the ſaid Deputy Cuſtomer the 16th Day of the ſaid Month of* September *at* Portſmouth *aforeſaid, and ſhewed to him, how that he had certain Woad in a Ship called the* Peter Dies, *then lying there upon the Sea, but to what Number he could not tell, and ſo made Entry with him there for* 1000 *Kintals of Woad, with like Proteſtation and Condition as he did before at* Southampton, *whereupon the ſaid Deputy Collector gave him Licence to lay it on Land. And further, the ſaid* Thomas Wells *ſaith, there is not yet weighed out of the ſaid Woad at* Southampton *above the Number of* 190 *Kintals, as appeareth by the Weigher's Books there, which is an Officer ſworn, ſo that the King's Majeſty cannot be defrauded of his Subſidy thereof due, for it lieth ſtill upon ſeveral great Heaps in Cellars near the ſaid Cuſtom Houſe, ſafely kept till it be weighed.* And the aforeſaid *Thomas Wells* affirmed all and ſingular the Things contained in the ſame Bill to be true. And the aforeſaid *John Smith*, upon his Oath before the Barons here likewiſe taken, ſaith that he, at the ſaid town of *Southampton*, was preſent at all and ſingular the Sayings, Deeds, Licences and Agreements, and other Things in the Bill aforeſaid ſpecified, read here in Court: All which things are true. And that he then, as Clerk of the aforeſaid Collector, and by his Command, entered in the Books of the ſaid Collector of Cuſtom and Subſidy aforeſaid, the aforeſaid green Woad. And he produced here in Court the Book of the ſaid Collector, teſtifying the Entry of the aforeſaid green Woad in theſe Words, *ſs. D' Nave Manuel Lopus intrante* 14 *Die Septembris ſs. D'Antonio Fogoſſa Alienigen. pro* 2000 *Kintals Gualdæ de Inſula val.* 500. *li. Cuſt.* 6. *li.* 5 *s. ſubſid.* 25. *li. The reſt to be tried by the King's Beam.* And the aforeſaid *John Davy*, upon his Oath before the Barons here likewiſe taken, ſaith, that he heretofore, viz. the 12th Day of *May*, in the third Year of the Reign of the ſaid Lord the King that now is, here in Court before the Barons of this Exchequer upon his Oath then here taken was examined to ſpeak the Truth touching the Premiſſes. Which ſaid *John Davy* the ſame Day delivered to the Court here upon his Oath aforeſaid a certain Bill ſigned with the Hand of him the ſaid *John*, touching the Truth of the Premiſſes by him known, and prayed that that Bill might be read. And the Barons commanded the ſaid Bill to be read, and at the Requeſt of the aforeſaid Attorney of the Lord the King to be enrolled, the Tenor of which ſaid Bill follows in theſe Words. *Sſ. Interrogatories miniſtred to* John Davy *the Searcher's Deputy of* Southampton, *for the Behalf of the King againſt* Anthony Fogoſſa. ſs. In primis, *Whether were you preſent or privy to the cuſtoming or Agreement for the Cuſtom of* 2700 *Kintals of Woad being ſeized at* Hampton *and* Portſmouth, *and forfeited to the King, beſides* 3000 *Kintals which were cuſtomed for, yea or no. ſs.* Item, *By whom were you deſired to have ſaid or depoſed any Thing in this Matter for the Behalf of* Anthony Fogoſſa *a* Portingale, *and what Reward was offered to you for the ſame Depoſition, and by whom, and what would he have had you to depoſe or ſay in the ſame, which moved you to depoſe in the behalf of the ſaid* Anthony Fogoſſa. Item, *Whether you did mind to have ſeized the ſame Woad, if it had not been ſeized the ſame Time that it was ſeized, yea or no. ſs.* John Davy *ſworn and examined the* 12*th Day of* May, *in the third Year of the Reign of our Sovereign Lord King* Edward *the Sixth, before* Nicholas Luke, *one of the Barons of the* Exchequer. *To the firſt Article and the third this Deponent ſaith, That he was not preſent nor privy to the cuſtoming or Agreement for the Cuſtom of* 2700 *Kintals of Woad, but ſaith, the Day after the Agreement had with the Cuſtomer for the ſaid Kintals of Woad, he came to* John Smith, *Clerk unto the ſaid Cuſtomer, and demanded of him a Copy of the Entry of the Cuſtom of the ſaid Kintals of Woad, which delivered him a Copy of the Entry but only of* 2000 *Kintals entered at* Hampton, *which Deponent alſo had a Copy of the Entry of* 1000 *Kintals entered at* Portſmouth *of the Clerk there, but the ſaid* Smith *ſaid, that the Merchant would enter more, if hereafter he found more to be weighed by the Beam. And this Deponent further ſaith, that he came to the ſaid Cuſtomer's Clerk about two Months after, and demanded of him whether there were any new Entry made of the ſaid Woad, which anſwered, that there was none other Entry than was at the firſt, which he had delivered the Copy of: whereupon this Deponent and his Fellow were minded to have made a Seizure for the King, but that the Comptroller's Clerk had made a Seizure before at the ſame Time. ſs. To the ſecond Article this Deponent ſaith, that he was never de-*

Depoſition of *Wells.*

Depoſition of *Smith.*

Depoſition of *Davy.*

Interrogatories.

I.

II.

III.

* *Note,* In a Demurrer upon Evidence the Evidence muſt be entered *verbatim.* Kelw. 76. a. Trials per Pais, 474. 7. *Edit.*

fired to have ſaid any Thing by the Merchant in this Matter; but ſaith, that the Cuſtomer required him that he would depoſe that he was preſent at the Time of the Agreement with the Cuſtomer for the cuſtoming of the ſaid Woad; which anſwered, that at all Times he would depoſe the Truth; and this Deponent cannot further ſay in the Premiſſes. Which being read, the aforeſaid *John Davy* affirmed all and every the Things ſpecified in the ſaid Bill to be true, except the Words aforeſaid, *Sſ. But ſaith, That the Cuſtomer required him that he would depoſe, that he was preſent at the Time of the Agreement with the Cuſtomer for the cuſtoming of the ſaid Woad; which anſwered, that at all Times he would depoſe the Truth.* Which ſaid *John Davy* ſaith upon his Oath, that he never affirmed the ſame Words, nor are they true. And thereupon, by *John Pollard* Serjeant at Law, and others learned in the Laws of Counſel with the aforeſaid *Anthony Fogoſſa*, it is given further in Evidence on Behalf of the ſaid *Anthony* to maintain the Iſſue aforeſaid, that in the aforeſaid great Tempeſt upon the Sea in the Plea aforeſaid ſpecified, for the Safety of the Ship aforeſaid, a great Part of the Woad then being in the Ship was caſt into the Sea before the ſaid Ship came to the Port of *Southampton:* which ſaid Matter, and the Matter teſtified by the aforeſaid *Thomas Wells* Collector aforeſaid, ſome of the Jurors aforeſaid know to be true. * And the aforeſaid Attorney of the Lord the King for the ſame Lord the King ſaith, that the Evidences aforeſaid above given are inſufficient in Law to maintain or prove the Iſſue aforeſaid on Behalf of the ſaid *Anthony Fogoſſa* above joined to the Country; wherefore, by reaſon of the Inſufficiency of the ſame Evidences, and for that by the ſame Evidences the Forfeiture of the Goods aforeſaid in the Information aforeſaid ſpecified is not denied, the ſame Attorney of the Lord the King for the ſaid Lord the King prays Judgment, and that the ſame Goods may remain forfeited to the Lord the King, according to the Form of the *Statute* aforeſaid. And the aforeſaid *Anthony Fogoſſa* ſaith, that the Evidences aforeſaid above given on Behalf of him the ſaid *Anthony* are ſufficient in Law, as well to maintain and prove the Iſſue aforeſaid, on Behalf of him the ſaid *Anthony* above joined to the Country, as to exclude the Lord the King from having any Forfeiture of the Goods aforeſaid: To which the aforeſaid Attorney of the Lord the King for the ſaid Lord the King, hath not ſufficiently anſwered, nor any Thing for the ſaid King alledged. Wherefore he the ſame *Anthony* prays Judgment, and that the aforeſaid Goods in the ſaid Information ſpecified may be delivered back to him, and that he as to the Premiſſes may be diſmiſſed from this Court; therefore to Judgment. ☞ *The Judgment appears after the Arguments.*

* *Note*, (as it ſeems) the King's Attorney here demurs upon the Evidence, whether the Defendant will agree or no. But Heath's Max. 95, 96. ſays, that in no Caſe may one demur upon Evidence, without the Conſent of the other Party, who may put himſelf upon the Jury to find a Verdict. And P. 34. H. 6. 36. pl. 7. Dy. 2. pl. 3. 4. ſeem to favour that Opinion. See Poſt 407. 8.

The King demurs upon the Evidence.

The CASE. *Hill. Term*, 4. *Ed.* 6. What ſhall be good Evidence to prove the Iſſue, if one agree with a Collector for the Subſidy of Merchandize.

Griffith the King's Sollicitor rehearſed the Caſe in this Manner. You, my Lords, have well underſtood that *Robert Reniger* has exhibited an Information before the Barons of the Exchequer, containing, that he had ſeized and arreſted 1693 Kintals of green Woad, of the Goods of *Anthony Fogoſſa*, a Merchant Stranger, for that they were carried and put upon Land as Merchandize, the Subſidy not being paid, nor the Collector agreed with for the ſame, againſt the Form of the Statute. And *Fogoſſa*, by way of Bar, has ſaid, that he had ſhipped on Board 4500 Kintals, and that a great Tempeſt aroſe upon the Sea, ſo that the Ship was in great Danger of being ſunk; and for the Safety of the Lives of them in the Ship, and of the reſt of the Goods therein, the Maſter of the Ship and the Mariners caſt into the Sea a great Part of the ſaid green Woad, and afterwards the Ship came to Land with the reſt of the Woad, whereof the Woad mentioned in the Information is Parcel; and becauſe the Certainty of the Woad left in the Ship was unknown to the Defendant, he came to one *Thomas Wells*, a Collector of the Cuſtom and Subſidy, and told him of the Misfortune, and all the Matter aforeſaid; and ſaid, that he ſuppoſed there were 2000 Kintals left and ſaved in the Ship: and he deſired the Collector to let him make an Entry in his Book for the ſame; and if he had more than 2000 Kintals, he would pay him for the Uſe of the King all that ſhould be due for the ſame, when it was tried by the King's Beam, or otherwiſe known. And he aſked him to give him Leave to put it on Land, and the ſaid Collector gave him Leave, and agreed that he ſhould do it. And thereupon the aforeſaid *Anthony Fogoſſa* contracted and agreed with the ſaid Collector for all Subſidies, according to the Rate of 12 *d.* for every 20 *s.* in Value, and found Surety to the Collector, *viz.* ſuch an one; and afterwards the Defendant put upon Land all the Woad left and ſaved in the ſaid Ship, which was 2000 Kintals, and the ſaid 1693 Kintals beſides; which 1693 Kintals is that contained in the Information whereof the Seizure was made, upon which he demanded Judgment. And the King's Attorney, by way of Replication, ſaid, that the ſaid 1693 Kintals were put upon Land, the King not being paid, without that that the aforeſaid Defendant contracted and agreed with the aforeſaid Collector for the aforeſaid 1693 Kintals, according to the Form and Effect of the Act aforeſaid, in Manner and Form as the Defendant has alledged. And the Defendant averred, that he did contract and agree, *&c.* and upon this they were at Iſſue, and the Jurors were ſworn; and the Defendant, in Proof of his Iſſue, produced three Witneſſes, *viz.* the ſaid *Wells* the Collector, and one called *Smith*, his Clerk, and another called *Davy*. *Wells* ſaid, that the Defendant came to him, and ſhewed him the Misfortune *ut ſupra*, and made a certain Entry for the 2000 Kintals *ut ſupra*. And becauſe he did not know whether there were any more, he deſired him to let him put it upon Land, if there ſhould be any more, and to have it weighed at the King's Beam, and then he would pay the Subſidy for it, according to the Rate, and did not ſhew any Rate in certain; and he brought in ſufficient Surety to perform this, and did not ſhew the Surety certainly. To which he being Collector agreed, and gave him Licence ſo to do: And further, *Wells* ſaid,

ſaid, that the King could not be defrauded of his Subſidy due, becauſe the Woad lies in Cellars near to the Cuſtom-houſe, ſafely kept until it be weighed. And the ſaid *Smith* teſtified, that all that was ſaid by *Wells* was true, and that he was then preſent when the Grant and Agreement was made. And further, he ſhewed the Book of Entry, and the Entry accordingly. And *Davy* ſaid, that after the Agreement had with the Collector, he came to *Smith* the Clerk, and demanded of him a Copy of the Entry, and he delivered him a Copy of the Entry of only 2000 Kintals, and told the Deponent, that the Defendant would enter more if it was found by the Beam. And the ſaid *Davy* further ſaid, that about two Months after, he demanded of the ſaid *Smith*, whether there was any new Entry made of the ſaid Woad, who ſaid that there was no other Entry made than what was made at firſt, whereof he had delivered a Copy; and this was the Effect of all the Evidence given by the three. And further, the Defendant maintain'd by Averment the caſting Part into the Sea in the Storm, and all that *Wells* depoſed; and ſaid, that ſome of the Jurors knew this to be true: and upon this Evidence the King hath demurred in Judgment. And it ſeems to me that Judgment is to be given for the King; for the Iſſue is, whether there was an Agreement according to the Form of the Statute or no, and the Evidence does not prove that there was ſuch an Agreement. [a] For every Agreement ought to be perfect, full, and compleat; and the Evidence here does not prove the Agreement to be perfect, nor full, nor compleat, but rather a Communication or Converſation, than an Agreement: for an Agreement concerning perſonal Things is a mutual Aſſent of the Parties, and ought to be executed with a Recompence, or elſe ought to be ſo certain and ſufficient, as to give an Action or other Remedy for a Recompence: and if it is not ſo, then it ſhall not be called an Agreement, but rather a nude Communication without Effect. [b] And therefore in Treſpaſs, if the Defendant will plead a Concord between the Plaintiff and him, that he ſhould pay the Plaintiff 20 *l.* at a Day to come, in Recompence of the Treſpaſs, this is not a good Bar, for it is not executed with any Recompence or Satisfaction, nor is there any Action or Remedy whereby to come at a Recompence or Satisfaction, for he ſhall not have an Action of Debt for it after the Day, as it is held in 30. *H.* [c] 6. For inaſmuch as the Concord is made after the Treſpaſs, it ſhall be called *nudum pactum, unde non oritur actio*; and therefore it ſhall not be any Bar, as it is there alſo holden. [d] And in 44. *Edw.* 3. in Debt for a Houſe ſold, the Defendant ſaid, that it was agreed between the Plaintiff and him, that the Plaintiff ſhould pull down the ſaid Houſe at his own Coſts, and ſhould remove it to ſuch a Place, and that then he ſhould pay the Plaintiff the ſaid Sum, and ſaid that he was always ready to have paid the ſaid Sum, if the Plaintiff had removed it, and this was adjudged a good Plea, inaſmuch as the Contract was entire, and was not executed on the Part of the Plaintiff: and alſo the Defendant could not compell the Plaintiff to pull it down and remove it, and therefore it was a good Bar. So here the Collector of the Cuſtom could not compell the Defendant to weigh the Woad at the King's Beam, and the King ought not to weigh it, ſo that perhaps it would never be weighed, and then the King would never be ſatisfied; and ſo it does not found in any Satisfaction, nor is there any Means to make it a Satisfaction. [e] And in 9. *Ed.* 4. in Treſpaſs upon the Statute of 5. *R.* 2. the Defendant ſaid that after the Entry there was an Accord between them, that the Plaintiff ſhould reenter into the ſame Land, and ſhould enjoy it without Interruption by the Defendant, and that the Defendant ſhould deliver to the Plaintiff all the Evidences concerning the ſaid Land, and ſaid that the Plaintiff had re entered, and that he had delivered to the Plaintiff all the Evidences concerning the ſaid Land, and the Opinion there is, that this was not a good Plea, for it ſhall be intended that the Evidences were the Evidences of the Plaintiff, and then to deliver him his own [f] Evidences was not any Satisfaction of the Wrong done before; but the Defendant ſhould there convey to himſelf [g] Title to the Evidences, and then plead this; and then it was held to be a good Bar. And ſo in 15. *H.* [h] 6. in Treſpaſs, the Defendant ſaid that there was an Accord between the Plaintiff and him, that whereas there was a Debate between the Plaintiff and the Lord *Grey*, if the Defendant did his endeavour to make them agree about a Treſpaſs done by the Plaintiff to the ſaid Lord, that then, *&c.* and ſaid, that he did his Endeavour, ſo that they were agreed; and this was there holden no Plea, becauſe it is not any Satisfaction; but if he had ſaid [i] that he, at his own Coſts, did his Endeavour to make them agree, *per quod* they did agree, this was held to be a good Bar. From whence it appears, that ſuch Accord [k] executory is no Bar, inasmuch as it does not enure as any Satisfaction, nor give any Recompence, and yet it is a mutual Aſſent of the Parties, and an Agreement; but it operates as a void Communication or Converſation, ſeeing it is not executed, and there is no Remedy to give Satisfaction. But the Agreement, which is effectual, is ſuch an Agreement as is executed and ſatisfied with a Recompence in Fact, or with an Action or other Remedy to execute it, and to recover a Recompence. And here in our principal Caſe, inasmuch as the Statute of 1. *Ed* 6. *Cap.* 13. ſays, that if any Merchandize be put upon Land, and the Subſidy not paid, or the Collector not agreed with for it, it ſhall be forfeited, *&c.* this Agreement intended by the Statute ſhall be taken in the beſt and moſt beneficial Senſe for the King, and that is, an effectual Agreement, *viz.* ſuch an Agreement as is executed with a Recompence, or by which the King may have an Action then given him for the recovery of a Recompence. And here it is not executed, nor is any Action then given to the King, inasmuch as the Reckoning is not certain, nor the Sum, which the Defendant ſhall pay, known at the Time when the Merchandize was put upon Land, and no Remedy is given to reduce it to a Certainty, inasmuch as *Fogoſſa* could not be compelled to weigh it, and the King, by the Law, ſhall not be compelled to weigh it, and ſo the Agreement is imperfect to give an Action for the Subſidy; for which Reaſon the Agreement intended by the Statute is not here fulfilled. And therefore it ſeems to me that he has not performed

For the Informer.

[a] 9. Co. 79. b. Hill. 29. Geo. 2. B. R. *Rex v. O Connor, per Nares arguendo.* Vin. Abr. tit. Contract A. pl. 4.

[b] M. 6. H. 7. 11. b. Fitz. Accord. 4. Bro. 3. Treſpaſs 279. M. 16. Ed. 4. 9. P. 17. Ed. 4. 3. a. *per Townſend*, Bro. Accord. 7. Kelw. 121. a. *per Keble.* Dyer. 75. pl. 26. 356. pl. 39. 1. Rol. abr. 129. pl. 11. 12. 1. Finch's Law 385. 2. Finch's Law 182. Heath's Max. 52. 59. Cro. Eliz. 304. pl. 1. 305, 306. pl. 4. T. Raym. 203, *Cock v. Honychurch per. Cur.* Ld. Raym. 122, *Allen v. Harris* adjudged, againſt the Caſe of *Caſe v. Barber*, T. Raym. 450, *Vid. infra* (k.)

[c] Fitz. Accord 5. agrees herewith, and cites *P.* 30. *H.* 6. 4. b. but S. P. does not appear in the Book of 30. H. 6. in Print.

[d] M. 44. Ed. 3. 28. a. Fitz. Monſtrans de Faits 145. Bro. Condition 28. Confeſs et avoid 44. Perkins. § 713.

[e] T. 9. Ed. 4. 19 a. Fitz. Accord 3. Bro. 1.

[f] S. P. 1. Rol. Abr. 128. pl. 4. Dyer 356. pl. 39. Cro. Eliz. 194.

[g] 1. Rol. Abr. 128. pl. 5.

[h] Fitz. Accord. 1.

[i] 1. Rol. Abr. 128. pl. 2, 3. 1. Finch 388. 2. Finch 182.

[k] *Vide ſupra* (b.) Yet there is a late Book to the contrary, *viz.* That an Accord may be pleaded without Execution, as well as an Arbitrement; and the Reaſon given is, becauſe an Action now lies upon mutual Promiſes, which formerly did not; and conſequently, there being equal Remedy on both Sides, an Accord ſtands upon the ſame Reaſon with an Arbitrement, *Caſe v. Barber*, T. Raym. 450. But that Opinion has been over-ruled in a later Judgment, *Allen v. Harris*, Ld. Raym. 122. Lutw. 1538.

the Effect of the Statute, and conſequently the Goods are forfeited, and ſo Judgment is to be given for the King.

E contra for the Defendant.

Gawdy Senior: the contrary appears to me. And firſt of all it is to be obſerved, that the ſaid Statute is in the Disjunctive, and divided into two Points, *viz. the Subſidy not paid*, or, *the Collector not agreed with for it*, &c. * So it is proved that the Intent of the Makers of the Statute was not always to have the Subſidy paid; but if an Agreement be made with the Collector for it, it is ſufficient, and the Statute is obſerved. And it ſeems to me, that an Agreement is here made with the Collector, and ſuch an Agreement as the Statute intends; as I ſhall prove hereafter. But firſt, it is neceſſary to give an Anſwer to the Caſes before put. And, Sir, the Caſes put of a Concord (which I confeſs to be good Law) are not like the Caſe here, nor are they grounded on the like Reaſon, for two Cauſes; [a] for when a Treſpaſs is done, and an Action brought for it, ſuch Concord executory may not be a Bar by any Reaſon, for there being a Wrong done, and not denied, it muſt be anſwered with Recompence; and then the Concord executory is no Recompence *de facto:* neither is there any Action given thereupon to compell the Party to make Recompence, and ſo he is without Recompence, and deſtitute of Means to recover any. And then inasmuch as by the pleading of the Concord he confeſſes the Treſpaſs, Law and Reaſon will ſay that it ſhall not be a Bar, for then the Plaintiff ſhould be barred without Satisfaction, where the Wrong is confeſſed. [b] But upon an Arbitrement, where a Sum is awarded in Recompence to be paid at a Day to come, there this ſhall be a good Bar, becauſe he may have an Action of Debt [c] for it at the Day limited, and the Treſpaſs is converted [d] into another Thing by the Arbitrators, who are Judges thereof: ſo that there it is anſwered with an Action, which countervails a Satisfaction in Deed. But ſo it is not in the Caſes of a Concord, for there the Treſpaſs firſt done may not be extinguiſhed by the Agreement, *viz.* the Concord afterwards made, which does not enure as any Satisfaction; and ſo is the Diverſity. But in our principal Caſe the King ſhall be recompenced and ſatisfied, as I ſhall prove hereafter; and for this Cauſe it is not like the Caſe of a Concord. The other Cauſe is, for that in our principal Caſe there is not any Wrong done before the Agreement which ought to be recompenced, as it is in the Caſes of a Concord, but the Agreement was firſt made before that the King was intitled to the Subſidy, and ſo the Agreement precedes the Wrong ſuppoſed to be done to the King, and does not come after the Wrong, as in the Caſe of a Concord. And for this Cauſe it may not be reſembled to the Caſe of a Concord, inasmuch as no Wrong precedes the Agreement, but the Agreement precedes the Wrong ſuppoſed; and ſo there is an apparent Diverſity between the Caſes. But the great Doubt here (if any there be) is in this Point, inasmuch as the Certainty of the Sum, which ſhall be paid for the Subſidy, is not known at the Time of the Agreement, or landing of the Merchandize, and ſo the King is not preſently intitled to an Action of Debt for it. And, Sir, notwithſtanding this, it ſeems to me, that the Statute is performed; for the Statute, (as I have ſaid) is divided into two Points, that is to ſay, *the King not being paid*, or, *the Collector not agreed with*, &c. and ſo the Statute grants an Agreement; and here, although * the groſs Sum is not certainly known, yet none can ſay but that there is a mutual Aſſent of the Collector and the Defendant, which is an Agreement, and this Agreement ſhall countervail a certain Agreement, for by this the Certainty ſhall be known by Circumſtance, *viz.* by the weighing, whenever it ſhall be weighed, which weighing the Law refers to the Collector; and ſo this Agreement is good enough to make a Certainty, which being known, the King may have an Action for the Subſidy. [f] As if one leaſes all his Acres in D. to *J. S.* for Years, rendering for every Acre 12 *d.* although the Number of the Acres was not known by the Leſſor nor by the Leſſee, and therefore the Rent is at the Beginning incertain; yet, upon the Admeaſurement or other Trial had, the Rent reſerved may be known certainly, for which the Leſſor may have an Action of Debt; and therefore for this poſſibility of Trial the Reſervation is good, which at the Beginning was incertain. [g] So if one gives two Acres to a Man, *habendum* the one for Life, and the other in Fee, it is incertain in which of them he ſhall have the Fee, and in which an Eſtate for Life; but if afterwards the Donee makes a Feoffment of one Acre, now he ſhall be ſaid to have a Fee in that *ab initio*. [h] So if one leaſes *Black*-Acre and *White*-Acre for Life, the Remainder of the one Acre in Fee, now it is incertain which Acre he in the Remainder ſhall have; but if he licenſe the Tenant for Life to cut down Trees in *White*-Acre, now he ſhall be adjudged to have the Remainder of that Acre *ab initio:* and ſo the Thing, which at the Beginning was incertain, is afterwards made certain. So in *Wheeler*'s Caſe [i] in 14. *H.* 8. the Grant of a Term upon Condition that the Grantee ſhould obtain the Favour of the Leſſor, and pay as much as *J. S.* ſhould award, was good when the Condition was fulfilled, and the ſecond Grant was adjudged void. And there it is held, *fo.* 21. that if one [k] makes a Leaſe for ſo many Years as *J. S.* ſhall name, now this is incertain at the Beginning; but after *J. S.* ſhall have named 20 Years, it ſhall be a good Leaſe for 20 Years *ab initio*. [l] And in 17. *Ed.* 4. in Treſpaſs for Corn taken away, there the Defendant and the Plaintiff had bargained together, that the Defendant ſhould go to the Place where it grew, and ſee the Corn, and if he liked it upon View, he ſhould take it, paying the Plaintiff 40 *d.* for every Acre; this was there holden a good Contract, notwithſtanding the Incertainty of the Quantity of the Corn, and of the groſs Sum which ſhould be paid for it, becauſe upon Circumſtance the Certainty might appear; and therefore, although this was a conditional Agreement, yet it was held a good Juſtification, [m] if he had preſently paid for it at the Time of his carrying it away. And in all theſe Caſes the Agreement between the Parties is incertain, and yet it ſhall be adjudged good, becauſe it may be reduced to Certainty by divers Ways and Means, and ſo ſhall countervail a Certainty at the Beginning. So ſhall it be in the principal Caſe; although the Agreement doth not contain in expreſs Words the preciſe Certainty of the Sum at the Beginning, yet it contains in itſelf a Circumſtance to make the Certainty known, and that is, the weighing by the Collector, which has the ſame Effect as a Certainty at the Beginning; and

* Wing. Max. reg. 9. pl. 4.

[a] Wing. Max. reg. 108. pl. 41.

[b] M. 5. Ed. 4, 7. pl. 14. *per Choke.* Bro. Arbitrem. 36. H. 9. Ed. 4. 21. a. *per Choke.* P. 17. Ed. 4. 2. b. *per Townſend.* Bro. Accord. 7. M. 6. H. 7, 11. *per Curiam.* Fitz. Accord. 4. Bro. 3. Treſpaſs 279. Kelw. 121. a. *per Keble.* Dy. 75. pl. 26. 356. pl. 39. 1. Rol. abr. 267. pl. 3. 1. Finch. 384, 385. 2. Finch 183. Doc. Pla. 39. Heath's Max. 52. 59. Lord Raym. 122. Comb. 440. *arguendo.* See Vin. Abr. tit. Arbitrement. Y. a. Z.

[c] M. 16. Ed. 4, 8. b. 9. F. N. B. 121. g. Kelw. 202. b. pl. 1. *in fine.* 121. a. pl. 70. 1. Finch 384. 2. Finch 183.

[d] 1. Finch. 384.

* Wing. Max. reg. 106. pl. 7.

[f] Touch. of Preced. 22. Poſt. 17. *Per Pollard.* Wing. Max. reg. 106. pl. 7.

[g] 1. Rol. Abr. 725. pl. 3. 726. D. pl. 1. Moor 83. Perkins § 77. Wing. Max. reg. 106. pl. 7.

[h] 1. Rol. Abr. 726. D. pl. 2. Touch. of Preced. 22. Wing. Max. reg. 106. pl. 7.

[i] H. 14. H. 8. 27. b. Bro. condition. 67. Touch. of Preced. 22.

[k] M. 14. H. 8. 21. b. *Per Rowe.* 1. Rol. Abr. 849. pl. 11. Co. Litt. 45. b. 6. Co. 35. b. Cro. El. 561. pl. 20. Hob. 174. 1. Anders. 259. Godb. 25. Skin. 535. Touch. of Preced. 21. Poſt. 13. *Per Brook.* 273. *Per Weſton.*

[l] P. 17. Ed. 4. 4. pl. 2. Bro. Contract 25. Touch. of Preced. 23 Wing. Max. reg. 106. pl. 7. Poſt. 17. S. P. *Per Pollard.*

[m] Poſt. 11.

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ſo the Intent and Effect of the Agreement intended by the Statute is performed. And we may ſee divers Caſes where Acts ought to be performed ſtrictly, and yet if the Intent is performed it is ſufficient, although the Words are not performed. [a] As if a Man makes a Feoffment to one upon Condition to make a Gift in eſpecial Tail to Huſband and Wife before ſuch a Day, and they die before the Day, and before the Gift is made, leaving Iſſue, there if the Feoffee make a Gift to the Iſſue and to the Heirs of his Father and Mother begotten, he has performed the Condition, and yet he has not performed the Words of the Condition; but inaſmuch as the Intent and Effect of the Condition is performed, it is ſufficient; and yet the Words of a Condition ought to be as ſtrictly performed as the Words of any penal Statute. [a] So if a Man is bound in an Obligation upon Condition to infeoff *J. S.* and he makes a Leaſe for Years and Releaſe to him in Fee, he has performed the Condition, although he has not performed the Words; and yet the Words of a Condition of an Obligation ought to be fulfilled as ſtrictly as the Words of any Statute; but inaſmuch as the Intent and Effect is fulfilled, which ſhall countervail the Words, it is ſufficient. So here, this Agreement upon Condition, which is ſpecially alledged, ſhall countervail the general Agreement, that is to ſay, an Agreement certain, and is of the ſame Effect, and is within the Words of the Statute. For which Reaſon, as it ſeems to me, the Statute is performed in Words and Effect, and ſo the King ſhall be barred. Alſo the Demurrer is upon the whole Evidence, and then although the firſt Part of the Evidence given by *Wells* had not made for the Defendant, (as in *rei veritate* it does) yet the ſecond Part of it ſhall make for him; for he ſaith that the King cannot be defrauded of his Subſidy, inaſmuch as the Woad lies in the Cuſtom Houſe, ſafely kept until it be weighed, *&c.* So that this proves wholly for the Defendant; and therefore for theſe Reaſons it ſeems to me that the King ſhall be barred.

[a] Litt. § 353. 8. Co. 90. b. 11. Co. 83. a. 1. Rol. Rep. 183. Poſt. 291. Vin. Abr. tit. Condition L. a. 2.

[a] P. 17. Ed. 4. 3. a. Bro. Condition 158. *Per Brian*, of a Leaſe and Releaſe (not ſaying what Leaſe) *quod Littleton negavit*; but *Brook* ſays that the Law is with *Brian*, if it be a Leaſe for Years and Releaſe. And ſee Accord. 1. Rol. Abr. 426. pl. 4. Co. Litt. 207. a. Carter, 88. *arguendo*. Strange, 49. *Per Pratt*, C. J. Vin. Abr. tit. Condition P. a. pl. 34. See Lit. Rep. 128.

Bradſhaw the King's Attorney. It ſeems to me that Judgment is to be given for the King; for here the Agreement is not ſuch as the Statute intends. For when there is a mutual Aſſent of the Parties upon a Thing incertain, this may not be adjudged in Law any thing more than a vain Communication and Diſcourſe when the Thing is not afterwards performed. For if I ſell you all my Corn for 12 *d. per* Buſhel, you may not take it before it is meaſured, whereby the Number of the Buſhels may be known, and alſo the Certainty of the Sum which is to be paid for it preſently, ſo that before the Certainty is known it cannot be adjudged any good Contract or Agreement. [b] So in 37. *H.* 6. if one grants or promiſes to give, in Marriage with his Daughter, ſo much money as *J. S.* ſhall award, there it is held, that before *J. S.* hath awarded and appointed it, the Party who has married the Daughter ſhall not have Remedy for any Money, for before it is reduced to a Certainty it is only a vain Communication. And about 20. *H.* 6. it is held, that if one leaſes his Land to *A.* for ſo many Years as *J. S.* ſhall name, *A.* may not enter into the Land before *J. S.* hath named the Number of Years, for perhaps *J. S.* will never name any Years, and then he ſhall never have any Intereſt in the Land, ſo that it can only be taken as a Communication before *J. S.* hath named the Number of Years. So here, the Statute ſhall not be intended of a void Agreement, but of an effectual and certain Agreement, whereupon the King may have an Action at the Time of the Agreement; and here the Evidence does not prove any ſuch effectual Agreement, but, as appears by the Evidence, it may be that the Woad ſhall never be weighed, and then the King ſhall never have his Remedy, for there is not any Time limited upon the Agreement when it ſhall be weighed, nor by whom, nor is it averred that the King has any Beam there. And therefore this Agreement is referred to an Incertainty, which by Intendment ſhall never be performed, and is contrary to the Effect and Intent of the Statute, which was made for the Advantage and Benefit of the King; for which Reaſon Judgment ought here to be given for the King. And alſo *Wells* has ſaid that he found Surety, and has not ſhewn what Surety in certain, as he ought, for their Ability ought to be ſhewn, that the Court may judge whether they be ſufficient. [c] As in 22 *Ed.* 4. a Man was bound to ſhew one a ſufficient Diſcharge of an Annuity, &c. and he ſaid, that he offered to ſhew a ſufficient Diſcharge, and the Party who was to ſee it refuſed to ſee it, and this was held to be no Plea, inaſmuch as he did not ſhew in certain what manner of a Diſcharge it was, in Order that the Court might judge whether it was ſufficient: ſo here, he ought to ſhew the Names of the Sureties, and their Ability, that the Court may be Judges thereof: for which Reaſon, &c. And alſo *Wells* has ſaid that he would pay according to the Rate, and has not ſhewn what Rate, and therefore it is not well depoſed. And there is another Cauſe why Judgment ſhould be given for the King, for admitting that the Matter might be pleaded, and ſhould be good, yet here it might not be given in Evidence, for the Iſſue is, whether the Defendant agreed or no according to the Form of the Statute, which ſhall be intended a general Agreement, viz. an Agreement certain, and here the Evidence proves a ſpecial Agreement, viz. an Agreement incertain, which does not prove the Iſſue, but it ought at firſt to have been pleaded and miniſtred in Bar, and relied upon, and inaſmuch as it was not done ſo, the Evidence does not purſue the Iſſue. [d] As in 31. *H.* 6. in Debt upon *non eſt factum* pleaded they were at Iſſue, and the Witneſſes which gave Evidence that he made the Deed were examined were the Delivery was, and they ſaid that it was delivered at *York*, which was in another County than where it bore Date, upon which the Defendant demurred, and by Award the Plaintiff was barred, becauſe the Delivery ſhall be intended where the Date was, and now the Witneſſes ſay the contrary, ſo that the Evidence does not warrant the Iſſue. [e] And in 18. *H.* 6. Iſſue was joined whether the Defendant held for Term of Life or not, and a Deed of a Leaſe for Life was given in Evidence, where no Livery of Seizin was made, and there it is held, that this Evidence does not warrant the Iſſue, which was, that he was Tenant for Life the Day of the Writ purchaſed, and is at this Day. [f] And in 14. *Ed.* 3. upon Traverſe of a Gift in Tail, the Witneſſes proved that another made the Gift, and there it was awarded that the Plaintiff ſhould be barred, becauſe the Evidence did not prove the Iſſue. So here, the Iſſue ſhall be intended a general Agreement, and the Evidence proves a ſpecial Agreement, which is not purſuant to the Iſſue. And if a general Agreement had been pleaded

[b] M. 37. H. 6. 8. b. Bro. Contract 17. But not to the ſame Effect as it is here cited.

[c] H. 22. Ed. 4. 40, 41. Bro. Condition 183. M. 35. H. 6. 10, 11. Bro. Condition 16. 9. Co. 25. a. *arguendo*. Hob. 187. 296. 1. Leon. 72. Cro. Eliz. 253. 914. 916. Cro. Jac. 165. 363. 634. Moor 857. Hardr. 133. Kelw. 89. b. 95. b. Doc. Pla. 58. 270. Vin. Abr. tit. Condition: Y. d. pl. 19.

[d] 2. Rol. Abr. 677. pl. 24. Trials per Pais 467. But ſays, that ſurely if this be found the Plaintiff ſhall have Judgment as well as upon a Bond delivered before the Date.

[e] T. 18. H. 6. 16. pl. 6. Fitz. Feoffments et Faits. 101. 2. Rol. Abr. 676. pl. 12.

[f] 2. Rol. Abr. 676. pl. 13. 1. Finch. 195.

pleaded in Bar, and in the Rejoinder he had alledged a ſpecial Agreement, this ſhould be adjudged a Departure in Pleading. [g] As in Treſpaſs if the Defendant will plead a Deſcent to him, and the Plaintiff ſays that after the Deſcent the Defendant infeoffed him, and the Defendant ſays, that this Feoffment was upon Condition, for the Breach whereof he entered, this is a Departure from the Bar, for it contains new Matter. So here, if the general Agreement had been pleaded in Bar, and in his Rejoinder he had maintained the Bar with a ſpecial Agreement, this had been a Departure; and by the ſame Reaſon, this being given in Evidence ſhall not maintain the general Agreement put in Iſſue: Wherefore, *&c.* Beſides, there is another Matter which ſhall make the King to have Judgment, and that is, inaſmuch as *Davy*, one of the Witneſſes, ſays, that about two Months after the firſt Agreement, *Smith* told him that there was not then any other Entry made but that which was firſt made, and that was for 2000 Kintals only, and his Saying ſhall be intended true, ſo that by his Depoſition there was not any ſuch Entry of the ſpecial Agreement made as *Wells* has teſtified. And therefore inaſmuch as the Witneſſes vary, and it is demurred in Judgment upon the Depoſition of all the Witneſſes, and the one makes againſt the Defendant, it ſeems to me that for this Cauſe Judgment is to be given for the King. And alſo, inaſmuch as the Depoſition of *Davy* is againſt the Defendant, and therefore he has diſproved the Depoſition of *Smith*, then there is only one Witneſs which proves for him, that is to ſay *Wells*, which is not ſufficient in any Law. For the Chriſtian Kings of this Realm in former Times have made their Laws as near to the Laws of God as they could, but of their own Authority have oftentimes added greater Puniſhments to Things prohibited than the Laws of God declare; and amongſt divers Points of the Law of God which they have purſued this is one, *viz.* [a] that in every Trial there ſhall be two Witneſſes at leaſt, which is agreeable to the Book of *Deuteronomy*. [b] And ſo of ancient Time the Law of this Realm has been accordingly, as it is expreſſed in the Book called the *Mirror of Juſtices*, which was made before the Conqueſt. [c] And agreeable hereunto it has been ruled in the Time of King *Edward* 3. that where one Juror in Aſſize appears, and no more, and the Plaintiff ſurmiſes that the Sheriff has warned many more who were in the Town, and prays that he who appears may be examined thereupon, it was awarded that he ſhould not, inaſmuch as he alone is not a ſufficient Witneſs. So here the Defendant has but one Witneſs which proves for him, which is not ſufficient. And therefore for all theſe cauſes Judgment is to be given for the King.

Atkins an Apprentice. It ſeems to me to the contrary; and firſt as to that which has been laſt moved, *viz.* that *Davy* has depoſed againſt us, and inaſmuch as the Demurrer is upon the whole Evidence, that Judgment ſhall be given againſt us; Sir, this is not ſo, for admitting that *Davy* has depoſed againſt us (as *in rei veritate* he has not) yet what he has ſaid ſhall be to no Purpoſe, for he was brought in to prove the Agreement, and if he knew nothing of the Agreement, it is the ſame as if he had depoſed nothing at all, and as if he had never been brought in: and therefore his Depoſition is meerly void. And alſo the King's Attorney has taken his Depoſition to this Effect, that more was not entered than 2000 Kintals, ſo that this Depoſition in this Point was meerly in the negative, for theſe words, *no*, and *not*, are Negatives. And ſuch a Depoſition is to no Effect, for it might be that more was entered although *Smith* did not tell him ſo, and ſuch a Depoſition in the Negative is meerly void. And as to that which has been moved by Mr. Attorney, that one Witneſs is not ſufficient to give Evidence to the Jurors, this is not ſo, for if the Law ſhould be ſo, a great Miſchief would follow. For if I have four Witneſſes, and the Sheriff will empannel three of them upon my Inqueſt, if I might not have the like Advantage of their Knowledge when they are empanneled, as I ſhould have had if they had been out of the Inqueſt, it would be a great Miſchief to me; but I may put the Matter to the Inqueſt without any Witneſs, and their Knowledge ſhall aid me, and not the Knowledge of the Witneſſes, for they may give a Verdict contrary to the Witneſſes, and ſo the Witneſſes and their Teſtimony is not very material when [d] there is an Inqueſt, for which Reaſon this Exception is not material. And as to that which has been moved, that he ought to aver that the King has a Beam to weigh ſuch Things, Sir, that is to be ſo intended, and there is an Officer appointed for it; wherefore it is not neceſſary to aver that which of neceſſity ought to be intended. And as to the other Matter which has been moved by Mr. Attorney, that the Agreement put in Iſſue ſhall be intended general, and the Evidence proves a ſpecial Agreement, and therefore does not maintain the Iſſue; Sir, it maintains [e] the Iſſue well enough, for a ſpecial Agreement is an Agreement, and this Word *(Agreement)* includes every Agreement; as a Feoffment upon Condition is a Feoffment; and ſo here, the ſpecial Agreement is included in this Word *(Agreement)*; and therefore the Evidence does well maintain the Iſſue. *Note, He did not anſwer to the other Exception*, viz. *that* Wells *had not ſhewn what Sureties*, &c. [f] *for that is not material, for if he agree without any Surety, the Agreement is good, and the King may have an Action of Debt againſt him, and the Statute does not ſpeak of any Surety, and therefore it ſhall be in vain to ſpeak of it, and perhaps he ſo underſtood it, and therefore made no Anſwer to him as to this Point.* And further he ſaid, as to the principal Matter, it ſeems to me, that the Agreement is ſuch as is intended by the Statute. And there are holden in our Law three Sorts of Agreements, and no more. [g] The firſt Sort of an Agreement is that which is executed at the Beginning, and ſuch an Agreement is mentioned in the Statute of Cloths, 25. *Ed.* 3. *cap.* 3. *Stat.* 4. which ſays, that the Goods and Things bought by Foreſtallers, being thereof attainted, ſhall be forfeited to the King, *if the Buyer thereof have made Gree with the Seller*; in which Caſe this Word *(Gree)* which is otherwiſe called an Agreement, ſhall be intended an Agreement executed, that is to ſay, Payment for the Things. The ſecond Manner of Agreement is, where one doth an Act, and another agrees and aſſents to it afterwards. [h] As if one commits a Diſſeizin to my Uſe, and afterwards I agree to it, now I ſhall be ſaid a Diſſeiſor *ab initio*, and ſuch an Agreement is an Agreement after an Act done. So if one raviſhes a Woman, and afterwards ſhe aſſents to the Raviſher, this Aſſent is called an Agreement; ſo that this Agreement is an Agreement after an Act or thing done, which Agreement is alſo executed; for when the Party agrees to that which

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[a] M. 6. H. 7, 3. a. *Per Read.* Fitz. Departure 30. Co. Litt. 304. a. 1. Finch. 280. 2. Finch. 30. 391. Vin. Abr. tit. Departure a. pl. 1.

[a] See Deut. cap. 17, v. 6. cap. 19. v. 15. Matth. cap. 18. v. 16. 2 Epiſt. Corinth. cap. 13. v. 1.

[b] Mirror. cap. 3. § 34. Waterhouſe on Forteſcue de Laud. 252. Accord, but the Commentator ſeems to have overreached the Text, which evidently does not extend to this Point, nor at all warrants the Concluſion which *Waterhouſe* has made upon it. And ſee Carth. 144. *per Holt*, C. J. that it was not neceſſary in any Caſe at common Law, to prove a Matter of Fact by more than one Witneſs.

[c] M. 48. Ed. 3. 30. Fitz. Inqueſt. 42. 48. Aſs. pl. 5. 2. Rol. Abr. 675. pl. 1. But ſee 2. Hawk. P. C. 256.

E contra for the Defendant.

[d] Poſt 12. *Per Brook.* Co. Litt. 6. b. Heath's Max. 95.

[e] Heath's Max. 25. Trials per Pais, 361, 363, 467. Vin. Abr. tit. Evidence C. b. pl. 7.

Nota Bene.

[f] Wing. Max. reg. 152. pl. 20.

[g] Terms de Ley. ad v. *Agreement.*

[h] P. 12 Ed. 4. 9. b. Fitz. Diſſeizin. 3. Bro. 66. & Agreement 4. M. 18. Ed. 4. 12. b. *Per Cateſby.* 38. Aſs. pl. 9. Davis 44. b. Wing. Max. reg. 124. pl. 6. Poſt 27. 31.

[3, Inſt. 25.]

is done before, then this Agreement ought to be called executed, inaſmuch as nothing is to be done afterwards; and ſo both theſe Agreements are executed. The third ſort of Agreement is, when both Parties at one Time are agreed that ſuch a Thing ſhall be done at a Time to come, this Agreement is executory, inaſmuch as the Thing ſhall be done hereafter; and yet there their Minds agree at one Time, but inaſmuch as the Performance ſhall be afterwards, and ſo the Thing upon which the Agreement was made remains to be done, this Agreement ſhall be called executory, as is ſaid before. And the Statute 26. *H.* 8. *cap.* 3. proves that there is ſuch an Agreement, for the Statute ſays, *That every Vicar, Parſon, and ſuch others*, &c. *before their actual poſſeſſion, or meddling with the Profits of their Benefice, ſhall ſatisfy, content, and pay, or compound, or agree to pay, to the uſe of the King, the firſt-Fruits*, &c. *and if any ſuch Parſon, Vicar*, &c. *enter into actual Poſſeſſion*, &c. *before he ſhall have ſatisfied or paid to the Uſe of the King the Firſt-Fruits, or before he has compounded or agreed for the Payment thereof*, &c. *that then he ſhall be taken as an Intruder*, &c. [a] Which Statute is in the Disjunctive, and ſpeaks of Payment *or* Agreement, &c. and this Agreement is to be intended executory, as the common Uſage proves, for it is uſual to make an Obligation for the Payment thereof at certain Days after. So there are three Sorts of Agreements mentioned and underſtood in our Law, as is before ſhewn. And the firſt of theſe Agreements, *viz.* the Agreement executed with Payment, is not intended in our Caſe, for the Statute (as hath been ſaid) is in the Disjunctive, *viz. the Subſidy not being paid*, or, *the Collector not agreed with for it*. And ſo if the Agreement, of which the Statute ſpeaks, ſhould be intended executed with Payment, then the Statute ſhould not be in the Disjunctive, for then the firſt Clauſe and the ſecond would be all one, which is not ſo, for this Word *(or)* is a Disjunctive, which makes the Clauſes ſeveral. Wherefore the Agreement, of which the Statute ſpeaks, muſt of Neceſſity be taken other than the firſt of the Agreements mentioned in my Diviſion, *viz.* the Agreement executed with Payment. And it may not be taken the ſecond Agreement whereof I have ſpoken before, for that is of Things firſt done, to which the Agreement is afterwards given, and it is not ſo in our Caſe; wherefore inaſmuch as the Statute doth warrant an Agreement, and it is not the firſt nor the ſecond Agreement mentioned in my Diviſion, and there are not, nor can be more than three Agreements; *Ergo ex conſequente ſequitur*, that the Agreement intended by the Statute is the third Agreement mentioned before, that is to ſay, the Agreement executory. And, Sir, the Agreement executory is divided into two Points, and no more. The one is ſuch an Agreement executory as is certain at the Beginning, (as hath been ſaid touching the Firſt-Fruits,) as if the Party ſhould ſay, I have ſo much Merchandize, or ſo many Kintals of Woad, the Subſidy of which will amount to ſo much, and for this he makes an Entry in the Book of the Cuſtomer, or an Obligation for the Payment of it; here this is one of the Agreements executory. The other is in our Caſe, or in ſuch like, where the Certainty does not appear, and the Parties are agreed that the Thing ſhall be performed or paid upon the Certainty being known. And then inaſmuch as there are two Agreements executory, and our Agreement here is not the firſt of them, I am to prove that the Statute will warrant and approve our Agreement here, which is the ſecond Agreement executory, as well as it will the firſt Agreement executory; and this I ſhall prove well enough. For in our Law, and in all other Laws (as I apprehend) there are ſome Things that happen, which may not be prevented by foreſight, nor by any Diligence or poſſible Means be eſchewed and avoided; and when any ſuch thing happens to a Man, the Law will not puniſh him for it, for the Law will not puniſh any Man but for his own Default, and if the Law ſees that there is no Default in him, it will not puniſh him; for if the Law ſhould puniſh a Man for an Accident, which by no Foreſight, Diligence, or Poſſibility could be avoided, it would be utterly againſt Reaſon, and therefore ſeeing that ſuch Accidents can by no Means be avoided, the Perſons upon whom they happen ſhall not be hurt thereby. [b] And therefore there are three Kinds of Laws in this Realm of *England*, by which the King's People are governed, *viz.* the Law general, Cuſtoms, and Statute Law, and in theſe three Laws ſuch unavoidable Accidents ſhall not hurt any one; for which reaſon though Effuſion of Blood, and the killing of Men are prohibited by the common Law, yet every man, in his own [c] Defence, or as [d] a Champion in Trial in a Writ of Right, or ſuch like, may kill others; and the one is for the Safety of his Life in his Defence, and the other is for the Neceſſity of Trial. [e] So by the common Cuſtom of the Realm Hoſts ſhall be charged for the Goods of their Gueſts loſt or ſtolen out of their Houſes, yet if their Houſes be [f] broken by the King's Enemies, and the Goods taken from thence, they ſhall not be chargeable for them, for in Reaſon ſuch Violence cannot be reſiſted, and therefore it ſhall infringe the Violence of the Cuſtom. Like Reaſon will diſpenſe with ſtatute Law; and therefore the Statute of *Marlbridge, cap.* 4. prohibits Diſtreſſes from being driven out of one County into another; yet it is held in 30. *Ed.* 3. [g] That where the Abbeſs of *Wilton* had a Manor in one County, ſhe might carry a Diſtreſs taken in another County in Land holden of the ſaid Manor, into the ſame County where the Manor was, notwithſtanding the Statute is in the negative; and this is in reſpect of the Inconvenience and Abſurdity that ſhould otherwiſe follow. And ſo we ſee that ſome Caſes ſhall be conſtrued contrary to Statutes, contrary to Cuſtoms, and contrary to the ordinary Courſe of the Common Law, and this is for the Neceſſity of the Matter, and therefore Reaſon maintains that ſuch Perſons as do ſo ſhall not be wrong-Doers. So in the principal Caſe here, if the Ship had been on fire, and he had caſt the Woad upon the Land before Payment of the Subſidy, or Agreement for it, he ſhould have been excuſed by reaſon of the Neceſſity of the Occaſion.

[a] Wing. Max. reg. 9 pl. 5.

[b] Poſt 213. *Per Weſton.*
[c] Poſt 13. *Per Brook.*
[d] M. 20. H. 7. 11. b. *Per Fineux.* 1. Finch 24. 2. Finch 35. Wing. max. reg. 110. pl. 32.
[e] H. 3. H. 4. Rot. 16. *Midd.* *Per legem terræ Hoſpitator communis tenetur warrantizare bona hoſpitantis.* Sic. P. 9. H. 4. Rot. 69. Dr. & Stud. l. 2. c. 42. F. N. B. 94. b.
[f] Wing. Max. reg. 110. pl. 32.
[g] H. 30. Ed. 3. 5. Fitz. Diſtreſs 16. But *note*, the Book is adjudged *contra*. Sed. S. P. Accord. M. 1. H. 6. 3. b. *Per Cur.* Fitz Diſtreſs 1. Bro. 37. Action ſur l'Eſtatute 41. P. 14. Ed. 3. Fitz. Bar. 275. Kelw. 100. a. pl. 3. 2. Inſt. 106. Hale on F. N. B. 89. p. Poſt 18 204. Dyer, 168. pl. 20. *Per Cur.* Notwithſtanding 22. Ed. 4. 11. Fitz. Bar. 120. Bro. Diſtreſs 54. dubitatur.

[h] Wing. Max. reg. 110. pl. 32. 349. pl. 49.

And ſo as the Caſe ſtands, the Tempeſt which aroſe upon the Sea could not be reſiſted, and therefore when they caſt the Woad out of the Ship into the Sea for the Safety of their Lives, whereby the certain Quantity of the reſt that was left in the Ship could not be known, they ought not to be blameable for this Incertainty that is made; and beſides, they could not weigh it in the Ship, nor by any other poſſible Means know the Certainty of it before it was put upon the Land; and inaſmuch as *Fogoſſa* (the Defendant) was not in any Fault for not knowing the Certainty, and upon the Incertainty no other more certain Agreement could be made for the King's Subſidy than has been made, it ſeems to me that the Defendant has done well, and that the Rigour of the Tempeſt ſhall excuſe the Rigour of the Statute. And ſo the Agreement here made ſhall by Neceſſity of Reaſon be ſaid the Agreement intended by the Statute, inaſmuch as a more perfect Agreement could not be made, the Accident having happened as it did; and ſo the Defendant has fulfilled the Effect and Intent of the Statute, for which reaſon Judgment ſhall be given for him.

E contra for the Informer.

Saunders one of the King's Serjeants. It ſeems to me to the contrary. And firſt it is to be ſeen (as I apprehend) how the Statute ſhall be taken, whether for the Benefit of the King, or for the Benefit of the Party. And it ſeems to me that although the Statute is penal, yet it ſhall be taken according to common Reaſon, and common Intendment, and according to the Minds of the Makers. And here although the Statute ſpeaks of *the Collector not agreed with*, and that generally, and alſo although the ſpecial Agreement, which is here upon Condition, is an Agreement, and included in the general Words, *the Collector not agreed with*, yet the Statute ſhall be conſtrued according to the Minds of the Makers, and ſhall extend only to ſuch an Agreement as they intended, ſo that their Intent ſhall be obſerved in this Statute, [a] as it ſhall be in other penal Statutes. [b] As in the Statute *of Waſt*, which ſays, if any one doth waſt in Land which he holds *ex dimiſſione, &c.* yet if his Eſtate be *ex* [c] *legatione*, he ſhall be puniſhed by the Equity of the Statute, and yet the Statute is penal; but the Minds of the Makers of the Statute were ſuch, and therefore the Uſe has been ſo ever ſince. And the Statute of *quia Emptores terrarum* [d], which reſtrains Men from making Tenures of themſelves, is penal, and yet where the Words are, that every one ſhall hold of the Lord Paramount, *ſecundum quantitatem terræ, &c.* this is taken and ought to be intended, [e] *ſecundum valorem terræ:* So that it has always been the Mind of the Legiſlature, that their Intent ſhould be obſerved in the Conſtruction of Statutes. [f] And in 4. *Ed.* 4. there was an Information brought in the Exchequer, that one had unfreighted certain Sacks of Wool, and had not found Surety according to the Statute of 14. *Ed.* 3. [g] *cap. ult. Stat.* 1. viz. *to bring Bullion, that is, Plate of Silver of two Marks for every Sack of Wool, and to take two Marks of Coin back again for the Bullion:* And there were two Statutes alledged to bar the ſaid finding of Surety, *viz.* the one was the 36. *Ed.* 3. *cap.* 11. which Statute recites, that the Commons of the Realm have granted to the King a Subſidy on every Sack of Wool for three Years, in conſideration whereof, the King grants by the ſame Statute, that after the three Years nothing ſhall be taken in Demand of the Commons, but only the ancient Cuſtom of half a Mark for every Sack, *&c.* And the other Statute which was alledged to bar the ſaid finding of Surety was the 45. *Ed.* 3. *cap.* 4. by which it was eſtabliſhed, that no Impoſition or Charge ſhould be put upon Wools, other than the Cuſtom and Subſidy granted to the King, *&c.* without the Aſſent of Parliament, and if any be, it ſhall be repealed and holden for none: And it is there ſaid and argued againſt the King, that by the general Words of theſe two Statutes the finding of Surety given by the ſaid Statute of 14. *Ed.* 3. ſhall be repealed and annulled; but there it is adjudged by great Advice, that the finding of Surety, *ut ſupra*, is not annulled, and that the Information was well made, for it is there holden that every Statute ought to be taken according to the Intent of thoſe that made it, where the Words are doubtful and not certain according to the Rehearſal of the Statute, and it was not the Intent of the Makers of the two laſt Statutes to diſcharge the Bullion, but only great Subſidies and great Charges upon Wool after the three Years; for which Reaſon the Judgment was, *ut ſupra*. Which proves that where the Words of a Statute are general, as they are in our Caſe, all Things which are within the general Words are not taken as the Purview of the Statute, but ſuch Things as the Makers of the Statute meant; ſo that the Intent of the Legiſlature is the Judge of the Words, and ſhall abridge the Generality of them. So in our principal Caſe, the Minds of the Legiſlature ought to be obſerved in this Statute. And then although the Statute is general, *viz. the Collector not agreed with*, and this Agreement may be conſtrued two Ways, *viz.* certain, or incertain, as in our Caſe, yet by the Intent of the Legiſlature it ought to be taken that Way which is moſt beneficial for the King, inaſmuch as it was made for his Benefit and Advancement; for the Commons pray, *that the King will accept this Subſidy as the Firſt-Fruits of their good Will*; by which Words it appears that the Makers of the Statute, that is, the King's Subjects, intended it to be made for the Advancement and Emolument of the King. And then it ought to be conſtrued moſt beneficially for the King, which Conſtruction ſhall be beſt ſatisfied by an Agreement certain, upon which the King may have an Action at the Beginning. [h] And alſo Statutes ought to be conſtrued according to the Reaſon of the common Law. And there is a Principle or Ground in the common Law for the Expoſition of Words, Clauſes, or Sentences, *viz.* [i] that in every Grant or Gift, if the Words are ambiguous and doubtful, they ſhall be taken moſt ſtrongly againſt the Grantors or Donors, and moſt beneficially for them to whom the Grant or Gift was made; and if it be ſo where a common Perſon is Grantee or Donee, *a multo fortiore* where the King is Grantee or Donee. And here

[a] 11. Co. 34. a. b. Poſt 86. *Per Curiam.*

[b] See the Statutes Glouceſter, cap. 5. Weſtm. 2. cap. 14. & Marlb. cap. 23. tho' theſe two laſt ſpeak not of a *Demiſe*.

[c] M. 10. H. 6. 8. pl. 29. Fitz. Brief. 63. Bro. General Brief. 26. & Waſt. 132. 2. Rol. Abr. 826. pl. 7. Theol. Dig. lib. 10. cap. 5. § 26.

[d] Weſtm. 3. cap. 2.

[e] Poſt 82. 18. Ed. 2. Fitz. Avowry. 218. 2. Inſt. 503, 504. Perkins, § 680.

[f] P. 4. Ed. 4. 3. b. & 12. Fitz. Bar. 309. Bro. Surmiſe. 29. & Parliament. 52.

[g] Raſt. Cuſtom. 1.

[h] 2. Inſt. 248. 3. Co. 131. b. 77. b. 78. a. 85. b. 1. Freem. 57. *Per Atkins.* J.

[i] Poſt 103. 238. 243. Kelw. 7. b. Dy. 22. pl. 140. Dal. 96. pl. 27. Davis, 45. a. 5. Co. 7. b. 6. Co. 36. a. 8. Co. 145. a. Co. Litt. 183. a. 197. a. Winch. 96. Ld. Raym. 663. *arguendo.*

here the Commons have given this Subſidy to the King by the ſaid Statute, and the Commons are the Donors and Grantors, and the King is the Donee or Grantee, in which Caſe, the Words of the ſaid Statute, which is the Grant, ought to be taken moſt beneficially for the King. And then if an Agreement certain is more beneficial for the King than the Agreement incertain here is, (as every one will confeſs it is) it follows conſequentially, that ſuch Agreement certain ſhall be intended for the King by the Statute in the Conſtruction of Law. And therefore the Statute *de Prerogativa Regis* [a] is a Grant of the Commons to the King, which ordains in *cap.* 1. that the King ſhall have the Wardſhip of the Lands of ſuch as hold of him in chief by Knight's Service, whereof the Tenants were ſeized in their Demeſn as of Fee at the Time of their Death, *&c.* which Words (in their Demeſn as of Fee,) have two Intendments, *viz.* of Fee-Simple or Fee-Tail, and the moſt common Intendment is Fee-Simple, [b] for when it is ſaid that ſuch an one is ſeized in Fee, this is commonly taken in Fee-Simple; and yet it has been adjudged, and is now uſed as clear Law, that the King ſhall have as well the Land which his Tenant had in Tail, as that which he had in Fee-Simple, which Caſe is as a Rule to us, that where the Words in the Gifts of Subjects made to the King by Parliament have two Intendments, they ſhall be conſtrued moſt ſtrongly for the Benefit of the King. And one may have Land by three Ways, to which he came not by Deſcent; one Way is, by Bargain or Gift for Money; another is, by Gift without any Recompence; and the third is, by Way of Remainder; and yet if a Man has Land by all theſe three Ways, and will give to the King all his Lands purchaſed, the King ſhall have all the ſaid Lands; for this Word *(Purchaſe)* ſhall be taken moſt ſtrongly againſt the Donor, and moſt beneficially for the King, the Donee. So this Word *(agreed* with) ſhall be taken moſt ſtrongly againſt the Subjects in the principal Caſe, and moſt beneficially for the King, and therefore inaſmuch as the Agreement certain is more for the Benefit of the King, the ſame ſhall be here intended by the Statute. And if the Tempeſt which is alledged was true, yet *Fogoſſa* might have helped himſelf ſeveral Ways, for he might have gueſſed upon Sight of it how much was left in the Ship, or he might have tried it by Lighters or Boats in carrying of it to Land, or he might have weighed it in the Ship by the Beam in diſburthening the Ship. So that it is not like ſome of the Caſes upon Neceſſity put by *Atkins* before, but his Ignorance of the Certainty is an affected Ignorance, and at leaſt he ought to have got it weighed before this Time. And inaſmuch as all theſe Defaults are in him, by which he appears to have been negligent and not to have done his Duty, and now the King has no Means to compel him to weigh it, ſo that perhaps it ſhall never be weighed, nor the Certainty ever appear, there is no Reaſon that this ſhould be taken for the Agreement intended by the Statute; for the Agreement intended by the Statute ſhall be ſuch as gives a certain Remedy, and ſuch Agreements, upon which [c] Remedy is not given, are void by the Common Law, and ſhall not be good in Bar. [d] And therefore in 19. *H.* 6. in Forger of falſe Deeds, the Defendant pleaded an Arbitrement made, *viz.* that the Plaintiff ſhould not ſue the Writ againſt the Defendant, and alſo that the Defendant ſhould be nonſuited in an Aſſize which he had againſt the Plaintiff, and he ſaid that the Day was not yet come, and it was adjudged no Plea in Bar; one Cauſe was becauſe the Nonſuit does not enure as a Satisfaction; and another Cauſe was becauſe he could not compel him to be nonſuited in an Aſſize; and if he had ſaid that the Award was that he ſhould give the Plaintiff [e] an Acre, this had been no Plea, if he had not ſaid that he had given it him, becauſe the Plaintiff could not compel him to give the Acre. So here he can not compel him nor any other to weigh it. And this is the Reaſon of the Concord in 6. [f] *H.* 7. where in Treſpaſs the Defendant pleaded a Concord that he ſhould pay Money to the Plaintiff, and ſhould alſo make him certain Windows, and he ſhewed that he paid the Money accordingly, but did not ſay that he had made the Windows, and there inaſmuch as the Concord was intire, and he did not alledge the Performance of [g] all, and the Plaintiff had no Remedy to compel him to make the Windows, the Plea was held ill. [h] But if the Act had been done there, it ſhould be otherwiſe both in the Caſe of an Arbitrement, and in the Caſe of a Concord, and perhaps alſo in the principal Caſe, for if a Day had been appointed, and at that Day it had been weighed and reduced to a Certainty before the Seizure, then perhaps the Seizure would have been wrongful, inaſmuch as the King knew the Certainty, and might then have an Action of Debt for the Duty, which Remedy by Action is taken to be of the ſame Effect as a Satisfaction in Deed, and ſhall countervail a Satisfaction. [i] And in 27. *Aſs.* in a Bill of Treſpaſs the Caſe is, that a Bailiff known pledged an Ox of his Maſter for twelve Buſhels of Wheat, ſo that if he did not pay, *&c.* that then he ſhould keep the Ox for ever, and the Wheat came to the Uſe of the Maſter, and afterwards the Maſter diſagreeing thereto took the Ox, and the other brought a Bill of Treſpaſs, and all this Matter was found by Verdict, and by Award the Plaintiff recovered, for there it is held that foraſmuch as the Wheat came to the Maſter's Uſe, and ſo founded in Satisfaction before the Maſter took the Ox, he ſhall be bound thereby, ſeeing it was done by his known Bailiff; but there it ſeems, if the Wheat had not come to the Maſter's Uſe, he ſhould not have been bound, for then it had not been any Recompence. And agreeable hereunto is the Book in 17. *Ed.* 4. [k] in Treſpaſs for taking Barley and Wheat, where the Defendant ſaid, that the Plaintiff bargained with him, that if after he had ſeen the ſaid Barley and Wheat he liked them, then he ſhould take them, paying ſo much for every Acre, and afterwards he ſaw them and liked them, and therefore he took them, and there it is held by the better Opinion that the Juſtification is not good, inaſmuch as he had not alledged Payment of the Sum, and alſo he ought to have certified him of his Mind. Wherefore Contracts or Agreements conditional ſhall be ſaid good after the Condition is performed, but before that they are no more than Communications;

[a] Statute 17 Ed. 2.

[b] Littlet. § 293. 11. Co. 39. a. *Per Curiam.* Wing. Max. reg. 189. pl. 8.

[c] Vid. ante 5.

[d] M. 19. H. 6. 37. Fitz. Arbitrement. 6. Bro. 21. 1. Rol. Abr. 266. pl. 2.

[e] M. 19. H. 6. 38. a. J. Rol. Abr. 266. pl. 3. 1. Finch. 385. 2. Finch. 183.

[f] M. 6. H. 7. 10. b. Fitz. Bar. 150. Accord. 4. Bro. 3.

[g] S. P. P. 10. H. 7. 24. a. P. 17. Ed. 4. 2. pl. 5. *Per Townſend.* Bro. Accord. 7. 1. Rol. Abr. 129. pl. 13. Dy. 356. pl. 39. 9. Co. 79. b. Doc. Pla. 15. T. Jones 6. *Per Cur.* 3. Bulſt. 325. *Per Dodder.* J. Heath's Max. 59. Nor is it good in Equity. 1. Chan. Caſ. 302. *Note*, T. Jones, 158. is contrary, but that Book has been ſince overruled, Ld Raym. 122.

[h] Rol. Abr. 129. pl. 14. 1. Finch. 385. 2. Finch. 182.

[i] 27. Aſs. pl. 5. Fitz. Treſpaſs. 230. Bro. Contract. 21. Treſpaſs. 245. Pledges, 16.

[k] P. 17. Ed. 4. 1. Bro. Contract. 25.

nications; and ſo is the Diverſity. And in the principal Caſe, if a Day had been appointed, and it had been weighed at the Day, &c. and the Certainty had been known before the Seizure, then perhaps the Seizure would have been wrongful, but now it ſhall be good; and therefore for both the Cauſes firſt above ſhewn, the Statute ſhall be conſtrued moſt ſtrongly for the Benefit of the King. And foraſmuch as there are ſo many Defaults in *Fogoſſa*, which prove his Ignorance to be affected, and ſeeing the King may not compel him to weigh the Woad, and to aſcertain his Duty to intitle him to an Action, (and ſo the Agreement doth not preſently import any Satisfaction) it ſeems to me, that the King ſhall not be bound by ſuch Agreement made with the Collector, being his Servant, no more than the Maſter ſhould have been bound in the ſaid Caſe of 27. *Aſs.* by the Agreement made with his Servant, if the Recompence had not come to the Maſter before; therefore it ſeems to me that Judgment is to be given for the King.

[a] 2. Rol. Abr. 675. pl. 5. Co. Litt. 6. b. Trials Per Pais. 342. Gilb. Law of Evid. 154. Touch. of Preced. 360. Vin. Abr. tit. Trial. Y. e. 3. pl. 5. tit. Evidence Z.

E contra for the Defendant. *Robert Brook* Recorder of *London* to the contrary. As to that which has been ſaid by the King's Attorney, that there ought to be two Witneſſes to prove the Fact; it is true that there ought to be two Witneſſes at leaſt where [a] the Matter is to be tried by Witneſſes only, as in the civil [b] Law, but here the Iſſue was to be tried by twelve Men, [c] in which Caſe Witneſſes are not neceſſary, for in many Caſes an Inqueſt ſhall give a preciſe Verdict, although there are no Witneſſes, or no [d] Evidence given to them. [e] As if it be found before the Coroner *ſuper viſum corporis*, that *J. S.* killed the dead Perſon, and he is arraigned and acquitted, the Inqueſt ſhall ſay who killed him, although they have not any Witneſſes; ſo that Witneſſes are not neceſſary but where the Matter is to be tried by Witneſſes only. For if Witneſſes were ſo neceſſary, then it would follow that the Jurors could not give a Verdict contrary to the Witneſſes, whereas the Law is quite otherwiſe, for when the Witneſſes for Trial of a Fact are [f] joined to the Inqueſt, if they cannot agree with the Jurors, the Verdict of the twelve ſhall be taken, and the Witneſſes ſhall be rejected: therefore this Point is clear enough. And as to what has been ſaid by the King's Attorney, that the Depoſition of *Davy* makes againſt us, inaſmuch as he ſays that *Smith* ſhewed him that an Entry was made for no more than 2000 Kintals, Sir, this is nothing to the Purpoſe, for if he could not ſay any Thing to prove the Iſſue in which he came to depoſe, then he is neither with us, nor againſt us, but his Depoſition is of the ſame Effect in Law as if he had ſaid nothing at all, or as if he had ſaid that he knew nothing of the Matter; ſo that this Point alſo is clear enough. And as to that which has been moved by the Attorney, that he ought to ſhew what Rate in certain; Sir, this is not at all neceſſary, inaſmuch as it is expreſſed by the Statute, *viz.* 12 *d.* for every 20 *s.* of which Statute, being general, all Perſons ought to take notice, as in all other Statutes; but if there were two Rates, (as there are not) then he ought to ſhew according to which Rate; but inaſmuch as there is only one Rate, he has ſaid well; wherefore this is clear enough. And as to the Conſtruction of the Statute, it ſeems to me that it ſhall be taken and conſtrued beneficially for *Fogoſſa* being a Stranger, for in the ſame Statute there is a Requeſt, *that all Merchants, as well Denizens as Strangers, coming into this Realm, be well and honeſtly treated and demeaned, as they were in the Times of the King's Progenitors, without Oppreſſion*, &c. which Words prove that it was the Intent of the Makers of the Statute, that it ſhould be conſtrued favourably for Strangers. And ſo the Statute itſelf is a more ſure Warrant to us to conſtrue the Statute for the Benefit of *Fogoſſa*, and in his Favour, than any of the ſaid Reaſons before given. [But *note*, the Statute is as he ſaid, and more, that is to ſay, *without Oppreſſion to be done to them, paying the Subſidies aforeſaid*, which Words he omitted.] And he argued further and ſaid, the Agreement here ſhall be good enough, and is within the Intent of the Statute; for in many Caſes Gifts and Grants ſhall not be certain at the Beginning, and yet ſhall be good, if there is a Mean to reduce them afterwards to a Certainty. Nevertheleſs it is the Nature of Gifts and Grants to be executed preſently, and every Gift is an Agreement between the Parties, and ſo is every Grant; and then if Gifts and Grants (which are Agreements, and the Nature of which is properly to be executed at the Time they are made) ſhall be good enough, notwithſtanding they are incertain at the Beginning, *a multo fortiore* Agreements executory of any Thing ſhall be good, though they are incertain at firſt. And to prove that ſuch Gifts and Grants ſhall be good notwithſtanding their Incertainty at firſt, there are many Caſes as well where the King as others are Parties. [g] And therefore if the King at this Day grants over certain Lands which have come to his Hands before, and further grants to the Grantee *ſuch Liberties, Privileges, Juriſdictions*, &c. as he had who was laſt ſeized of the Lands, where the King knows not the Certainty of the Liberties and Privileges, yet this Grant is good enough, and the Patentee may enquire what Liberties or Privileges the other had before, and the ſame he ſhall uſe and enjoy, and yet they were not certainly expreſſed, but were incertain at the Time of the Grant: But foraſmuch as this Incertainty may be reduced to a Certainty by Inquiry, or other Circumſtances, the Grant is good. [h] And ſo it is holden in 9. *H.* 6. where the King granted to the Ducheſs of *York quandam Inſulam, &c. cum omnibus exitibus, amerciamentis, et proficuis omnium gentium reſidentium, &c. de et infra Inſulam prædict. in quibuſcunque curiis noſtris emergentibus*; there it is held that the Grant is good, and yet at the Beginning the King knew not what Iſſues, or what Amercements would be afterwards forfeited; but becauſe when they were forfeited, they might be certainly known, (and ſo there is a Means to know the Certainty of them) the Grant was adjudged good. [i] And ſo in 5. *Ed.* 4. the King granted to one called *Garter* the Office of King of Heralds *cum feodis et proficuis ab antiquo*, &c. here in this Grant there

[b] Tholoſ. Syntagm. Juris, lib. 48. cap. 13. §9. Corvinus Enchirid. tit. de Teſtibus. Ulpianus, lib. 31. *ad edict.* Digeſt. lib. 22. tit. 5. Forteſcue, de laud. cap. 20. 32. Waterhouſe on Forteſ. p. 250.

[c] Ante 8. *Per Atkins.* Co. Litt. 6. b. Heath's Max. 95.

[d] T. 14. H. 7. 29. b. *Per Vaviſor.* 2. Rol. Abr. 677. pl. 27.

[e] T. 10. Rich. 2. *Per* T. 11. H. 4. 93. a. Bro. Corone. 32. ibid. 39. M. 14. H. 7. 2. b. Bro Corone 52. Appeal 42. 37. Aſs. pl. 13. *Per Green.* Fitz. Corone 213. Bro. 117. 37. H. 8. Bro. Appeal. 122. M. 13. Ed. 4. 3. b. Dy. 238. pl. 36. 22. Aſs. pl. 39. Fitz. Corone 178. Pulton, 207. a. 2. Hal. Hiſt. Pl. Cor 65. 300, 301. 2. Hawk. Pl. Cor. 49. St. Pl. Cor. 181. a. 1. Finch. 367. 2. Rol. Abr. 676. pl. 5. B. N. C. § 297.

[f] 23. Aſs. pl. 11. Bro. Enqueſt. 61. Attaint. 67. Teſtmoignes 12. Challenge 115.

[g] 10. Co. 65. a. *Per Curiam.* Wing. Max. reg. 106. pl. 6. Poſt 130. P. 20. Ed. 3. Fitz Avowry. 129. Bro. Patents. 31. & 91.

[h] T. 9. H. 6. 27. Fitz. Grant. 7. Bro. Patents. 4. Wing. Max. reg. 106. pl. 7.

[i] 1 H. 5. Ed. 4. 8. Bro. Patents. 60. Wing. Max. reg. 106. pl. 7.

was

was no Certainty of the Fees and Profits belonging to that Office, and yet the Grant was held good enough, *cauſa qua ſupra*. [a] And ſo in 30 *H.* 6. if the King grants all ſuch Lands as came to him by Attainder, *&c.* this Grant comprehends no Certainty; yet it was held good, becauſe by Circumſtances it may be reduced to a Certainty. And ſo if the King will pardon all Riots, *&c.* here the Pardon contains no Certainty, nor does the King know what he pardons, and yet this Pardon is good enough. Same Law is in the Caſes of common Perſons, [b] for it is held in 21 *H.* 6. that if a Parſon will grant all his Tithe Wool of the next Year, it is a good Grant; yet the Quantity of the Wool is incertain at the Time of the Grant, but inasmuch as it may be reduced to a Certainty afterwards, the Grant was held good enough. [c] So if a Man will grant to me the Perquiſites of his Court, this incertain Grant is good, *cauſa qua ſupra*. [d] And ſo a Feoffment of two Acres, *viz.* the one for Life, and the other in Fee, without determining in certain in which he ſhall have Fee, this incertain Feoffment may be reduced to a Certainty; as if the Tenant loſe both the Acres by Default, he may have a *quod ei deforceat* for the one, and a Writ of Right for the other Acre, and by that Means the Certainty of the Gift ſhall be determined and known. [e] So if one grants a Rent-charge to another, the Grantee may avow or have a Writ of Annuity, and which ever of theſe he will uſe is maintainable, and yet at the Beginning it was incertain, but notwithſtanding this Incertainty the Grant is good. [f] So in 9 *Ed.* 4. one grants to another 20 *s.* or a Robe annually, here the Grantee does not know the Certainty of the Grant, for perhaps he ſhall always have the 20 *s.* perhaps the Robe always; and yet the Grant is there held to be good, becauſe it is reducible to Certainty by the Will of the Grantor. [g] And ſo a Leaſe for ſo many Years as *J. S.* ſhall name is good, and yet it is incertain; but if he name a Number, then it is good *ab initio*. [h] So if I have two Horſes in my Stable, *viz.* the one black, the other white, and I give to *J. S.* one of theſe Horſes, this is a good Gift, notwithſtanding the Incertainty; becauſe by Circumſtances, *viz.* by his Election, the Certainty may be known. And then inaſmuch as the Law is ſo in the Caſes aforeſaid, this proves our Matter, as it ſeems to me, for every Gift, every Grant, every Feoffment, and every Confirmation is an Agreement, for it is the Will of the Donor that the Donee ſhould have the Thing; and the Donee is content to take it. And ſo there is a mutual Aſſent of their Minds, which mutual Aſſent of Minds is an Agreement, and an Agreement is nothing but a mutual Aſſent of Minds touching any Thing, for there ought to be ſomething upon which their Minds may concur and conclude. And as in all the Caſes which I have put before there is a Matter and Subſtance, upon which their Minds agree, ſo there is in our Caſe, that is to ſay, the Money which ſhall be paid; wherefore the Caſes that I have put before prove that the Incertainty is not material, and the King may be here anſwered, as to the Incertainty, by the Caſes of the King put before: ſo that he ſhall be rebutted with his own Caſes, inasmuch as in the one Caſe and in the other there is a Medium or Circumſtances to try the Incertainty. And as to what hath been ſaid, that upon the Agreement it was not concluded who ſhould weigh the Woad, or within what Time it ſhould be weighed; Sir, this is not material, for in every Port there is an Officer who has the Cuſtody of the Beam, and who ought to weigh it, and it may be weighed upon Requeſt; ſo that to conclude upon that which is certain before would be in vain. And therefore the Circumſtances to reduce this to Certainty are certain enough. And beſides, although the Statute had ſpoken of an Agreement certain, (as it does not) yet here the Neceſſity of the Matter will aid us; for the Tempeſt, which was the Cauſe of the Ignorance of the certain Quantity of the Woad, and all the Neceſſity alledged is confeſſed [i] by the Demurrer to be true in Manner and Form as we have alledged it: and when Laws or Statutes are made, yet there are certain Things which are exempted and excepted out of the Proviſion of the ſame by the Law of Reaſon, although they are not expreſly excepted. As the breaking of Priſon is Felony in the Priſoner himſelf by the Statute [k] *de frangentibus priſonam*. yet if the Priſon [l] be on Fire, and they who are in, break the Priſon to ſave their Lives, this ſhall be excuſed by the Law of Reaſon, and yet the Words of the Statute are againſt it. [m] So in 14. *H.* 7. the Jurors who were ſworn upon an Iſſue for Fear of a great Tempeſt departed thence and diſperſed themſelves, and it was there held that they ſhould not be amerced, and that their Verdict afterwards was good, and that they did not do ill; which was ſo held in regard of the Neceſſity of the Occaſion, but otherwiſe they ſhould have been grievouſly puniſhed. [n] And ſo for the Safeguard of my Life I may kill another that aſſaults me. And the Statute of *Weſtminſter* 2. *cap.* 3. which gives Receit to a Feme-Covert, ſays, "If the Wife do come before Judgment ready to anſwer the Demandant, and to defend her Right, ſhe ſhall be admitted," *&c.* ſo that the Statute does not give the Receit but where the Wife is ready to anſwer; and yet it has been adjudged, that ſhe, being received, ſhall [o] pray in Aid, or ſhall [p] vouch, ſo that ſhe has been received, where ſhe has not been ready to anſwer. But the ancient Fathers of the Law, conſidering the ſaid Statute, ſaw that if it ſhould be taken according to the Words, great Inconvenience would follow from thence, *viz.* the Loſs of the Recompence by the Warranty, *&c.* and therefore they conſtrued the ſaid Statute according to Equity and Reaſon, although the Words did not allow of it, but ſeemed againſt it; ſo that in all Statutes there are ſome private Caſes excepted out of the general Proviſion by Equity of Reaſon, in Avoidance of a greater Miſchief. And ſo the Statute of *Weſtminſter* 2. *cap.* 1. ordains, "That they to whom the Land was ſo given upon Condition, ſhall have no Power to alien, *&c.*" which Statutedoes not ſpeak of the Heirs of the Donee in Tail, but of the Donees themſelves, that they ſhall not have Power to alien, and yet it has been adjudged, that the Alienation of the † Iſſue in Tail ſhall not be more prejudicial to his Iſſue than the Alienation of the firſt Donee ſhall be to his Iſſue: for the ancient Fathers of the Law, ſeeing that theſe Caſes were in equal Miſchief, took them to be in like Law, and in ſuch

[a] M. 30. H. 6. *Per Choke.* Fitz. Grants. 91. Bro. Patents. 74. 9. Co. 47. a. Wing. Max. reg. 106. pl. 7.
[b] P. 21. H. 6. 43. Fitz. Grants. 40. Bro. 132. & Contract. 13. Hob. 132. 2. Rol. Abr. 48. pl. 4. Moor 174. Touch. of Preced. 20.
[c] P. 21. H. 6. 43. *Per Aſcue.* Touch. of Preced. 20.
[d] Perkins. § 75. Touch. of Preced. 21.
[e] F. N. B. 152. a. Litt. § 219. 2. Co. 36. a. Touch. of Preced. 21.
[f] M. 9. Ed. 4. 37. a. *Per Litt.* Fitz. Det. 89. Bro. 113 M. 13. Ed. 4. 4. b. Bro. Debt. 160. 3. Ed. 3. Fitz. Affize 175. Co. Lit. 145. a. Poſt. 17. *Per Pollard.* 2. Co. 37. a. Mo. 85. Touch. of Preced. 21.
[g] Ante 6. Poſt. 273. Hob. 174. Co. Litt. 45. b. 6. Co. 35. b. 1. Rol. Abr. 849. pl. 11. 1. Anderſ. 259. Godb. 25. Moor 666. Cro. Eliz. 561. Skin. 535.
[h] H. 21. H. 7. 18. b. Bro. Done. 19. Dy. 91. pl. 11. Perkins, § 74. Co. Litt. 145. a. Moor. 83. 2. Co. 37. a. Touch. of Preced. 21.
[i] Poſt. 50, 85, 172, 411. Hob. 233. Co. Lit. 72. a. 1. Finch. 197. 5. Co. 69. b. Carter. 225. 1. Sid. 10. 1. Freem. 39. 2. Rol. Rep. 22. 3. Leon. 199. 1. Brownl. 124. Gouldſb. 52. pl. 1. Ld. Raym. 18. See Vin. Abr. tit. Demurrer. S.
[k] 1. Ed. 2. Stat. 2. 1 H. 15. H. 7. 2. a. *Per Keble.* 2. Inſt. 590. 1. H. H. P. C. 611. 2. Hawk. Pl. Cor. 145. Bac. Max. Reg. 5. Wing. Max. reg. 110. pl. 33. Dalt. Juſt. cap. 109. Litt. R. 99.
[l] T. 14. H. 7. 29. Bro. Verdict. 19. Wing. Max. reg. 110. pl. 33. Vin. Abr. tit. Trial G. g. 4.
[n] St. Pl. Cor. 15. Ante 9. 1. Finch. 24. 2. Finch. 35. Wing. Max. reg. 110. pl. 32.
[o] P. 20. H. 6. 23. pl. 4. Fitz. Receit. 59. Bro. 10. 2 Rol. Abr. 445. pl. 5. 7. 44. pl. 3. Vin. Abr. tit. Receipt S.

[p] T. 21. H. 6. 48. Fitz. Receit. 60. P. 20 H. 6. 23. b. 25. Aſſ. 14. Fitz. Voucher. 204. Bro. 160. Fitz. Receit. 9. Bro. 160. 2. Rol. Abr. 445. pl. 5. 7. 44. pl. 3. Vin. Abr. tit. Receipt S. † T. 5. Ed. 2. Fitz. Formedon 52. Bro. 71. Parliament 91. where the Miſchief was conſidered, and adjudged according as it is here vouched for the Cauſe above given. Poſt. 178. *Per Brook. C. J.* T. Jones 239.

Sense they construed the Minds of the Makers of the Statute, out of mere Necessity to avoid a Mischief. By which Cases before recited by me it appears, that some Things are for Necessity's Sake exempted and excepted (by Equity of Reason) out of the prohibitory Words of Statutes, and other Things which are not remedied by the Words of Statutes, are (by Equity of Reason) taken within the Purview of the same Statutes. And if any Thing shall be in any Case exempted out of the Penalty of any Statute, we shall here be aided by Equity of Reason, notwithstanding that the Words of the Statute had been against us, (as *in rei veritate* they are not) for we have shewn the Danger of the Lives of those who were in the Ship, and also the casting of the Woad into the Sea for the Safety of their Lives, so that the Ignorance of the Certainty of the Woad came by meer Necessity, and all this the King has confessed by the Demurrer. And then *Fogossa* being ignorant of it could not by any Possibility have compounded or agreed more certainly for the Subsidy, and therefore Reason will say that we have accomplished the Intent of the Statute; and so it seems to me that Judgment is to be given against the King.

Harris another of the King's Serjeants, to the contrary: And he argued to the same Effect with the King's Attorney, *viz.* that the Evidence which proves the Agreement upon Condition does not warrant the Issue, which shall be intended a general Agreement. [a] As if the Defendant in Trespass pleads, not guilty, and gives a Licence in Evidence, [b] or if in a *Formedon* in Descender upon a Gift in Frank-Marriage the Gift is traversed, and a Deed is shewn of a Gift in Frank-Marriage, the Remainder over in Fee, [c] or, upon Traverse upon a Lease for Years alledged without Deed, if a Deed is shewn in Evidence, this Evidence does not warrant the Issue; so here. And also he argued that the Collector of the Subsidy had no Authority to give any one License to put the Merchandize upon Land, the Subsidy not being paid nor agreed for, [d] as a Bailiff has nothing to do with the Debts of his Master, and if he pay them he shall not be allowed for it in his Accompt, without Specialty; but if he pay a Quit-Rent issuing out of the Land, he shall be allowed for it, because the Payment of this belongs to his Office; and so if the Collector accept any other Agreement than is intended by the Statute, this shall not aid the Party. And he said that an Agreement upon Condition ought to be fulfilled before it shall be pleaded. As, if I give all the Money in my Purse to *J. S.* he may not have an Action for it, except he alledge the Certainty of it; so that without Certainty the Action is not maintainable; so is it in the Case here; for which Reason Judgment is to be given for the King.

And afterwards at another Term, *viz.* on the 26th Day of *April* in *Easter* Term next following. *Pollard* Serjeant argued thus to the contrary. First of all it seems to me very necessary to give an Answer to the Ojections and Arguments made and alledged last Term against the Defendant. And one of the principal Arguments and Reasons upon which they chiefly relied, was, that the Agreement generally was put in Issue, which shall be intended the most common Agreement, and that is, a general Agreement, and the Evidence given by *Wells* proves a special Agreement, *viz.* an Agreement upon Condition, which is of another Nature than the Agreement tendered by the Issue; and therefore they said the Demurrer hereupon shall be adjudged for the King and the Informer. Sir, as to this I answer, that by the Arguments already made nothing has been put in Issue, but whether he agreed according to the Statute. And in this Word *(agree)* every Agreement is contained: and therefore inasmuch as the Agreement upon Condition is included in the Words of the Issue, *viz.* in this Word *(Agreement)* it is sufficient for us to prove the Agreement upon Condition; for an Agreement upon Condition is an Agreement, as a Feoffment upon Condition is a Feoffment. [e] And therefore in 36. *H.* 6. a Man brought an Action of Debt upon a Recognizance, and the Defendant pleaded, *nul tiel Recognizance*, upon which they were at Issue, and at the Day, *&c.* a Recognizance with Condition was certified, and there it is strongly debated whether or no he had failed of his Record, and at last with great Advice it was adjudged that the Plaintiff had not failed of his Record, but had proved his Issue sufficiently *; for the Justices there held, that a Recognizance upon Condition is a Recognizance. [g] So here the Agreement upon Condition is an Agreement, and therefore the Evidence well proves the Issue. But forasmuch as this Point is all one with the principal Matter, I shall argue it more at large when I come to the principal Matter. And what I have hitherto said has been upon a Supposition that the Issue is as it was before moved, *viz.* That the Agreement generally was put in Issue. But, Sir, I deny that the Agreement generally is put in Issue, but the special Agreement, which is upon Condition, is only put in Issue. For in the Answer the Defendant has shewn the Tempest, and the casting the Woad into the Sea, and all the Means by which he became ignorant of the certain Quantity of what was left in the Ship, and also he has shewn the Entry of 2000 Kintals, and the special Agreement with the Collector for the Remainder now in Dispute, and has concluded, *Et super hoc cum præfato Collectore concordavit et agreavit*, in which Case, (as it seems to me) although he has concluded with the Conclusion *super hoc*, *ut supra*, yet the Issue is not general, as it should be if the Matter before the Conclusion had been omitted, but the special Matter shall remain, and the *super hoc* shall have relation to it; so that the Issue shall be upon the special Matter, for that is the Substance and Foundation of the Conclusion, which the Conclusion shall not avoid, but inasmuch as it is in the Affirmative, as the Conclusion is, and is agreeable with the Conclusion, the special Matter and the Conclusion shall remain together, as one entire Matter and Substance of the Issue. [h] And therefore in Assize of *Mortdancestor* if the Tenant pleads special Bastardy in the Demandant, he ought to plead it certainly, as to say, that the Demandant was begotten between *J. S.* and *Alice G.* and born before Espousals, and afterwards Espousals were had between them, and he ought to conclude, *and so a Bastard*; now this Conclusion has not avoided the special Matter before, for if so, then the Issue shall be Bastard generally; and if so, it shall be [i] tried by the Bishop, and if so, the Bishop will certify him *mulier*, for such a Bastard is *mulier* in the spiritual Law; but such Matter shall be tried by the Assize, (as

[a] 25. H. 8. Bro. General Issue 81. B. N. C. § 76. T. 12. H. 8. 1. *Per Brook et Brudnel.* Bro. General Issue 46. Kelw. 38. a. 59. a. 21 Rol. Abr. 676. pl. 14. Heath's Max. 76, 78. Trials per Pais 430. Brown's Anal. 15. Gilb. L. of Evid. 252. Sed *Contra* T. 21. H. 7. 28. a. *per Rede.* 2. Rol. Abr. 676. pl. 15. 677. pl. 28. See Vin. Abr. tit. Evidence O. b. 1. *E contra* for the Informer.

[b] 2. Rol. Abr. 676. pl. 14. Vin. Abr. tit. Evidence C. b. pl. 5. for this is no Gift in Frank-marriage. Bro. Frankmarriage 11. B. N. C. § 347. Co. Litt. 21. b.

[c] 2. Rol. Abr. 676. pl. 14. Vin. Abr. tit. Evidence. C. b. pl. 6. Heath's Max. 9. 80.

[d] T. 4. H. 7. 14. b. *per Keble.* Bro. Baily 27. Lit. R. 71. Post. 282.

Easter Term 4. Edw. 6.

E contra for the Defendant.

[e] 36. H. 6. 2. Fitz. Record. 20. Bro. Failer de Record. 4. Kitch. 464. Tr. per Pais 361. [f] Kitch. 242. Tr. per Pais 363. 370. Gilb. L. of E. 283. Plaintiff pleads a Lease simply, and gives in Evidence a Lease upon Condition, and the Condition performed, it is good, for the Evidence proves the Effect of the Issue. So if the Issue be of a Feoffment absolute, and the Proof be of a Feoffment conditional. Heath's Max. 85.

[g] Trials per Pais 467. Vin. Abr. tit. Evidence C. b. pl. 7. Heath's Max. 85.

[h] Vin. Abr. tit. Trial P. pl. 23. *in Marg.* 1 T. 30. Ed. 3. 8. b. M. 38. Ed. 3. 27. b. *Per Finch.* M. 39. Ed. 3. 31. Bro. Trials 53. M. 40. Ed. 3. 39. pl. 18. P. 49. Ed. 3. 18. Bro. Trials 16. 49. Ass. pl. 7. H. 18. Ed. 4. 30. a. 1. Rol. Abr. 361. K. pl. 1. 2. Rol. Abr. 586. pl. 22. 9. Co. 31. b. Co. Litt. 74. a. Hard. 63. *arguendo.* Hob. 296. Dal. 74. pl. 59. O. Bendl. 139. 1. Finch. 402. Trials per Pais 8.

(as in many Books it is adjudged) *ergo* the Concluſion has not avoided the ſpecial Matter, but the ſame remains, and the Iſſue is taken upon it. [a] So in a *Formedon* in Deſcender if the Tenant traverſes the Gift, and the Demandant by way of Replication maintains the Gift with a Recovery in Value by Reaſon of a Warranty, he ought to conclude, *et iſſint dona*; now if the Concluſion has avoided the ſpecial Matter before alledged, then the Tenant ought to traverſe the Concluſion only, that is, the Gift, which is a Matter in Fact, and ſhall be tried *per Pais*; but the Caſe is not ſo, for he ought to anſwer to the Recovery in Value, and that ſhall be tried by the Record; which proves that the ſpecial Matter before the Concluſion ſhall remain. [b] And ſo in Aſſize if the Plaintiff makes himſelf a Title and concludes, and ſo he was ſeized until by the Defendant diſſeized, now if the Concluſion has avoided the ſpecial Matter before, then it follows that the Defendant may not anſwer to the Title, but the Law is, that he ought to anſwer to the Title, and traverſe it; by which it is proved, that the Concluſion has not avoided the ſpecial Matter before; and in all theſe Caſes the Matter before the Concluſion and the Concluſion are in the affirmative. But in Debt, if the Defendant pleads Payment, and ſo he owes him nothing; or in Treſpaſs for Goods taken, if the Defendant pleads a Gift of them, and ſo not guilty, in theſe Caſes the Concluſion has avoided the ſpecial Matter, and the Concluſion only ought to be traverſed, and not the Matter before, for the Concluſion is a Traverſe of the Action, and the Matter before the Concluſion is in the affirmative, and the Concluſion in the negative, which has avoided the Matter before. But in our principal Caſe, and in the other Caſes before, the Matter precedent and the Concluſion are in the * affirmative, which may well ſtand together as one entire Subſtance of the Iſſue; and therefore the ſpecial Agreement is put in Iſſue, and then the Evidence proving it is purſuant enough. Another Objection was made the laſt Term, *viz.* that the Agreement was not good and perfect, becauſe it was not concluded and agreed what Perſon ſhould weigh the Woad, and therefore the Agreement was imperfect to reduce the Value of the Subſidy to a Certainty, and without the Certainty being known, the King cannot be ſatisfied, nor have any Action for it, *&c.* And as to that, it ſeems to me that the Perſon who ſhall weigh it is certain enough, and as certain as if he had been appointed by expreſs Words; and that is, the Collector of the Subſidy, and in Right of the King he may juſtify doing the ſame. And therefore I take this to be a Principle, that when it is agreed between any Perſons that a principal Thing ſhall be done or had, and before it may be done or had, there is another Thing firſt to be done, and it is not certainly agreed who ſhall do the ſaid other Thing, there the Law appoints [c] him that has the greateſt Knowledge and Skill to do the ſaid other Thing. [d] And therefore in 9. *Ed.* 4. in Debt upon an Obligation, the Defendant pleaded a Defeazance, which was that the great Bell of *Mildenhall* ſhould be carried to the Houſe of the Defendant in *Norwich*, and there ſhould be weighed and put in the Fire, and that if the Defendant made a Tenor of it to agree in Tune and Sound with the other Bells of *Mildenhall*, that then the Obligation ſhould be void; and the Defendant ſaid that the Bell was not weighed, Judgment *ſi actio*; and if this was a good Plea, was the Queſtion; For the principal Point was, that the Defendant ſhould make the Bell to agree with the other Bells, and before that could be done, the weighing of the Bell was neceſſary, in order that the Weight and Quantity of it might be known, for without that he could not make the Bell to agree with the others: and the putting the Bell into the Fire to melt it was alſo neceſſary, and who ſhould weigh and put it into the Fire was not expreſſed in the Defeaſance, ſo that there it falls to the Conſtruction of Law who ought to do it; and it is there clearly held that the Defendant ought to do it, and that the Plea, *ut ſupra*, was not good; for upon the Matter it appeared that the Defendant was a Brazier, and it belongs to his Office to weigh and put the Bells into the Fire, and therefore the Law appoints him to do it. [e] And in the ſame Caſe it is alſo held for Law, that if a Taylor is bound in an Obligation upon Condition indorſed, that the Obligee ſhall bring to his Shop three Yards of Cloth, which ſhall be there cut out, and then if the Obligor make the Obligee a Gown of it, that the Obligation ſhall loſe its Force, in ſuch Caſe the Obligor, *viz.* the Taylor, is bound to cut it out, for the principal Point is the making of the Gown, and before that can be done, it muſt of Neceſſity be cut out, and who ſhall do this is not expreſſed, and therefore the Law appoints the Taylor to do it, becauſe he has the greateſt Knowledge and Skill to do it, and it belongs to his Buſineſs. [f] So in our principal Caſe it is certainly concluded and agreed that the Collector on Behalf of the King ſhall have the Subſidy, and this is the principal Thing, and before this can be had there is another Thing to be done, *viz.* the weighing it to try the Certainty of it, for without the Certainty be known the King cannot be ſatisfied, and who ſhall weigh it was not concluded and expreſſed, and therefore the Law ſhall appoint the Collector to do it, becauſe it belongs to his Office; for as properly as it belongs to the Office of a Brazier in the other Caſe to weigh the Bell and put it in the Fire, or to the Office of a Taylor to cut out the Cloth, ſo properly does it belong to the Office of the Collector to weigh the Thing for which the Subſidy ſhall be paid, for without weighing it he cannot come to the Knowledge of the Value of the Subſidy in this Caſe, and in many other Sorts and Kinds of Merchandize: and for this Reaſon it belongs to the Office of Collector to have a Beam, and to weigh the Merchandizes, as the Means to come at the Knowledge of the Certainty of the Subſidy, and it is an Incident to his Office, and therefore the Law appoints the Collector here to weigh it, which is as certain in Law as if it had been concluded by expreſs Words; and ſo the Agreement is perfect notwithſtanding this Exception. And if *Fogoſſa* ſhould bring an Action of Treſpaſs againſt the Collector for meddling with the Woad when he weighs it, the Collector might well juſtify it. [g] For in 2. *Rich.* 2. in Treſpaſs, it is held as a Maxim, that if a Man has an Intereſt in any Thing by the Grant or Aſſent of another, and the Party that has ſuch Intereſt cannot have the principal Thing without doing another Thing, there he may do the ſaid other Thing, and juſtify the ſame, becauſe

[a] H. 7. H. 7. 5. *Per Kebl.*

[b] M. 32. H. 6. 14 per Littleton. Fitz. Iſſue. 91.

* See Co. Litt. 303. b.

[c] Regula. 1. Finch. 44. 2. Finch. 61. Noys Max. 14. Co. Litt. 96. a. 2. Inſt. 425. Perk. § 785.

[d] P. 9. Ed. 4. 4. a. Fitz. Debt. 87. Bro. Condition 72. 1. Finch. 44. 2. Finch. 61. 1. Rol. Abr. 465. pl. 32. Poph. 199. *Per Noy, arguendo.* 1. Rol. Rep. 312.

[e] Perk. § 786. 1. Finch. 44. 2. Finch. 61. See Vin. Abr. tit. Condition A. d. pl. 32.

[f] 1. Finch. 44. 2. Finch. 61.

[g] 8 M. 2. R. 2. Fitz. Barr. 237. Bellew's C. 66. Temp. Ed. 1. Fitz. Grant. 42. agreed as a Principle. Hob. 234. Godb. 359. 2. Rol. Abr. 59. pl. 1. 11. Co. 52. 2. Moor 218. Cro. Jac. 178. pl. 10.

becauſe it is the Means to come to his Profit; for there it is held, [a] that if one grants to me all his Trees growing in his Wood, I may cut them down and carry them through his Land, and although his Graſs be trodden down with the Carriage of them, he ſhall not have a Writ of Treſpaſs for it; for Trees are ſuch Things that they muſt either be carried with Carts, or the Party cannot have them, nor make any Profit of them. But the principal Caſe there was, that one ſold all his Fiſhes in his Pond, and the Vendee dug a Trench, ſo that the Water might run out, and by that Means he might take the Fiſhes, and the Vendor brought a Writ of Treſpaſs againſt him for digging the ſame, and there it was awarded that he ſhould recover, [b] becauſe the Vendee might take the Fiſhes by Nets or other Engines; but if there had been no other Means to take them it had been otherwiſe, as it is there held. And for the coming to the Banks to Fiſh, he may well juſtify that, for without that he cannot take them by any Means. So that a Man may always juſtify the neceſſary Circumſtances, where he has a Title to the principal Thing: So here the Collector, in the Behalf of the King, hath a Title to the Subſidy, which he cannot have, nor any Action for it before the Certainty be known, and the weighing it is the Means to come to the Certainty of it, which he may do, and ſhall not be puniſhed for meddling with the Woad for ſuch Cauſe or Purpoſe, but may well juſtify the ſame. And ſo it ſeems to me that the Collector ought to do it, and may juſtify it, and therefore the Agreement is perfect, notwithſtanding this Exception. Another Exception was taken the other Term, that the Agreement ſhould be judged imperfect, becauſe the Certainty of the Time for the weighing of it was not limited and appointed upon the Agreement. [c] And as to this, it ſeems to me clear enough that the Collector of the Subſidy may weigh it when he pleaſes, for the Agreement was, that when it ſhould be weighed, that then he ſhould pay according to the Rate, which in Conſtruction of Law is as much as if it had been agreed, that when the Collector would weigh it, then he ſhould preſently pay for the ſame, in which Caſe the Time is referred to the Will of the Collector. And ſo in all like Caſes, where it is agreed that one ſhall have Benefit upon an Act firſt to be done by him, and no Time is limited when it ſhall be done, the Law ſaith it ſhall be done at his Will. [d] As if a Man makes a Feoffment in Mortgage, upon Condition that if he pay to the Mortgagee 20 *l.* that then he ſhall re-enter; inaſmuch as no Day of Payment is limited, the Mortgagor may pay it when he pleaſes; for he he is to have the Benefit, *viz.* his Land again. So if one grants to another that when he has married his Daughter he will give him 20 *l.* in this Caſe inaſmuch as no Time is limited when he ſhall marry her, he may marry her when he pleaſes; ſo that the Time is referred to his Will, who is the Agent, and who ſhall take Benefit by the Marriage. So in the principal Caſe, inaſmuch as the Payment ſhall be made to the Collector upon the weighing, and no Time is limited for the weighing, the Law refers the Time thereof to the Will and Pleaſure of the Collector; and ſo the Agreement is good and perfect notwithſtanding the ſaid Exception. And if the Law be ſo, *viz.* that the Collector in Right of the King ought to weigh it, and at what Time he pleaſes, and may juſtify the ſame, then that which is ſaid, that the King is not ſure of any Recompence nor Action, is not true, for the Collector may weigh it, and thereby know the Certainty of the Subſidy, upon which an Action ſhall accrue to the King; ſo that if the King ſhall be without Action, it is the Folly of his Collector, and ſo the Folly of the King to have ſuch a Collector. And as to what was ſaid the other Term, that when Contracts or Agreements conditional are made, they ſhall not be deemed of any Effect before they have their Perfection and be fully accompliſhed, and therefore here this Agreement which is conditional, (although it ſhall be ſaid good after the Performance of the Condition) yet now inaſmuch as the Seizure was before the Performance, *viz.* the Woad weighed, it ſhall be void *ab initio*, becauſe the Sum of the Subſidy is not certain, and for this Incertainty the Agreement is void *ab initio:* Sir, as to this I anſwer, that he who made this Objection affirmed by the very Objection that the Agreement was good at the Beginning: and he affirmed alſo by the Objection that the firſt putting of the Woad upon the Land, *viz.* the landing, was lawful and without Cauſe of Forfeiture, but the Non-performance of the Circumſtances afterwards defeated it, by that Relation. And if the Non-performance of the Circumſtance is the Cauſe of Forfeiture, then I ſay, that this ought to have been ſhewn by the King, which does not now appear. But nothing is alledged in the Information to be the Cauſe of Forfeiture but the landing without Payment or Agreement. And then by way of Anſwer we have alledged an Agreement before the landing, [e] whereupon the Plaintiff by way of Replication ought to have alledged ſome Default in us, which ſhould make the Agreement void *ab initio*, which is not now diſcloſed, and ſo it does not appear, and we have alledged enough for ourſelves: and that which makes againſt us we ſhall not be compelled by Law to ſhew, but it ought to come in on the contrary Part, ſo that if the Default of us in the Non-performance of the Condition ſhall make the Agreement void *ab initio*, it ought to be alledged on the other Side. [f] As if a Sheriff takes one by Force of a *Capias*, now he does well, but if he returns *non eſt inventus*, he ſhall be a Treſpaſſor *ab initio*. And in ſuch Caſe, in falſe Impriſonment brought againſt him, it is ſufficient for him to alledge that he was Sheriff, and that the *Capias* came to him and he took him and impriſoned him by Force thereof, Judgment *ſi actio*: and there the Plaintiff ought to alledge the falſe Return of the Writ, for this makes for the Plaintiff, inaſmuch as it makes the Defendant a Treſpaſſor *ab initio*. So here the Default in us, which ſhould make the Agreement void *ab initio*, ought to have been ſhewn and alledged by the Plaintiff, wherefore inaſmuch as it is not ſo alledged, no ſuch Default ſhall be intended. And all this I have ſaid upon a Suppoſition, *viz.* that the Law will have the Defendant to weigh it, and that its not being weighed ſhall be his Default. But as I ſaid before, the not-weighing of it is referred by the Law to the Collector in the King's Behalf, who

[a] Perk. § 110. 1. Finch. 45. 2. Finch. 63. Hob. 234. 2. Rol. Abr. 60. pl. 16. 567. M. pl. 1. ſaid to be adjudged *per Cur.* T. 15. Jac. 1. in *Stukely's* Caſe. 11. Co. 52. a. Godb. 53. *arguendo.*

[b] S. P. adjudged T. 7. R. 2. Statham Treſpaſs. 53. Bellew's C. 304. Perk. § 110. 2. Rol. Abr. 60. pl. 15. 1. Finch. 45. 2. Finch. 63. Hob. 234. 1. Brownl. 224. Godb. 53. *arguendo.*

[c] Wing. Max. reg. 116. pl. 32.

[d] Littlet. § 337. Wing. Max. reg. 116. pl. 32. 2. Anderſ. 73. *Per Anderſon* C. J. 2. Danv. Abr. 65. pl. 5. 1. Bac. Abr. 425.

[e] Wing. Max. reg. 125. pl. 3.

[f] M. 13. H. 7. 2. a. M. 8. Ed. 4. 18 a. P. 11. H. 4. 58. a. *Per Hill.* M. 12. H. 6. 3. a. *Per Catteſmore.* 2. Rol. Abr. 563. pl. 19. there miſprinted (8) Cro. Eliz. 729. pl. 67. 2. Keb. 591. *Per Cur.* 12. Mod. 311. *Steward v. Floyd.*

who was then ſole Party, [a] and therefore the not weighing of it in Default of the Collector ſhall not make the Agreement void *ab initio* to our Prejudice, which before was good. Then as to the principal Matter, it is to be ſeen whether the Agreement here be warranted by the Statute which ſaith, *the Collector not agreed with, &c.* And as it ſeems to me, it is warranted by the Statute; and this I ſhall prove by the Definition of the Word, by the Rules of the common Law in the Conſtruction of Statutes, and by the Intent of the Makers of the ſaid Statute. And firſt as to the Definition of the Word (*Agreement*) it ſeems to me that *aggreamentum* is a Word compounded of two Words, *viz.* [b] of *aggregatio* and *mentium*, ſo that *aggreamentum eſt aggregatio mentium in re aliqua facta vel faciendâ.* And ſo by the Contraction of the two Words, and by the ſhort Pronunciation of them they are made one Word, *viz. aggreamentum*, which is no other than an Union, Collection, Copulation, and Conjunction of two or more Minds in any Thing done or to be done. And then the Statute which ſaith, *the Collector not agreed with*, is as much as to ſay, that if the Minds of the Collector and the Party are not united, collected, coupled, and joined together about the Subſidy, that then the Goods ſhall be forfeited, and otherwiſe not; but here the Minds of the Collector and the Party are united, collected, coupled, and joined together about the Subſidy, *viz.* that the King ſhall have according to the Rate of 12 *d.* for every 20 *s.* after the Woad is weighed, which is as much as to ſay, after that the Collector *will* weigh it; and this was before the landing of it, whereupon I conclude, *ergo* the Goods are not forfeited. And although the Certainty of the Subſidy is not known at firſt, yet this is no Matter, for it is an Agreement, for in this Word (*Agreement*) every Agreement is included, and there are divers Agreements incertain at the Beginning which ſhall be adjudged good. [c] As in the Caſe where I ſell all my Corn for 12 *d. per* Buſhel, here notwithſtanding the Incertainty of the Quantity of the Corn, and the Incertainty of the Sum for it, yet the Agreement is good. [d] So where one leaſes his Cloſe rendering 12 *d.* Rent for every Acre, notwithſtanding the Incertainty of the Rent, yet it is a good Reſervation and Agreement. [e] So where a Man grants to one a Robe or 20 *s. &c.* the Grant is good notwithſtanding the Incertainty. And ſo in all the Caſes put by Maſter *Brook*, becauſe there is a Means to reduce the ſame to Certainty, which being done, there is Remedy enough to come at the principal Matter upon which the Agreement is made. [f] So in the principal Caſe, after it is weighed the Certainty will appear, which being known, the King may have his Remedy for it, ſo that none can deny the Agreement to be good. And thus it is proved by the Definition of the Word. And further I ſaid that the Rules of the common Law hitherto uſed in the Conſtruction of Statutes prove that we have ſatisfied the Statute; for whereas it has been ſaid, that although the Statute is general, *viz. the Collector not agreed with, &c.* and altho' the ſpecial Agreement is an Agreement, yet that it is to be conſtrued the beſt for the King, and that Conſtruction ſhall be of an Agreement certain; Sir, I ſay that the Rules of the Common Law forbid this, for there is a Principle in the Common Law, that penal Statutes ſhall be taken ſtrictly, and not extended by Equity to the Prejudice of them upon whom the Penalty is inflicted. [g] And by like Reaſon the Words of penal Statutes ſhall not be conſtrued to the Prejudice of them upon whom the Penalty is inflicted. And here none will ſay but that this Statute is penal, inaſmuch as it makes a Forfeiture of the Goods of every Subject, and ſo gives Prejudice to every Perſon, and Benefit to none but the King. And then inaſmuch as the Statute is penal, it cannot be ſaid that the Agreement intended by the Statute is an Agreement certain, for he that ſays ſo puts a Gloſs upon the Text, and wreſts the Words to a Kind of Intent and Equity, and to more than an Equity, for it is a Denial of the Text, which is meerly contrary to the Rules of the Common Law uſed in the Conſtruction of penal Statutes, which ſhall be taken favourably for them upon whom the Penalty is inflicted. Wherefore inaſmuch as it cannot be ſaid but that our ſpecial Agreement is an Agreement, and ſo within the Words of the Statute, it cannot be reaſonably ſaid but that we have ſatisfied the Statute; for the Rules of the Common Law will not ſuffer the general Words to be abridged and reſtrained to the Prejudice of him upon whom the Penalty is inflicted, but, on the contrary, we ſee many Caſes where the general Words of Statutes ſhall be reſtrained and abridged for the Benefit of him upon whom the Penalty is inflicted. And therefore the Statute of *Weſtminſter* 2. *Cap.* 40. [h] ſays, that where the Huſband aliens the Land of his Wife, *It is agreed that the Suit of the Woman, after the Death of her Huſband, ſhall not be delayed for the Nonage of the Heir that ought to warrantiſe, &c.* which Statute is general, *viz. for the Nonage of the Heir, &c.* and does not ſay the Heir of the Huſband, nor the Heir of a Stranger, but only for the Nonage of the Heir, *&c.* which Word (*Heir*) is general, and includes every Heir; [i] but yet in 18. *Ed.* 4. in a *Cui in vita* brought by the Wife in ſuch Caſe, the Tenant vouched one who vouched over an Heir within Age, who was not Heir of the Huſband, and there it is adjudged that for his Nonage the Parol ſhould demur, becauſe the ſaid Statute is penal to the Voucher, and the general Words, *viz. for the Nonage of the Heir*, are reſtrained and abridged, and ſtraitned from their Generality to the Heir of the Huſband only. So that there it is holden, in favour of him upon whom the Penalty is inflicted, that the general Words ſhall be reduced to a ſpecial Senſe, *viz.* to the Heir of the Huſband only. So the Statute of *Weſtminſter* 2. *Cap.* 11. is, that if the Accountants be found in Arrears before Auditors, *their Bodies ſhall be arreſted, and by the Teſtimony of the Auditors of the ſame Account ſhall be ſent and delivered unto the next Goal of the King's in thoſe Parts, until, &c.* Which Statute is general, that they ſhall be impriſoned by the Auditors, and does not ſay at what Time, ſo that by the Letter of the Statute the Auditors may impriſon the Accountants when they pleaſe after their Accompts. [k] But yet in 27. *H.* 6. in Debt upon Arrears of Account it is adjudged, that if the Auditors do not commit the Accountant to Priſon preſently after the Account, that they may not commit him at all to Priſon; for the Statute is penal to him that ſhall be impriſoned. And therefore the Generality of the Time ſhall be reſtrained ſpecially, for the Benefit of him upon whom the Penalty is inflicted, but not on the contrary

[a] Wing. Max. reg. 147. pl. 38.

[b] Hill 29. Geo. 2. B. R. *Rex v. O'Connor. Per Nares arguendo.* Terms de Ley ad v. *Agreement.*

[c] Ante 6. *Per Gawdy.*

[d] Ante 6. *Per Gawdy.*

[e] Ante 13. *Per Brook.* M. 9. Ed. 4, 36. *Per Littleton.* Fitz. Debt. 89. Bro. Debt. 113. 13. Ed. 4. 4. Bro. *ibid.* 160. Co. Litt. 145. a.

[f] Wing. Max. reg. 106. pl. 7.

[g] Wing. Max. reg. 183. pl. 10.

[h] Vide Poſt. 47. Note, by the 32. H. 8 cap. 28. an Entry is given to the Wife or her heir after an Alienation by the Huſband.

[i] M. 18. Ed. 4, 16. Bro. Age 43. 16. Ed. 3. Fitz. Age 47. 17. Ed. 3 59. 7. Ed. 2. Fitz. ib. 139. 46. Ed. 3. *ib.* 76. 2. Inſt. 455. 4. Co. 50. a. 6. Co. 5. a. 2. Leon. 148.

[k] H. 27. H. 6. 8. Fitz. Barr. 44. Bro. Account. 6. Dett. 16 Execution. 135. Faux Impriſon. 32. 2. Inſt. 381. 8. Co. 119. b. 2. Brownl. 265. 2. Bulſt. 129. Wing. Max. reg. 182. pl. 10.

trary, for the Generality of the Words ſhall never be reſtrained and abridged to the Diſadvantage and Prejudice of him upon whom the Penalty is inflicted, for this is entirely contrary to the Order and Rule of the Common Law; from whence it follows, that the Agreement here is warranted by the Rule of the Common Law uſed in the Conſtruction of Statutes. And further I apprehend that the Intent of the Makers of the Statute approves the ſaid Agreement. [a] For the Scope and End of every Matter is principally to be conſidered; and if the Scope and End of the Matter be ſatisfied, then is the Matter itſelf and the Intent thereof alſo accompliſhed. And here the Subſtance and End of the ſaid Statute, and the Intent of the Makers thereof was, that the King ſhould have the Subſidy; and this only was the Scope and Sum of the ſaid Statute, and of the Intent of the Makers thereof; and if the Agreement here is ſufficient to give the Subſidy, and to make the King aſſured thereof, then it follows that the Statute, and the Intent of the Makers thereof is performed and ſatisfied. And that this is ſo, I have proved before, for the Agreement warrants and authoriſes the King to weigh the Woad, by his Collector, at what Time he pleaſes, and when that is done, the King has Title of Action, and ſo has an Aſſurance of the Subſidy. So that the Surety is referred to the Will of the King, for he may have it when he pleaſes; whence it follows, that the Sum, Effect, and End of the Statute, and of the Intent of the Makers of the Statute is obſerved and ſatisfied. And if at the Time of the making the Statute the Queſtion had been aſked of the Makers thereof, whether their Intents in the Caſe here were to enforce the Party to weigh the Woad in the Ship, or to forfeit it if he put it upon the Land to weigh it in order to try the certain Quantity, they would have laughed at the Queſtion, inaſmuch as ſuch weighing is the ſure Means to try the Truth of the Subſidy in all ſuch Merchandizes; and by this Way their Intent ſhall be moſt fully performed and accompliſhed, ſeeing the King cannot be deceived, but ſhall be fully apprized of the true Value of the Subſidy by ſuch Means. And ſo the Intent of the Makers of the Statute warrants the ſaid Agreement. Alſo there is another Reaſon which proves their Intent to be ſuch, and that is, the common Uſage in former Times, for all Statutes before then made, which grant any Subſidies, have had the very ſame Words which this Statute hath, *viz. the Collector not agreed with, &c.* And in ſuch Caſes where the Party did not know the Certainty of it, it was always uſual in former Times to weigh the Merchandizes upon ſuch Agreement as this is here, and upon knowing the Certainty to pay the Subſidy. And all Merchants will teſtify ſuch Uſage. And then inaſmuch as the Uſe hath been heretofore to make ſuch Agreements, where there have been ſuch Words in Statutes heretofore made as there are now, and ſuch an Agreement hath been allowed heretofore, it cannot be taken but that the Intent of the Makers was, that ſuch an Agreement made as before was uſed ſhould be good. And ſo the Intent of the Makers of the Statute approves the ſaid Agreement. Beſides, it ſeems that their Intent ſhall be ſo for another Cauſe. For, Sir, admitting that the Words of the ſaid Statute had ordained, that if an Agreement certain was not made with the Collector before the landing, the Goods ſhould be forfeited, yet here the Agreement incertain ſhall be adjudged good, and out of the Penalty; [b] for in every Law there are ſome Things which when they happen a Man may break the Words of the Law, and yet not break the Law itſelf; and ſuch Things are exempted out of the Penalty of the Law, and the Law priviledges them although they are done againſt the Letter of it, for breaking the Words of the Law is not breaking the Law, ſo as the Intent of the Law is not broken. And therefore the Words of the Law of Nature, of the Law of this Realm, and of other Realms, and of the Law of God alſo will yield and give Way to ſome Acts and Things done againſt the Words of the ſame Laws, and that is, where the Words of them are broken to avoid greater Inconveniences, or through Neceſſity, or by Compulſion, or involuntary Ignorance. To avoid greater Inconveniences, as beating the Perſon of a Man in ſome Caſes is allowed, and yet the beating and wounding of any Man is as well againſt the Law of Nature, as againſt the Law of the Land. [c] But in 22. *Aſſ.* where a Man was mad and of unſound Memory, and did great Miſchief, a Man, together with his Parents, took him, bound him, and beat him with Rods; and it is there holden that they might juſtify the ſame, for the Avoidance of the great Hurt that he might do, being of unſound Mind, and yet both the Law of Nature, and the Law of the Realm prohibits generally any one to beat another, but this ſpecial Caſe, for the Prevention of a greater Miſchief, hath an Exemption and a ſpecial Priviledge. [d] And the Statute of *Marlbridge*, *cap.* 4. ordains generally that none ſhall carry a Diſtreſs from one County into another, yet it is adjudged that if one holds Land of a Manor in another County, the Lord may diſtrain and drive the Diſtreſs from off the Land holden of the Manor into the County where the Manor is; and this is to avoid a Miſchief and Inconvenience, for it would be a great Damage to the Lord if he might not drive the Diſtreſs to his Manor; for Avoidance of which the Law is not broken, although the Words of the Law are broken. [e] And I have read in Books that amongſt the *Romans* there was a Law, that every one that ſcaled the Walls in the Night-time ſhould be condemned to Death, and a certain Perſon in the Night ſcaled the Walls in Time of War to diſcover the Approach of the Enemy, and he was not only diſcharged by the Senate from the Penalty of Death, but beſides was well rewarded for the Action, and yet he had thereby broken the Words of the Law, but the wiſe Senators expounded it to be no Breach of the Intent of the Law, becauſe that Law was made to prevent Hurt and Danger that might come to the *Romans* by the ſcaling of the Walls, and not to inhibit Benefit and Safety to the City; ſo that the ſaid Judgment was given in order to avoid a great Inconvenience which might come to the *Romans* by ſuch an Example. [f] And this Manner of expounding and conſtruing Laws is not a miſtaking them or a wrong Judgment of them, but it is a tempering the Rigour of the Law. And we may ſee alſo (as I ſaid) [g] that Neceſſity ſhall be a good Excuſe in all Laws, and that all Laws give Place to Neceſſity; for it is a common Proverb, *Quod neceſſitas non habet legem*; and therefore Neceſſity ſhall be a good Excuſe in our Law and in every other Law. [h] And therefore in a *precipe quod reddat* the Tenant ſhall excuſe his Default for Enereaſe of Water; and yet every Default is abhorred in Law, becauſe it is a

Contempt

[a] Wing. Max. reg. 32. pl. 18.

[b] Dr. & Stud. l. 1. cap. 16. Wing. Max. reg. 184. pl. 34. Hob. 96.

[c] 22. Aſs. pl 56. in Treſpaſs brought by him who was beaten, and the Defendant juſtified for the Cauſe *infra*, and the Plaintiff took Iſſue *de injuria ſua propria abſque tali cauſa*, &c. Fitz. Barr. 300. Bro. de ſon tort. 44. Faux. Impriſonm. 35. Treſpaſs 235. 2. Rol. Abr. 546. C. pl. 1. 559. pl. 5. H. 22. Ed. 4. 45. pl. 10. Bro. de ſon tort. 51. 1. Hawk. P. Cor. 130. Wing. Max. reg. 110. pl. 34. 184. pl. 34. See Vin. Abr. tit. Treſpaſs C. and E. a.

[d] M. 1. H. 6. 3. *per Cur.* Fitz. Diſtreſs. 1. Bro. 33. Action ſur leſtatute 41. 14. Ed. 3. Fitz. Bar. 275. Kelw. 50. a. pl. 3. 2. Inſt. 106. Hale on F. N. B. 89. p. Dy. 168. pl. 20. Anteq. Poſt. 204. notwithſtanding 30. Ed. 3. 5. Fitz. Diſtreſs 16. 22. Ed. 4. 11. Fitz. Bar. 120. Bro. Diſtreſs 54. *dubitatur.*

[e] Wing. Max. reg. 184. pl. 34. Dr. & Stud. lib. 1. cap. 16. L. P.

[f] Dr. & Stud. Ubi ſupra. 8 Molloy 3. 1. Rol. Rep. 452. Kitch. 4.

[g] M. 38. H. 6. 12. Bro. Saver del default. 28. Bac. Max. reg. 5. Wing. Max. reg. 110. pl. 35. Lit. R. 89, 98. Kitch. 396.

Contempt of the Court; but becauſe he cannot come without Danger of Death, the Neceſſity of the Accident in ſuch Caſe, ſeeing no Default is in him, ſhall excuſe him. And alſo the Law of God gives Place to Neceſſity: So that the Words of the Law of God may be broken for Neceſſity without Offence to God. And therefore in the old Law it was forbidden by the Law of God [a] to eat the ſacred Bread, *viz. panem propoſitionis*, yet it appears that *David* [b] through Neceſſity of Hunger eat the ſaid Bread, and did not break the Law, although he broke the Words of the Law, as *Chriſt* himſelf declares in the Goſpel, becauſe he did it for Neceſſity. [c] So the Apoſtles of *Chriſt* for Neceſſity of Hunger plucked the Ears of Corn of other Perſons, and eat them, and although they broke the Words of the holy Scripture, which forbid them to take other Men's Goods without the Will of the Owner, yet they did not offend thereby, as it appears by the Goſpel. From which Caſes we ſee that the Law of Man and the Law of God yield and give Place to Neceſſity. And Compulſion alſo is a good Excuſe in our Law. [d] As if a Man makes an Obligation by Dureſs, he ſhall avoid it. [e] So if a Man's Arm be drawn by Compulſion, and the Weapon in his Hand kills another, it ſhall not be Felony. And ſo in all other Caſes where a Man does a Thing to which he is forced and compelled, he ſhall not ſuffer thereby. And alſo if a Man breaks the Words of the Law through involuntary Ignorance, this is no Breach of the Law. [f] As if an Infant of tender Age kills a Man, it ſhall not be Felony, becauſe he has not Diſcretion nor Underſtanding; for which Reaſon the Law imputes it to his Ignorance, which is natural to every one at that Age, and ſo there is no Fault in him; and therefore it is called involuntary Ignorance, for he cannot be wiſe nor prudent if he would, but he is ignorant by Compulſion, and therefore ſhall be excuſed. And ſuch Act is properly ſaid to be done *ex ignorantiâ*, viz. where involuntary ignorance is eſteemed to be the Cauſe of the Act. [g] So if a Man *non ſanæ memoriæ* kills another, although he has broken the Words of the Law, yet he has not broken the Law, becauſe he had no Memory nor Underſtanding, but meer Ignorance, which came to him by the Hand of God; and therefore it is called involuntary Ignorance, to which the Law imputes the Act, inaſmuch as there is no Fault in him, and for that Reaſon he ſhall be excuſed, ſeeing he is ignorant by Compulſion. And ſuch Act is ſaid to be done *ex ignorantia*, becauſe involuntary Ignorance is the Cauſe of it. And in *Deuteronomy Cap.* 19. *v.* 4, 5, 6. God provides by a ſpecial Remedy, that he who does any Thing through ſuch Ignorance ſhall not be puniſhed for it; for there it is ordained, that if a Labourer is at Work with a Hatchet, and the Head of the Hatchet falls from the Helve and kills a Stander-by, ſuch Labourer ſhall not be put to Death, but a ſpecial [h] City was ordained as a Sanctuary for him, becauſe he did it through involuntary Ignorance. But where a Man breaks the Words of the Law by voluntary Ignorance, there he ſhall not be excuſed. [i] As if a Perſon that is drunk kills another, this ſhall be Felony, and he ſhall be hanged for it, and yet he did it through Ignorance, for when he was drunk he had no Underſtanding nor Memory; but inaſmuch as that Ignorance was occaſioned by his own Act and Folly, and he might have avoided it, he ſhall not be privileged thereby. And *Ariſtotle* ſays that ſuch a Man deſerves double [k] Puniſhment, becauſe he has doubly offended, *viz.* in being drunk to the evil Example of others, and in committing the Crime of Homicide. And this Act is ſaid to be done *ignoranter*, for that he is the Cauſe of his own Ignorance: and ſo the Diverſity appears between a Thing done *ex ignorantia*, and *ignoranter*. And therefore, as I ſaid, where the Words of a Law are broken to avoid a greater Inconvenience, or by Neceſſity, or Compulſion, or involuntary Ignorance, in all theſe Caſes the Law itſelf is not broken. And now let us conſider and examine our own Caſe. [l] And in our Caſe the Woad was caſt into the Sea, and the Incertainty occaſioned to avoid a greater Miſchief, for the Life of every Man is more precious than any Goods, and the Loſs of a Man's Life is a greater Misfortune than the Loſs of his Goods, and therefore the Woad was caſt into the Sea in order to avoid the greater Miſchief of the Loſs of Life, and thereby the Incertainty was occaſioned. Alſo it was done through Neceſſity, and that too the greateſt Neceſſity that could be, for it was to avoid the Danger of Death, which Neceſſity was equal to that of the Encreaſe of Waters, or of Hunger in the other Caſes aforeſaid, the Preſervation of Life being the acting Cauſe and Motive both in the one Caſe and in the other. And alſo it may be ſaid to be done by Compulſion, for when a Thing comes to ſuch a Point that a Man has only one Alternative, *viz.* either to do ſuch a Thing or to die preſently, and in Order to preſerve his Life he does it, ſuch Act may well be ſaid to be done by Compulſion, and by the greateſt Compulſion that can be, for there is no greater Compulſion than that which ſets inevitable Death before a Man's Eyes, if he does not make Uſe of ſuch a particular Remedy that offers itſelf for his Safety. So was it in our Caſe, for the caſting the Woad into the Sea, which occaſioned the Incertainty of the Remainder, came by Compulſion. And alſo it cannot be denied but that the Ignorance of the certain Quantity of the Remainder was involuntary, inaſmuch as the caſting the Woad into the Sea, which was the Cauſe of that Ignorance, was by Compulſion, which is involuntary. And foraſmuch as the Ignorance of the certain Quantity of the Remainder is to be aſcribed and imputed only to Neceſſity and Compulſion, and the Avoidance of a greater Miſchief, which are Things that could not be prevented by Foreſight or Circumſpection, nor reſiſted by Power, then I ſay, that there is no Default in *Fogoſſa* touching the ſame, and if his Ignorance of the certain Quantity of the Remainder is owing to no Default in himſelf, then there is no Default in him as touching the Agreement, for a more certain or perfect Agreement for the Subſidy (the Caſe being as it was) could not be made. And if the Cauſe of the Ignorance is to be imputed and aſcribed to Neceſſity, Compulſion, and the Avoidance of a greater Miſchief, and that Ignorance is the Cauſe of the incertain Agreement which is made, then, I ſay, that the incertain Agreement itſelf is to be imputed and aſcribed to Neceſſity and Compulſion, and the Avoidance of a greater Miſchief. And from hence I conclude, that if each of the ſaid four Cauſes, *viz.* the Avoidance of a greater Miſchief, Neceſſity, Compulſion, and involuntary Ignorance, can ſeverally by themſelves

[a] Exodus cap. 29. v. 33, 34.
[b] Matthew cap. 12. v. 3, 4.
[c] Matthew cap. 12. v. 1. et ſeq.
[d] Bac. Max. reg. 5. Wing. M. reg. 21. pl. 48. reg. 110. pl. 36.
[e] Hob. 134. Ld. Raym. 39. *Per Cur.* Wing. Max. reg. 21. pl. 48.
[f] H. 3. H. 7. 1. pl. 4. *Per Fairfax.* Bro. Corone 133. *Note*, It is here put at large of an Infant of *tender Age* and ſo the Book of 3. *H.* 7. leaves it, without aſcertaining the preciſe Age that ſhall at all Events excuſe an Infant from the Guilt and Puniſhment of Felony. But by the beſt Opinions this ſeems only applicable to an Infant of 7 Years old, who cannot be guilty of Felony, whatever Circumſtances proving Diſcretion may appear, for *ex præſumptione juris* he cannot have Diſcretion, and no Averment ſhall be received againſt that Preſumption. But if he be above 7 Years old, and under 14, tho' *primâ facie* he is to be judged not guilty, yet if it appear by ſtrong Circumſtances, and pregnant Evidence that he had Diſcretion to judge between Good and Evil, Judgment of Death may be given againſt him, as it was done in 3. *H.* 7. *ſupra* in the Caſe of a Boy of 9 Years old. See 1. H. H. P. C. 26, 27, 28. S. P. C. 16. f. Pult. 125, 126. Dalt. Juſt. cap. 147. Yet we ſee in the *Regiſter*, fo. 309. b. a Precedent of a Pardon granted to an Infant under 7 Years old, who was indicted for homicide.
[g] 12. H. 3. Bro. Corone 170. M. 21. H. 7. 31. pl. 16. F. N. B. 202. d. S. P. C. 16. e. 1. H. H. P. C. 30. 1. Hawk. P. C. 2. Pult. 125. b. Dalt. Juſt. cap. 147. Co. Litt. 247. b. 4. Co. 124. a. b. Hob. 96. 134. 1. Finch. 20. Bac. Max. reg. 5.
[h] Concerning theſe Cities of Refuge, ſee Exod. 21. 13. Numb. 35. Deut. 4. 42. et ſeq. Joſh. 30. 21. Selden de jure Nat. lib. 4 cap. 2.

[i] Pult. 125. 1. H. H. P. C. 32. 1. Hawk. P. C. 2. Co. Litt. 247. a. 4. Co. 125. a. Dalt. Juſt. cap. 147. Bac. Max. reg. 5. Cromp. Juſt. 29. a. [k] Herewith agree ſome of the Civilians, as Bartholinus and others. See Covarruvias, tom. 1. p. 557. in relect. ad Clem. Si furioſus, Par. 3. § 3. 4. [l] See Bac. Max. reg. 5.

excuſe

excuse a Man from the Charge of breaking the Law, notwithstanding he breaks the Words of it, *a multo fortiore* where all the four Causes meet together, a Man may break the Words of the Law, and yet not break the Law itself. And if the said four Causes put together are a sufficient Justification to a Man, so that though he has broken the Words of the Law, he shall not be said to have broken the Law, *a multo fortiore* all of them put together are sufficient to excuse him, who has fulfilled the Words of the Law, from breaking the Law by the Intent of the Words. And therefore inasmuch as these four Causes are the Occasion that the incertain Agreement was here made, and that a certain Agreement could not be made, it follows *ex consequente* that this shall be as profitable and available to the Party as a certain Agreement should be. Wherefore seeing the Statute saith, *the Collector not agreed with*, by which Words it gives an Authority to agree with the Collector, and *Fogossa* has made a special Agreement with him, which is an Agreement, and so within the Words of the Statute, it seems to me that by the Definition of the Word, by the Rules of the Common Law used in the Construction of Statutes, by the Intent of the Makers of the Statute, and by all Reason and Equity, it ought to be adjudged a sufficient Agreement, and warranted by the Statute; and so Judgment is to be given against the King.

Molineux another of the King's Serjeants argued to the contrary.

The rest of the Record.

Edward the sixth, by the Grace of God King of *England*, *France* and *Ireland*, Defender of the Faith, and of the Church of *England*, and also of *Ireland*, in Earth the supreme Head. To the Treasurer and Barons of our Exchequer, *Greeting*. Where *Roger Porter* Servant to *Robert Reniger* Comptroller of our Customs and Subsidies in our Port of our Town of *Southampton*, and in all Places and Creeks to the same Port belonging, by the Commandment of the said *Robert Reniger* the *seventh* Day of *November* in the *second* Year of our Reign, at our Town of *Southampton* aforesaid seized, and to our Use and the Use of the said *Robert*, arrested 1693 Kintals of green Woad of the Goods and Chattles of one *Anthony Fogossa* Merchant Stranger, supposed by the said *Robert* to be forfeited, for that the said Woad should be laid on Land, the Subsidy thereof due not paid, nor the Customer in the said Port agreed with for the same, contrary to the Form of the *Statute* in that Behalf made and provided. And therefore the said *Robert Reniger* made Information before you our said Barons, as by the Records of our said Exchequer amongst others more plainly appeareth. We let you wit, that we be credibly informed, that the said *Anthony Fogossa* intended not to defraud us of our said Subsidy, nor of any other our Duties for the same, but laid the same Woad on Land by the License and Agreement of the Customer of our Port aforesaid. And we not minding the said *Anthony Fogossa* to be vexed, sued, troubled, or inquieted in Body, Goods, Lands, or Tenements, for the said 1693 Kintals of green Woad, or any Parcel thereof, or the said Woad to remain to us as forfeit by Reason of the said Seizure or Information, contrary to good Conscience, by the Consent of our Council, Will and Command you our said Treasurer and Barons, and every of you, not only to cancel and make void one Recognizance, wherein the said *Anthony Fogossa* and his Sureties stand bound to us in our said Exchequer for the Payment of the Price or Value of the said Woad (if the same hereafter for the Cause in the said Information specified be adjudged forfeit) but also utterly to surcease for ever of all Manner of Processes, Suits, Quarrels, Demands, Judgments and Executions made and hereafter to be made for us, or in our Names against the said *Anthony Fogossa* or any of his said Sureties, in or for the Premisses, or any Parcel thereof, or for or upon the said Information of the said 1693 Kintals of green Woad, or any Parcel thereof, or any other Thing the same Woad concerning, or by any Means touching, by Force or Reason of the said Information, or Seizure, or of any Thing, Article, or Clause therein contained; any Law, Statute, Use, or Course of our said Exchequer, or any Ambiguity, Doubt, Question, Matter or Cause whatsoever you or any of you to the contrary moving in anywise notwithstanding. And these our Letters shall be your sufficient Warrant and Discharge in that Behalf. Given under our Privy-seal at our Manor of *Greenwich* the 23d Day of *June*, in the *fourth* Year of our Reign.

And thereupon the same *Anthony* prays Judgment as above, *&c.* And because the aforesaid 1693 Kintals of green Woad were redelivered to the aforesaid *Anthony Fogossa* by Reason of a certain Recognizance entered into for the same before the Barons here in the Term of the *Holy Trinity*, in the *third* Year of the Reign of the said Lord the King, that now is, by the aforesaid *Anthony Fogossa* and certain others, *viz. Henry Mody* of the Parish of *St. Michael Bassishaw* in *London* Mercer, *John Cosworth* of the Parish of *St. Bashing-Barth* in the Ward of *Bradstreet* in *London* Mercer, *William Merick* of the Parish of *St. Martin Owtwych* in *London* aforesaid Merchant-Taylor, *Richard Carrell* of the said Parish of *St. Martin* in *London* aforesaid Mercer, *Edward Cook* of the Parish of *St. Nicholas Acon* in *London* Draper, *Anthony de Marome* of the Parish of *St. Olaves* in the Ward of the *Tower* of *London* Merchant Denizen, and *John Quarles* of the Parish of *St. Peter* the Poor in *London* aforesaid Draper, Recognitors, as the same *Anthony* before the aforesaid Barons here has acknowledged, and the Premisses being seen by the Barons, and mature Deliberation being had by them thereupon, it is granted by the same Barons that the said Recognizance and the Condition thereof in and by every Thing be made void, cancelled, and holden for none, by Reason of the Writ aforesaid, and that in and upon the Premisses Execution be no farther done. And that the same *Anthony* as touching the Premisses go at present without Day, saving always to the King his Action if hereafter, *&c.*

Judgment.

Nota bene, by the Reporter.

But note, (Reader) *that (as I was credibly informed) the Opinion of all the Barons of the Exchequer, and of all the Justices of* England, *except* Hales *Puisn Justice of the Common Bench, and* Mountague *Chief Justice of the same Bench, was, upon Conference between them, against the King and the Informer, and with the Defendant; and therefore it was thought better that Judgment should be given against the King by Force of the* * *Privy Seal, than by the Rigour of Law, after the Argument of the Judges. And for this Reason the Privy-Seal was sent to the Court of Exchequer.*

* 2. Sid. 146.

A Report of a Caſe argued in the Common Bench *before all the Juſtices of the ſame Bench, in* Eaſter *Term in the* fourth *Year of the Reign of King* Edward *the Sixth, between* Matthias Colthirſt *Plaintiff and* Peter Bejuſhin *Defendant, in a Writ of* Treſpaſs *brought by the ſaid* Matthias *againſt the ſaid* Peter. *And the Record was as follows.*

Trin. Term. 3; *Edw.* 6. *Somerſet.* Declaration.

PETER *Bejuſhin* late of *Claverton* in the County aforeſaid yeoman was attached to anſwer *Matthias Colthirſt* Eſquire of a Plea, wherefore with Force and Arms the Cloſe and Houſe of the ſaid *Matthias* at *Barton* and *Walcot* he broke, and his Graſs, to the Value of 20 *l.* there lately growing with certain Cattle eat up, tread down, and deſtroyed, and other Wrongs to him did, to the great Damage of the ſaid *Matthias*, and againſt the Peace of the Lord the King now, *&c.* And whereupon the ſame *Matthias* by *John Bill* his Attorney complains, that the aforeſaid *Peter*, the 18th Day of *December* in the *ſecond* Year of the Reign of the Lord the King now, with Force and Arms, *&c.* the Cloſe and Houſe of him the ſaid *Matthias* at *Barton* and *Walcot* broke, and his Graſs, to the Value, *&c.* there lately growing, with certain Cattle, to wit, Horſes, Oxen, Cows, Hogs, and Sheep eat up, tread down, and deſtroyed, the Treſpaſs aforeſaid, as to the eating up, treading down, and deſtroying the Graſs aforeſaid, from the aforeſaid 18th Day of *December* until the Day of obtaining the Writ Original of him the ſaid *Matthias*, *viz.* the 3d Day of *January* then next following, at ſundry Days and Times continuing; and other Wrongs, *&c.* to the great Damage, *&c.* and againſt the Peace, *&c.* whereby he ſays that he is injured, and hath Damage to the Value of 40 *l.* and therefore he brings Suit, *&c.*

Bar.

And the aforeſaid *Peter* by *William Rede* his Attorney comes and defends the Force and Injury, when, *&c.* And as to the Force and Arms, he ſays that he is not guilty thereof; and of this he puts himſelf upon the Country: and the aforeſaid *Matthias* does the like. And as to the Reſidue of the Treſpaſs aforeſaid above ſuppoſed to be done, the ſame *Peter* ſays that the aforeſaid *Matthias* his Action aforeſaid againſt him ought not to have, becauſe he ſays, that the Cloſe, and the Houſe aforeſaid, and alſo the Places in which the Treſpaſs aforeſaid is ſuppoſed to be done, are, and at the Time aforeſaid when the Treſpaſs aforeſaid was ſuppoſed to be done, were, one Meſſuage and 160 Acres of Land with the Appurtenances in *Barton* and *Walcot* aforeſaid, called the *Grange*, or the Farm of *Barton* near *Bath*, whereof long before the Time aforeſaid when, *&c.* one *William Holeway* late Prior of the late Monaſtery and Cathedral Church of *Bath* in the County aforeſaid was ſeized in his Demeſn as of Fee, in right of his Church aforeſaid, and being ſo thereof ſeized, he the ſame late Prior and the then Convent of the ſame late Monaſtery, before the Time aforeſaid when, *&c. viz.* the 2d Day of *January* in the twentieth Year of the Reign of Lord *Henry* the *Eighth* late King of *England*, Father of the Lord the King now, at the Monaſtery of *Bath* in the County aforeſaid, by their certain Deed indented, (which the ſame *Peter* produces here in Court ſealed with the common Seal of the aforeſaid late Prior and Convent, the Date whereof is in the Chapter-houſe of the ſame late Prior and the then Convent there, the ſame Day and Year,) by unanimous Aſſent and Conſent, delivered, granted, and to farm let unto one *Henry Bejuſhin* Gentleman and *Eleanor* his Wife the Meſſuage and Tenements aforeſaid with the Appurtenances amongſt other Things, by the Name of all their Grange and Farm of *Barton*, near *Bath*, with all the Houſes ſituate and ſtanding upon the ſame, and all the Demeſn-Lands, Meadows, and Paſtures to the ſame appertaining, that is to ſay, *King's Mead*, the *Sleepy Heys*, and the cloſes adjoining to the aforeſaid Farm and Grange, and a piece of Land called a *Furlong*, or *Hakodwood* in *Lippwekſ*-Wood called *Middle-Wood*, and a Cloſe or Parcel of Meadow or Paſture called the *Amerry-Orchard*, with the Paſture and Feeding of ten Heads of the Rother Beaſts going in the Lawn Park annually, as had been uſed and accuſtomed in Time paſt. And alſo with the Paſture of the *Hawe*, *Wrogges-Mead*, *Broddecrofts*, *Long-Mead*, and the *Amerry-Mead*, with the Eaſement of the Sheep-houſe in the aforeſaid *Amerry*, according to the Form and Effect of a certain Bill thereof made, to the Indenture aforeſaid annexed; and alſo all other Demeſn-Lands, Meadows, and Paſtures to the aforeſaid Grange and Farm appertaining, ſituate and lying in the Pariſh and Fields of *Walcot* and *Barton*, which the aforeſaid *Henry* then held, and which one *Nicholas Saunders* formerly held, had, occupied, and enjoyed by reaſon of the Farm aforeſaid, with all and all Manner of Tithes of Sheaves of Corn, Hay, Milch-Cows, Calves, Geeſe, Hogs, and Sheep, and all other Tithes annually renewing by reaſon of the aforeſaid Grange or Farm, with all Works of their cuſtomary Tenants and of other Inhabitants within their Hundred of *Barton* uſed and accuſtomed annually to be done there: And alſo one Parcel or Portion of their Mount of *Launſdown*, as appears by the Metes and Limits upon the ſame Down, with all Commons and Sleights in the aforeſaid Pariſhes and Fields of *Walcot* and *Barton* to the ſame late Prior and Convent belonging, for the feeding and paſturing of their Sheep called the *Ewes-Flock* of *Barton*, with 360 Ewes, each of the Price of 13 *d.* coming and paſturing upon the ſame, with the cuſtomary Works in waſhing and ſheering the aforeſaid Flock called the *Ewes-Flock*, annually accuſtomed to be done by their Tenants of *Walcot*, and all Wool, Lambs, and other Profits annually growing by reaſon of the aforeſaid Sheep, (the Tithes of the Wool and Lambs of the aforeſaid Sheep, and of all other Things nouriſhed and ſuſtained by the aforeſaid Farm and Grange excepted, to be paid yearly to the Sachriſt of the aforeſaid cathedral Church for the Time being, as they ſhould happen to fall.) And further the ſame late Prior and Convent by the ſame Deed indented in like manner granted and to Farm let to the aforeſaid *Henry* and *Eleanor* their Mount called the *Down* at *Comb*, and all other their Commons, Sleights, and Paſtures, as well ſeveral as common within their Demeſn of *Comb*, and the Park wholly reſerved by their Prede-

ceſſors for the feeding, paſturing, and ſuſtaining of their Sheep, and of the Flock called the *Wether-Flock* of *Comb* in as ample Manner and Form as had been uſed and accuſtomed to be occupied in Times paſt, with all Works, Cuſtoms of waſhing and ſheering the aforeſaid Sheep according to Cuſtom to be done there, with three Carts of good Hay yearly to be made and carried by the Farmer of their Demeſn Lands of *Comb* aforeſaid, and alſo three other Carts of good Hay to be gotten within their Demeſn of *Kingkome* at their own proper Charges and Coſts, and to be carried yearly by the aforeſaid *Henry* and *Eleanor* at their own proper Charges and Coſts, with 360 Sheep, called *Wether-Sheep*, each of the Price of 16 *d.* going and paſturing upon the aforeſaid Down, and Common, and other Premiſſes with the Appurtenances, with all the Wool and other Profits and Encreaſe annually ariſing and growing by reaſon of the aforeſaid Sheep, and the *Wether-Flock* of *Comb*, (the Dung of the aforeſaid Sheep, and others there kept and paſtured by reaſon of the Farm aforeſaid only excepted, which Dung the aforeſaid Farmer of the aforeſaid Demeſn-Lands of *Comb* ſhould wholly have and enjoy for the Amendment of his Lands there:) To have and to hold the aforeſaid Grange and Farm of *Barton*, and all the Premiſſes to the ſame appertaining, with all and ſingular their Appurtenances, with all the Tithes thereof, as is aforeſaid, and alſo the aforeſaid Parcel of *Launſdown*, and the Rivers, Commons, and Sleights within the Pariſh of *Walcot* and *Barton*, with the aforeſaid 360 Ewes going and paſturing upon the ſame, called the *Ewes-Flock* of *Barton*, with all Iſſues and Profits of the ſame Sheep, as is before recited: And alſo all the aforeſaid Down, Paſtures, Sleights, and Commons at *Comb* aforeſaid, with all and ſingular their Appurtenances, with the aforeſaid 360 Sheep called *Wethers*, going and paſturing upon the ſame, called the *Wether-Flock* of *Comb*, with all the Profits thereof, as is above ſpecified (except as is before excepted) to the aforeſaid *Henry Bejuſhin* and *Eleanor* his Wife, for Term of their Lives, and of the longeſt Liver of them: And after the Death of the ſaid *Henry* and *Eleanor*, the aforeſaid late Prior and Convent willed and granted by the aforeſaid Indenture, that the aforeſaid Grange and Farm of *Barton*, with all and ſingular their Appurtenances to the ſame belonging within the Pariſh aforeſaid of *Walcot*, with all the Tithes of the ſame, as is above ſpecified, and alſo the aforeſaid Parcel of *Launſdown*, with all other Paſtures, Sleights, and Commons, with their Appurtenances, with the aforeſaid 360 Ewes, called the *Ewes-Flock* of *Barton*, with all the Iſſues and Profits thereof (except the Tithes of the Wool, Skins, and Lambs, which ſhould be annually paid to the Sachriſt of the aforeſaid Cathedral-Church for the Time being, when they ſhould happen to fall,) ſhould remain to *William Bejuſhin*, one of the Sons of the aforeſaid *Henry* and *Eleanor*, to have and to hold to the aforeſaid *William* for Term of his Life, if he ſhould inhabit and reſide wholly in and upon the aforeſaid *Grange* and Farm of *Barton*. And if it ſhould happen, that the aforeſaid *William Bejuſhin* ſhould die before the aforeſaid *Henry* and *Eleanor*, then the aforeſaid late Prior and Convent willed and granted further by the aforeſaid Deed indented, that the aforeſaid *Grange* and Farm of *Barton*, with all and ſingular the Appurtenances to the ſame belonging, and all the Tithes thereof, as is aforeſaid, and the aforeſaid Parcel of *Launſdown*, and all other Paſtures, Sleights, and Commons, with the aforeſaid 360 Ewes, called the *Ewes-Flock* of *Barton*, with all the Iſſues and Profits thereof (except the Tithes before excepted, to be paid as before is limited) ſhould remain to the aforeſaid *Peter Bejuſhin* another of the Sons of the aforeſaid *Henry* and *Eleanor*; to have and to hold to the ſame *Peter* for Term of his Life, if he alſo would inhabit and reſide within the aforeſaid *Grange* and Farm of *Barton* during the Term above expreſſed, as in the aforeſaid Indenture amongſt other Things more fully appears. By virtue of which Demiſe, the ſame *Henry* and *Eleanor* were ſeized of the Meſſuage and Tenements aforeſaid with the Appurtenances in their Demeſn as of Freehold, and the ſame *Henry* and *Eleanor* being ſo thereof ſeized, the aforeſaid *William Bejuſhin* died in the Lifetime of them the ſaid *Henry* and *Eleanor*: And afterwards, and before the Time aforeſaid when, *&c.* the aforeſaid *Henry* and *Eleanor* died; after whoſe Deaths he the ſame *Peter* entered into the Tenements aforeſaid with the Appurtenances, and was and yet is thereof ſeized in his Demeſn as of Freehold. And further the ſame *Peter* ſays that he continually after his Entry aforeſaid into the Tenements aforeſaid with the Appurtenances, and hitherto has inhabited and been reſident within the aforeſaid *Grange* and Farm of *Barton*. And the aforeſaid *Matthias* claiming the Tenements aforeſaid with the Appurtenances by Colour of a certain Deed of Demiſe thereof made to him for Term of his Life by the aforeſaid late Prior and Convent, long before the aforeſaid Demiſe by the ſaid late Prior and Convent of the ſaid Tenements with the Appurtenances to the aforeſaid *Henry* and *Eleanor* in Form aforeſaid made, (where nothing of the ſaid Tenements with the Appurtenances ever paſſed into the Poſſeſſion of him the ſaid *Matthias* by that Deed,) entered, upon the Poſſeſſion of which ſaid *Matthias* he the ſame *Peter* into the Tenements aforeſaid with the Appurtenances afterwards, to wit, the ſame Time when, *&c.* re-entered, and the Graſs aforeſaid, as the proper Graſs of him the ſaid *Peter* then there growing with the Beaſts aforeſaid eat up, tread down, and deſtroyed, as it was lawful for him to do. And this he is ready to verify; wherefore he prays Judgment if the aforeſaid *Matthias* his Action aforeſaid againſt him ought to have, *&c.*

Colour.

The Plaintiff demurs.

And the aforeſaid *Matthias Colthirſt* prays *Oyer* of the Deed intended; and it is read to him in theſe Words. [*Which was inrolled verbatim accordingly*, &c.] Which ſaid Deed indented being read and heard, the ſame *Matthias* ſays, that the aforeſaid Plea of the aforeſaid *Peter* above in Bar pleaded is inſufficient in Law to preclude him the ſaid *Matthias* from having his Action aforeſaid againſt the aforeſaid *Peter*, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer the ſaid Plea in Manner and Form aforeſaid pleaded, wherefore for

for want of a ſufficient Anſwer of the aforeſaid *Peter* in this Behalf, he the ſame *Matthias* prays Judgment, and his Damages by reaſon of the ſaid Treſpaſs to be adjudged to him, *&c.*

And the aforeſaid *Peter*, for that he has above alledged ſufficient Matter in Law to preclude the aforeſaid *Matthias* from having his Action aforeſaid againſt him, which he is ready to verify, which ſaid Matter the aforeſaid *Matthias* does not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment refuſes to admit, prays Judgment, and that the aforeſaid *Matthias* may be precluded from having his Action aforeſaid againſt him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here in eight Days of St. *Michael* to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.* *And ſo Continuance until fifteen Days of* Eaſter, *&c.* *The Judgment appears after the Arguments.*

Joinder.

Continuance.

Pollard Serjeant briefly recited the Caſe in this Manner. You, my Lords, have well underſtood how that *Matthias Colthirſt* has brought an Action of Treſpaſs againſt *Peter Bejuſhin* for entering into and breaking his Cloſe and Houſe. And the Defendant has ſaid that the Prior of *Bath* was Lord of the *Grange* or Farm of *Barton*, and of ſo much land, which is the Place where, *&c.* in Fee, and he and the Convent leaſed it by Deed indented, ſhewn forth, to Henry *Bejuſhin* and *Eleanor* his Wife to have and to hold to them for Term of their Lives, the Remainder to *William Bejuſhin* one of the Sons of the ſaid *Henry* and *Eleanor* for Term of his Life, *ſi ipſe habitaret, et reſidens eſſet omnino de et ſuper prædicta Grangia et firma de Barton:* And if the ſaid *William* ſhould happen to die before the ſaid *Henry* and *Eleanor* then the ſaid Prior and Convent appointed that the ſaid *Grange* and other the Premiſſes ſhould remain to the ſaid Peter *Bejuſhin*, another of the Sons of the ſaid *Henry* and *Eleanor*, for Term of his Life, *ſi ipſe etiam vellet inhabitare et reſidens eſſe infra prædictam Grangiam et firmam de Barton, durante termino ſuperius expreſſo*; by Force of which the ſaid *Henry* and *Eleanor* were ſeized in their Demeſn as of Freehold; and they being ſo ſeized, the ſaid *William Bejuſhin* died in the Lifetime of the ſaid *Henry* and *Eleanor*, and afterwards *Henry* and *Eleanor* died, after whoſe Death the ſaid *Peter* now Defendant entered, and was and yet is ſeized in his Demeſn as of Freehold. And further he ſays, that all the Time ſince his Entry until now he has been an Inhabitant and Reſident in the aforeſaid *Grange* and Farm of *Barton*. And he gives Colour to the Plaintiff, whereupon the Plaintiff has demurred in Judgment. And it ſeems to me that the Plaintiff ſhall recover; and this for the Inſufficiency of the Form, as well as of the Matter contained in the Bar. And as to the Form, it ſeems to me to be inſufficient for two Cauſes; the firſt is, becauſe the Defendant has not ſhewn when he entered after the Remainder fell, but he has ſhewn the Death of him in the meſne Remainder, and afterwards the Death of the Huſband and Wife the particular Tenants, and that he entered after their Deaths, and that he has continually inhabited and been reſident thereupon all the Time ſince his Entry, and ſo he has not ſhewn that he has been reſident all the Time ſince the Remainder fell, and the Remainder was given to him for his Life, *ſi ipſe vellet inhabitare et reſidens eſſe infra prædictam Grangiam et firmam de Barton, durante Termino ſuperius expreſſo*, and then inaſmuch as the Poſſeſſion of his Eſtate for Life commenced and was caſt upon him by the Death of the Huſband and Wife, he ought to have ſhewn that he has been reſident ſince that, *viz.* ſince the Death of the Huſband and Wife. For this Clauſe *durante termino prædicto* is as much as to ſay, all the Time during the whole * Term, *viz.* from the Beginning unto the End thereof, which is from the Death of the Huſband and Wife unto the Death of the Defendant, and not once only during the Term; and ſuch was the Intent of the Condition, as it appears from the Matter, which ſhews and imports that continual Hoſpitality was intended to be there kept up and maintained from the Death of the Huſband and Wife during the Life of the Defendant. And for any Thing that is ſhewn it may be that the Huſband and Wife died ten Years ago, and that Hoſpitality has not been kept up there for all this Time, which is contrary to the Will of the Leſſor; and therefore although he has performed the Words of the Condition if ſo be he has been once reſident upon the *Grange* during the Term, and during all the Time ſince his Entry, yet he has not thereby performed the Intent of the Condition, which muſt be ſatisfied and fulfilled before the Condition ſhall be ſaid to be performed. [a] And therefore if a Man is bound in an Obligation upon Condition to infeoff *J. S.* of the Manor of *D.* and he makes a Feoffment to another of 20 Acres Parcel of the Manor, and afterwards infeoffs *J. S.* of the Manor, he has not performed the Condition, and yet he has performed the Words of the Condition; but the Intent was that *J. S.* ſhould have the whole Manor, which Intent he has not performed. [b] And in 21. *H.* 6. one was bound in an Obligation upon Condition that his Feoffees of the Manor of *D.* ſhould grant a Rent of 40*s.* to the Plaintiff for his Life, and he had three Feoffees, and two of them granted the ſaid Rent to him, and there all the Juſtices held, that by the Word (Feoffees) all his Feoffees are intended, ſo that all of them ought to grant the Rent, and therefore the Grant by two was no Performance of the Condition, although the Words were performed, for the Intent appears to be, that all his Feoffees ſhould grant it to him, which was not performed. So that the Intent of a Condition ought always to be performed as well as the Words thereof. And here it ſeems to be the Intent of the Condition, that Hoſpitality ſhould be kept up upon the *Grange* continually, that is to ſay, from the Beginning of the Time that he might be in poſſeſſion until the End of the Term, which is, from the Time of the Death of the Huſband and Wife unto the Death of the Defendant. And here he has not ſhewn that he entered as ſoon as he conveniently could after the Death of the Huſband and Wife, and therefore inaſmuch as he has not ſhewn and averred that, he has not ſhewn the Performance of the Condition by himſelf,

The CASE. *Eaſter Term.* 4. *Edw.* 6. Leaſe is made to Huſband and Wife for their Lives, Remainder to A. their Son for Life, and if he die living the Huſband and Wife, that then it ſhall remain to B. another of their Sons for Life, *ſi ipſe vellet inhabitare*, &c. This is a good Remainder on Contingency, *viz.* if A. dies before the Huſband and Wife. Vide 3. Co. 20. a. T. Raym. 144. Lane, 22.

For the Plaintiff.

* O. Bendl. 182. Palm. 482. Poſt 27. 30.

[a] H. 3. H. 7. 4. b. *Per Vaviſor.* Fitz. Bar. 129. Bro. Condition. 126. M. 20. H. 7. 13. a. *Per Fineux.* P. 10. H. 7. 19. a. *Per Vaviſor.* M. 5. Ed. 3. 35. pl. 9. Perk. § 810. Litt. Rep. 128. 264.

[b] M. 21. H. 6. 10. pl. 22. Fitz. Bar. 154. Bro. Condition. 56. Perk. §790. Poſt 30. *Per Hales.* J. 34. *Per Mountague*, C. J. 291. *arguendo.*

ſelf, and it is the Performance of the Condition which makes the Continuance of his Eſtate, for which Cauſe his Plea is not good. And alſo the Plea is not good for another Reaſon, *viz.* becauſe the Defendant has not ſhewn the Day of his Entry; for if he had ſaid that he entered immediately after the Death of the Huſband and Wife, and had not ſhewn the Day certain, and that he had been continually reſident ſince his Entry, yet the Plea would not be good becauſe of the Incertainty of the Time of the Entry. For if the Plaintiff had replied that he did not enter at all, then the Iſſue would be incertain, and the Jurors could not know what Day of Entry to find; for which Reaſon the Day of his Entry ought to be ſhewn, and then the Plaintiff might traverſe his Entry at ſuch Day, and ſo Iſſue might be joined upon the Day. And therefore in all other Caſes where the Time is iſſuable the Day ought to be ſhewn certainly. [a] For which Reaſon it is held in 32. *H.* 6. that if a Man pleads a Leaſe for Years made to him, he ought to ſhew what Day the Leaſe was made, becauſe it is iſſuable. [b] So in 33. *H.* 6. in Debt by an Executor, the Defendant pleaded that the Teſtator made the Plaintiff and one *R.* his Executors at *London*, which *R.* is alive, not named, *&c.* Judgment of the Writ, and the Plaintiff confeſſing this replied, that afterwards the Teſtator made him ſole Executor in the County of *Middleſex*, and the Defendant ſaid, that after the Time laſt aſſigned by the Plaintiff, the Teſtator made the Plaintiff and *R.* his Executors in Manner and Form *ut ſupra*, *abſque hoc* that he made the Plaintiff his ſole Executor after that Time, and the Defendant's Plea was held not good, becauſe the Day on which the Plaintiff and *R.* were made Executors is incertain, which ought to be certainly alledged for the Knowledge of the Jurors, and therefore the Defendant was forced to put a Day certain in his Plea on which the Plaintiff and *R.* were made Executors, *abſque hoc* that the Plaintiff alone, after that Time, was made ſole Executor. And ſo the Defendant who miniſtred the Matter of the Iſſue was forced to ſhew the Day certain. [c] And in 3. *H.* 6. in Treſpaſs for wrongfully taking away his Servant, the Defendant ſaid, that long before the Servant made an Agreement with the Plaintiff, he made an Agreement with the Defendant himſelf at ſuch a Place, and from thence he went with the Defendant himſelf, at the Requeſt of the Defendant, to ſerve him: And the Plaintiff traverſed the Bar, *et alii e contra*, and this Iſſue was clearly holden not good, becauſe the Plaintiff did not ſhew what Day he retained him, for without that was ſhewn the Jurors could not know the Certainty of the Time ſo as to find with which of them he firſt made an Agreement, wherefore the Plaintiff was there put to ſhew the Day in certain. So here, if the Plaintiff ſhould traverſe the Defendant's Reſidence ever ſince the Remainder fell, this Iſſue would be upon an incertain Point, inaſmuch as no certain Time is ſhewn whereof they may enquire, for which Reaſon the Day ought to be ſhewn in certain. And it lies upon the Defendant here to ſhew it, becauſe he is in the affirmative, for the Plaintiff muſt ſtand to the Traverſe and Denial of the Entry at the Time, and he that is in the Negative ought not to ſhew that to be done, which he denies to be done, and therefore the Defendant being in the affirmative ought to ſhew it, and becauſe he has not done ſo, the Plea is naught. Then as to the Matter in Law, it ſeems that the Remainder is void for divers Cauſes; one Cauſe is, becauſe the Limitation of the Remainder is here appointed during the particular Eſtate, [d] and every Remainder ought always to be appointed and limited to take Effect, after the particular Eſtate ended, and not during the particular Eſtate, for if it is limited and appointed to take Effect during the particular Eſtate, then it ſhall be utterly void, becauſe it is repugnant to the firſt Eſtate. * As if a Leaſe is made for Life, the Remainder for Life, and if the firſt Tenant for Life die, that then it ſhall remain over to a Stranger in Fee, this is a void Remainder, becauſe it is appointed to take Effect immediately after the firſt Eſtate for Life determined, and when the firſt Eſtate for Life is determined, then the Remainder for Life commences, and from thence has Continuance: And if it continues from thence, then it follows that the Remainder in Fee may not take effect immediately after the firſt Eſtate for Life ended, for if the Remainder in Fee ſhould then begin to take Effect, it would avoid the firſt Remainder for Life, which cannot be avoided, becauſe it was firſt appointed; and therefore inaſmuch as the Remainder in Fee is limited to take Effect during the Eſtate precedent, which Eſtate precedent the Remainder in Fee muſt either avoid, or be void itſelf, it ſeems to me that it ſhall be void for the Repugnancy. [e] So if a Leaſe is made to two, the Remainder over in Fee after the Death of the firſt of them, this Remainder is void, becauſe the Survivor of them ſhall hold Place after the Death of the firſt, and inaſmuch as the Survivor of them ſhall have the Land immediately after the Death of the other, it cannot immediately remain over to another in Fee, for if ſo, then it muſt drown the firſt Eſtate, which continues; and therefore the Remainder ſhall be void for the Repugnancy, ſooner than it ſhall drown the firſt Eſtate, which was appointed and limited before the Remainder. So in the principal Caſe, it is given to Huſband and Wife for their Lives, the Remainder to the eldeſt Son for Life, upon Condition that if the eldeſt die living the Huſband and Wife, that then it ſhall remain to the Defendant for Life, which is as much as to ſay, that then immediately the Defendant ſhall have the Land, which cannot be, for the firſt Eſtate continues at that Time, and if the Remainder ſhould be good, it muſt drown the firſt Eſtate, which the Huſband and Wife have, which it ſhall not do, and therefore the Remainder ſhall be void for the Repugnancy and Contrariety it bears to the firſt Eſtate. Alſo the Remainder is void for another Cauſe, *viz.* becauſe it is limited to commence upon Condition, [f] which no Remainder may do, for Conditions always enure in Privity, ſo that none but Privies ſhall take advantage of them; [g] for none ſhall enter for a Condition broken except the Feoffor, Donor, and Leſſor, or their Heirs. And as none but Privies ſhall avoid an Eſtate before made for the Breach of

[a] M. 22. H. 6. 8. a. Fitz. Bar. 54. Bro. Pleadings, 154. Kitch. 457.

[b] M. 33. H. 6. 44. pl. 25. Fitz. Replication, 18. Bro. 6. Executors, 21. Jours, 8. Viſne, 5. Heath's Max. 154.

[c] 3. H. 6. 32. pl. 22. Fitz. Iſſue, 42. Bro. 2. Jours, 4. Replication, 49. Heath's Max. 154.

[d] 1. Co. 135. a. b. 2. Co. 51. a. 3. Co. 21. a. T. Raym. 144. 1. Finch. 50. T. Jones, 112. *arguendo*. Noy's Max. 31. Vin. Abr. tit. Remainder, W. pl. 8.

* Winch. 56. *arguendo*.

[e] M. 18. H. 8. 4. a *ndo*.

[f] Adjudged accord. *Cogan v. Cogan*. Cro. Eliz. 360. 1. Leon. 283. S. P. dubitatur, *Per Anderſon*, See Poſt. 34.

[g] Litt. § 347. Co. Litt. 214. b. Dr. & Stud. lib. 2. cap. 20 Perk. § 830. 1. Finch. 96. 2. Finch. 107. Poſt 34. See the Preamble of the Statute of 32. *H.* 8. *cap.* 34. which declares the common Law to be ſo.

of a Condition, ſo none but Privies only ſhall take a new Eſtate by Performance of a Condition. [a] And therefore if a Man makes a Leaſe for Life, reſerving Rent, upon Condition that if the Rent be behind it ſhall remain to a Stranger in Fee after the firſt Eſtate ended, this Remainder is void, becauſe it depends upon a Condition, and none ſhall take Benefit by it but only Privies, and the Stranger to whom the Remainder is appointed is not a Privy, but a Stranger, *ergo* he ſhall not take Benefit by the Remainder, for which Reaſon the Remainder is void. So if I make a Leaſe for Life, upon Condition that if the Leſſee do not pay me 20 *l.* at ſuch a Day, that then it ſhall remain over to a Stranger in Fee, and he fails of Payment, this is a void Remainder, *cauſa qua ſupra.* But if I make a Leaſe for Life, upon Condition that if the Leſſee do ſuch an Act he ſhall have Fee, and he does it accordingly, there he ſhall have the Fee; becauſe he is privy to the Condition, and therefore he ſhall take Benefit by it. And ſo the Diverſity appears where the Eſtate upon Condition is appointed to a Privy, and where to a Stranger. Then here in our Caſe the Remainder is appointed and limited to the Defendant, if his Brother firſt dies in the Life of the Huſband and Wife, and if he does not die in the Life of the Huſband and Wife, then the Defendant ſhall not have the Remainder. So that the Commencement of the Remainder is upon a Contingent, *viz.* upon this Word *(if)* which is a Word conditional, which precedes the Remainder. And for this cauſe the Remainder, which muſt here commence upon a Condition, is not good. [c] But if an Eſtate is made for Life upon Condition that if the Tenant for Life die, that then it ſhall remain over, this Remainder is good, becauſe it commences upon the Determination of the Eſtate which is certain and not incertain, and therefore it is no Condition. But in our Caſe it is incertain, and may be called a Condition, for there is no Condition but what is incertain, and may be performed or broken: And here it is incertain, and conſequently a Condition, and then the Remainder ſhall be void. And ſo the Remainder here is void for the two Cauſes before ſhewn. And further, my Lords, it is to be conſidered and obſerved, that in every Weal-Public it is neceſſary and requiſite that the Conveyances of Things ſhould be certain, for Certainty is the Mother of Repoſe, and Incertainty the Mother of Contention, which our wiſe and provident Law has ever guarded againſt and prevented all Occaſions thereof. For which Reaſon it has ordained certain Ceremonies to be uſed in the Change and Tranſmutation of Things from one to another, (and eſpecially in the Caſe of Freeholds which are of greater Price and Eſtimation in our Law than other Things) in order to know the certain Times when Things paſs; and therefore in every Feoffment the Law has appointed that [d] Livery and Seizin ſhall be had, and in every Grant of Reverſions or Rents, *&c.* that [e] Attornment ſhall be made, which are certain Points containing the Time when, and to whom ſuch Eſtates do paſs. And upon the ſame Reaſon the Law has ordained and appointed that every Remainder ſhall have three Things, beſides thoſe beforementioned, as Rules and Directions whereby to know and diſcern when Remainders are good; *viz.* [f] an Eſtate precedent made at the ſame Time that the Remainder commences, [g] and that the particular Eſtate *continue* when the Remainder veſts, [h] and that the Remainder be out of the Donor at the Time of the Livery; and if any of theſe three Things fail, the Remainder is void. [i] And therefore as to the firſt Point, if the Leſſor confirms the Eſtate of his Tenant for Years, the Remainder in Fee, this is a void Remainder, becauſe the Eſtate for Years was made before the Remainder, and not at the Time with the Remainder, and he ſhall not take it as a Grant of the Reverſion, becauſe he is not Party to the Deed. [k] So if the Leſſor diſſeizes his Tenant for Life, and afterwards makes a new Leaſe to him for Life, the Remainder in Fee, this Remainder is void, becauſe the Tenant for Life is remitted to his Eſtate, which was made long before the Remainder appointed; ſo that the Eſtate precedent was not made at the Time of the Remainder, and therefore the Remainder is void. [l] So if the Heir endows his Mother, the Remainder in Fee, this Remainder is void, although Livery and Seizin be made to the Woman, becauſe the Dower has Relation to the Death of the Huſband; and therefore inaſmuch as the Eſtate precedent was not made when the Remainder was appointed, the Remainder is void. And as to the ſecond Point, the Eſtate precedent ought to *continue* when the Remainder veſts. [m] And therefore *Frowick* is of opinion in 21. *H.* 7. that if one makes a Leaſe for Life upon Condition that if he do not ſuch an Act his Eſtate ſhall ceaſe, and that then it ſhall remain over in Fee, this Remainder is void; becauſe it does not veſt during the Eſtate precedent, for by the Ceſſer the firſt Eſtate is determined. [n] So if a man makes a Leaſe for Life, and that a Day after the Death of the Tenant for Life it ſhall remain over, this Remainder is void, becauſe the firſt Eſtate is determined before the Appointment of the Remainder. And as to the third Point, that the Remainder ought to paſs out of the Leſſor at the Time of the Livery made, or elſe it ſhall be void, this is proved by the Caſes before put: And alſo in the common Caſe, [o] where a Leaſe is made for Life, Remainder to the right Heirs of *J. S.* who is then alive, this Remainder paſſes out of the Leſſor preſently, although it does not veſt preſently. And ſo in all Caſes the Remainder ought to paſs out of the Perſon of the Leſſor at the Time of the particular Eſtate made. But in our Caſe the Eſtate precedent was made long before the Remainder, and therefore the Remainder ſhall be void, as in the other Caſes before; and alſo the Remainder was not out of the Leſſor at the Time of the Livery, but it was appointed to paſs upon the Performance of a Condition, for the Words are, "that if the Son "in the Remainder die, then it ſhall remain to the Defendant; *&c.*" and this Word, *(then)* is a Relative, and has its Antecedent, which is to be tried by the Queſtion, *when*; as if it be demanded, when he ſhall have the Remainder, it is to be anſwered, when *William* is dead; then he ſhall have it, and not before. So that the Remainder did not paſs preſently, inaſmuch as the Condition precedes the Remainder. [p] And therefore in 15. *H.* 7. in the firſt Caſe, a Diverſity is held in a Writ of Annuity, that if I grant to one, that when he ſhall be promoted to a Benefice he ſhall have an Annuity, there if he demand the Annuity he ought firſt to ſhew that he is promoted to a Benefice; but if an Annuity is granted to one until he be promoted to a Benefice, there he ſhall have a Writ of Annuity, and need not ſhew that he is not yet promoted, becauſe the Annuity precedes, and the Promotion is ſubſequent and goes in Deſeaſance of the Annuity,

[a] M. 18. H. 8. 3. b. *arguendo.*
[b] M. 18. H. 8. 3. b. *arguendo.* 1. Co. 86. b. *Per Walmeſley, J.*
[c] M. 27. H. 8. 24. a. *Per Fitzherbert.*
[d] Since the Stat. of *Uſes*, Livery and Seizin is not ſo frequent as formerly; neither can Eſtates be created now by Livery and Seizin only without Writing, ſince the Statute of 29. *Car.* 2. *cap.* 3.
[e] This Ceremony is taken away by Statute of 4. *Ann. cap.* 16.
[f] Co. Litt. 49. a. 143. a. Dr. & Stud. lib. 2. cap. 20. 2. Rol. Abr. 415. C. pl. 1. Vaugh. 269. 1. Finch. 102. 2. Finch. 113. T. Jones, 124. *arguendo.* Noy's Max. 31. 123.
[g] 8. Co. 75. a. Vin. Abr. tit. Remainder, W. pl. 7. in Marg.
[h] Co. Litt. 378. a. Cro. Eliz. 360. Noy's Max. 123.
[i] Dr. & Stud. l. 2. c. 20. Bro. Done. 45. Eſtates 80. Vin. Abr. tit. Remainder, C. pl. 1. in Marg.
[k] Vin. Abr. tit. Remainder, C. 4. pl. 7. 1. Finch. 20. 2. Finch. 13. Vin. Abr. tit. Remainder. C. 4. pl. 8.
[l] M. 21. H. 7. 12. a. *in fine Caſus*, Poſt 155. *Per A. Brown.* T. Raym. 144. S. P. cited *arguendo*, and ſaid to be good Law, Vin. Abr. tit. Remainder, T. pl. 7.
[m] 11. 32. H. 6. Fitz. Feoffments, 99. P. 11. R. 2. Fitz. Detinue, 46. T. 9. H. 6. 24. 2. *Per Martin.* H. 2. H. 7. 13. b. *Per Keble*, Bro. Done 22. Grants 151. T. 12. H. 7. 27. b. *Per Kingſm.* Bro. Done. 25. 2 Rol. Abr. 415. D. pl. 3. Perk. § 52 87. 708. 2. And. 37. Co. Litt. 343. a. b. 378. a. Poſt 27. 28. 554. 556. 563. 2. Co. 51. b. 3. Co. 20. a. 10. Co. 50. b. Poph. 82. Winch. 55. Hob. 33. T. Raym. 144. Noy's Max. 124. Cont. 11. H. 4. 74.
[n] 2. And. 37. Co. Litt. 343. a. b. 378. a. Poſt 27. 28. 554. 556. 563. 2. Co. 51. b. 3. Co. 20. a. 10. Co. 50. b. Poph. 82. Winch. 55. Hob. 33. T. Raym. 144. Noy's Max. 124. Cont. 11. H. 4. 74.
[o] Same Diverſity, H. 15. H. 7. 1. pl. 1. Bro. Annuity, 22. Count. 43. Poſt. 32. *Per Hinde*, J. Doc. Pla. 85. 91, 92. 7. Co. 10. b. 2. Brownl. 98. Hardr. 9. 10. 82. Cro. Car. 108. Wing. M. 2. Reg. 168. pl. 2.
[p] Same Diverſity, H. 15. H. 7. 1. pl. 1. Bro. Annuity, 22. Count. 43. Poſt. 32. *Per Hinde*, J. Doc. Pla. 85. 91, 92. 7. Co. 10. b. 2. Brownl. 98. Hardr. 9. 10. 82. Cro. Car. 108. Wing. M. 2. Reg. 168. pl. 2.

nuity, and therefore ought to be ſhewn on the contrary Side. [a] And in 7. *Ed.* 3. a Man made a Leaſe for 8 Years rendering 100 *s.* Rent yearly, and if the Leſſee would hold the Land over the Term to him and to his Heirs for ever, that then he ſhould pay yearly 20 *l.* and within the 8 Years the Leſſor brought an Action of Debt for the 100 *s.* and it was held maintainable; which proves that the Fee did not paſs preſently, becauſe the Condition precedes the Fee, *viz.* if he will hold over, *&c.* and he had not determined his Pleaſure then, for if the Fee had paſſed preſently, the Action would not lie, for then the Rent ſhould not be a Chattle. [a] And in *Pleſington's* Caſe in 6. *R.* 2. where a Leaſe for Years was made to two, upon Condition that if the Leſſor die within the Term, or grant the Reverſion, that then the Termors ſhould have Freehold; there it is held that inaſmuch as the Condition precedes the Freehold, the Freehold is not out of the Leſſor preſently, and thereupon one of the Termors attorned as Termor for Years, ſaving his Advantage. Which Caſes prove that in our Caſe the Remainder did not paſs out of the Leſſor at the Time of the Livery, inaſmuch as the Condition precedes the Remainder; and they alſo prove that the Remainder commences upon Condition, and that the Remainder is appointed to commence after the Commencement of the particular Eſtate, which is contrary to the Rule of Law; and therefore for this and the ſaid other Cauſes the Remainder ſhall be void. And ſo the Plaintiff ſhall recover for the Inſufficiency of the Matter, as well as of the Form of the Bar.

Cook Serjeant to the contrary. As to the two Exceptions, which have been moved, *viz.* that the Plea is not good, becauſe he has not ſhewn that he has been reſident all the Time ſince the Remainder fell, neither has ſhewn what Day he entered; Sir, as to this it ſeems to me that it ſhall be taken that he entered immediately after the Death of the Huſband and Wife, and that he has been reſident all the Time ſince, for the Defendant has pleaded by Way of Bar, [b] and if the Bar has Matter of Subſtance, and is certain to a common Intent, it is ſufficient, although it is not certain to every ſpecial Intent. [c] And therefore in the ſaid Caſe of 33. *H.* 6. put by my Brother *Pollard fo.* 24. where the Defendant pleaded that the Teſtator made the Plaintiff and one *R.* his Executors, Judgment, *&c.* the Plea was good without ſhewing that this was after the Time that he made the Plaintiff ſole Executor, for it ſhall be ſo intended. So that if the Defendant's Plea be certain to a common Intent it is ſufficient. [d] So if the Defendant in Treſpaſs ſays, that the Place where, *&c.* is his Freehold, the Plea is good, and yet it may be that the Plaintiff has an Eſtate for Years, or ſome ſpecial Eſtate which may ſtand with his Bar, and that the Plaintiff may puniſh the Defendant; but ſuch ſpecial Matter ſhall not be intended, and therefore the Bar ſhall be good, becauſe it is good to a common Intent. [e] And ſo in 6. *Ed.* 4. in Debt upon an Obligation upon Condition indorſed for the Performance of all the Covenants contained in an Indenture, the Defendant ſaid that in the Indenture it was compriſed that the Defendant ſhould bring one to be an Apprentice to the Plaintiff in the Art *de Tuma fila*, and alſo that he ſhould inform another in the ſaid Art, and then the Obligation to be void, and he ſaid that he had performed them, upon which they were at Iſſue, and a Verdict for the Plaintiff, and it was moved in Arreſt of Judgment, that the Plea was not good, becauſe the Condition was that the Defendant ſhould perform all the Covenants in the Indenture, and he did not ſay in his Plea [f] that the ſaid two Covenants were all, ſo that he did not alledge Performance of all the Covenants, for which Reaſon his Plea was not good; but yet all the Juſtices held the Plea good, for that when the Defendant alledged the two Covenants in the Indenture, it ſhall not be taken by common Intent that there were more Covenants than thoſe, except the Plaintiff ſhews the contrary on his Part; and becauſe the Bar was good to a common Intent, the Plea was held to be good. [g] So in a Formedon *ne dona pas* is *primâ facie* a good Bar, and yet it may be that the Land was recovered in Value, in which Caſe the Plea is not proper, for other Land was given, and yet the Demandant ſhall there recover; but inaſmuch as it ſhall be intended a general Gift, the Plea ſhall be good. And ſo a Bar which anſwers a common Intent is good, although it does not anſwer every ſpecial Intent. [h] And in 3. *H.* 6. in Debt againſt Executors, who pleaded that they had fully adminiſtred the Goods of the Deceaſed the Day of the Writ purchaſed, and ſo nothing in their Hands, the Plea was good; and yet it is not good to every ſpecial Intent, for it may be (as the Caſe there was) that other Goods, which did not belong to the Teſtator the Day of his Death, are come into their Hands in Lieu of the other Goods, but yet the Bar was there held good, becauſe it anſwered a common Intent. [i] So in Aſſize if the Tenant pleads in Bar a Recovery in Aſſize heretofore againſt a Stranger, and that the Eſtate of the Plaintiff was Meſne between the Diſſeizin and the Recovery, the Plea is good, and yet it may be that the Plaintiff now in the Aſſize was in by Deſcent, or has a meſne Title, which ſhall take away the Aſſize of the other, and ſhall not be avoided by the ſaid Recovery; but this ſhall not be intended without being ſhewn, for which Reaſon the other Plea which is good to a common Intent ſhall ſtand. [k] So if one pleads in Bar that his Father was ſeized, and died ſeized, and the Land deſcended to him as Son and Heir, and he entered, *&c.* this is a good Bar, and yet it is not certain to every Intent, for it may be that a Stranger abated and died ſeized, in which Caſe the Entry of the Heir is not lawful: but this ſhall not be intended without being ſpecially ſhewn, and therefore the Bar, which anſwers every common Intent, is good. [l] So in our Caſe the Bar ſhall be good, becauſe by common Intendment it ſhall be taken that the Entry was immediately after the Remainder fell, and if it was not ſo the Plaintiff ought to have ſhewn it, for we by way of Bar ſhall not be compelled to ſhew the Certainty of the Time; but when the Thing commences in reſpect of Time, then the Certainty of the Time ought to be ſhewn. [m] As if one retains another to ſerve him a Year for 20 *s.* Wages, there if the Servant demands the 20 *s.* he ought to ſhew that the Time is paſſed, *viz.* that the Year is expired, and he ought to plead it certainly, becauſe his Action is given in reſpect of the Year paſſed, and of a Thing done in Time, and the Time is Parcel of the Cauſe of the Demand, and precedes the Demand. But here the Time purſues the Demand, and is not the Cauſe of the Demand, and therefore we ought not to ſhew it as certainly as where the Time gains the Thing, for here it goes

4 H. 7. Ed. 3. 10. pl. 20. Fitz. Debt. 187. 1. Rol. Abr. 595. pl. 6. Perk. §. 710. Co. Litt. 217. a. Poſt 272. *Per Al. Brown*, J.

a 6. R. 2. Fitz. Joris clamat. 20. Bellew's Caſ. 45. 102, 103. Perk. §. 729. 1. And. 316. Poſt 482. *Per Mead.* See Vin. Abr. tit. Condition, B. a. pl. 3.

E contra for the Defendant.

b M. 31. H. 8. 9. b. *Per Forteſcue*, Bro. Bar. 101. T. 9. Ed. 4. 12. a. *Per Moile*, Bro. ibid. 42. H. 21. Ed. 4. 83. a. *Per Brigg.* Bro. ibid. 89. H. 8. H. 7. 9. b. *Per Brian.* Doc. Pla. 58. Co. Litt. 303. a. 5. Co. 122. a. 8. Co. 57. a. 2. Bulſt. 77. Litt. R. 71. 79. 1. Finch. 38. 2. Finch. 54. Ld. Raym. 318. Bac. Max. reg. 3. Heath's Max. 3. 33. Touch. of Preced. 192. Poſt 28. 33. 56. 432.

c Heath's Max. 54, 55.

d T. 18. H. 7. 25. *Per Kable.* Heath's Max. 55.

e M. 6. Ed. 4. 2. Fitz. Bar. 89. Bro. Condition, 144. Heath's Max. 55.

f Dyer. 27. pl. 176. Sed vide ibid. 28. pl. 184.

g M. 3. H. 6. 4. b. *Per Martin.* Fitz. Iſſue, 42. Poſt 31. *Per Hales*, J.

h M. 3. H. 6. 3. pl. 4. Fitz. Iſſue, 42. Poſt 31. *Per Hales*, J. *Contra* P. 7. H. 4. 28. a.

i M. 21. H. 6. 27. a. *Per Newton, quod fuit conceſſum.* Fitz. Aſſiſe, 37. Bro. Bar. 26. Kelw. 108. b.

k Poſt 33. *Per Mountague*, C. J.

l Heath's Max. 56. Wing. Max. reg. 168. pl. 3.

m M. 26. H. 7. 12. a. *Per Rede.* 1. Rol. Rep. 410. *Per Dodder.* Wing. Max. reg. 21. pl. 29. Vin. Abr. tit. Contract. K. pl. 13.

goes in Defeaſance of the Thing, and therefore the Bar is good, notwithſtanding the ſaid two Exceptions. Further it ſeems to me, that the Remainder here is good, for firſt there is an Eſtate upon which the Remainder may be built, and the Remainder is here appointed upon it. But the Cauſe why the Remainder ſhall not be good is alledged in two grand Points, *viz.* becauſe the Fee does not paſs preſently out of the Leſſor, and alſo becauſe the Remainder may not paſs upon Condition. And it ſeems to me that the Remainder paſſes out of the Leſſor preſently, as in *Littleton*'s Caſe, *viz.* [a] if one makes a Leaſe for 5 Years, upon Condition that if he pay to him 20 *l.* within the firſt two Years, that then he ſhall have Fee, the Fee paſſes out of the Leſſor preſently. [b] So where a Leaſe is made for Life, the Remainder to the right Heirs of *J. S.* who is alive, the Remainder is out of the Leſſor preſently, altho' it may not veſt preſently. So ſhall it be here. And, Sir, a Remainder may well commence upon Condition: [c] As if a Leaſe is made for Life, upon Condition that if *J. S.* marry my Daughter during the Eſtate for Life it ſhall remain to him, this is a good Remainder, and yet it commences upon a Condition, for here there is an Eſtate upon which the Remainder may be built: And as well as I might have given it to him immediately, ſo may I give it him by meſne Diſtance of Time, and upon Condition, for that which I may give without Condition, I may give upon Condition. [d] And in 34. *Ed.* 3. the Caſe is that one deviſed Land deviſable for Life upon Condition that if his Heir, to whom the Reverſion deſcended, diſturbed the Tenant for Life, or the Executors of their Adminiſtration, that then the Land ſhould remain to the Daughter of the Deviſor and to her Heirs, and he died, and the Tenant for Life died, and the Son of the Daughter brought a *Formedon* in Remainder againſt the Heir of the Deviſor, and alledged that he diſturbed the Tenant for Life, and the Executors alſo; and there the Tenant traverſed that he did not diſturb the Tenant for Life, nor the Executors, and upon this Iſſue was joined, which ſhould not have been ſo, if the Remainder had not been good: which Caſe proves that a Remainder may well be upon Condition. [e] And if one makes a Diſſeizin to the Uſe of a Stranger, and the Stranger afterwards agrees to it, he ſhall have the Land thereby. And if a Freehold may be transferred from one to another by ſuch Aſſent, *à multo fortiore* may it be transferred from one to another upon Condition, and eſpecially where there is an Eſtate of Freehold precedent to which the Condition may be annexed. And therefore for theſe Cauſes it ſeems to me that the Remainder is good.

[a] Litt. § 350.

[b] See ante 25. (e). and the Books there cited.

[c] Poſt 34.

[d] H. 34. Ed. 3. Fitz. Formedon. 68. Bro. 70. *in fine.*

[e] M. 18. Ed. 4. 12. *Per Cateſby.* P. 12. Ed. 4. 9. Fitz. Diſſeizin. 3. Bro. 66. Agreement, 4. Dal. 92. Poſt. 32.

Morgan Serjeant to the contrary. The Pleading is not good, becauſe he does not ſhew the Time of the Death of *William*, and of the Huſband and Wife. But I will not dwell long upon this, for there is another Blemiſh and Wound in the Pleading which is incurable, and that is, becauſe he has not ſhewn the Day of his Entry; for here the Condition is, *ſi ipſe vellet inhabitare, &c. durante termino ſuperius expreſſo:* which is for the whole * Term, *viz.* from the Beginning to the End; and then inaſmuch as he ought to dwell there all the Time, the Time is Parcel of the Matter, which ought to be ſhewn, for it is Part of the Subſtance of the Bar: And then although a Bar may be good to a common Intent, yet it ſhall not be good, † where Part of the Subſtance is omitted; but where ſuch Things are omitted, which by ſpecial Intendment, and not by general Intendment are omitted, the Law warrants ſuch Bar. [f] As if a Man pleads a Feoffment in Bar, this ſhall be intended good to common Intent, and yet it may be that the Feoffor was within Age, or in Priſon: But ſuch ſpecial Things ſhall not be intended by the Law, unleſs they be ſhewn. But if one is bound in an Obligation to infeoff another between the Date of the Obligation and the Feaſt of *St. Michael* next enſuing, there if an Action is ſued upon the Obligation, it is no Plea to ſay that he infeoffed him, but he ought to ſhew the certain Day, for the Time is Part of the Subſtance of the Bar, and if this be omitted, it ſhall never be ſupplied by Intendment; and alſo the Plea ſhould not be good, if he had ſaid that he infeoffed him before the Feaſt of *St. Michael*, without ſhewing the Day certain, in reſpect of the Knowledge of the Jurors if Iſſue ſhould be joined upon it. [g] So if one pleads in Bar that he was Lord, and an Alienation was made in Mortmain, and he entered, this is not a good Bar, for it ſhall not be intended that he entered within the Year, if it be not ſhewn, for there the Time is Part of the Subſtance of the Bar; and it ſhould not be a good Plea there to ſay, that he entered within the Year, without ſhewing the Day certain, for the Knowledge of the Jurors. [h] And I was of Counſel in the *King's Bench* in a Bill of Covenant brought by the Leſſee againſt the Leſſor, who had covenanted with him, that if he was lawfully ejected during the Term of any Part of the Land, he ſhould have as much other Land of the Leſſor during the ſame Term, and he ſhewed that he had been ejected of ſuch a Piece of Land, and did not ſay when, and it was holden that he ought to have ſhewn the Day certain, becauſe it was Matter of Subſtance. So in our Caſe the Time is Part of the Subſtance of the Bar, which ought to be certainly ſhewn, and foraſmuch as it is not, the Bar is not good. Further, there are two principal Things from whence Arguments may be drawn, that is to ſay, our Maxims, and Reaſon, which is the Mother [i] of all Laws. But Maxims are the Foundations of the Law, and the Concluſions of Reaſon, and therefore they ought not to be [k] impugned, but always to be admitted; yet theſe Maxims may by the Help of Reaſon, be [l] compared together, and ſet one againſt another, (although they do not vary) where it may be diſtinguiſhed by Reaſon that a Thing is nearer to one Maxim than to another, or placed between two Maxims, nevertheleſs they ought never to be impeached or impugned, but always be obſerved and held as firm Principles and Authorities of themſelves. And there is a Maxim, that when a Remainder is appointed to one, he to whom it is appointed ought at that time to be a Perſon able, and to have Capacity to take the Remainder, or elſe it ſhall be void. [m] As if a Leaſe is made to one for Life, the Remainder to *J. S.* in Fee, who is then a Monk profeſſed, and afterwards he is deraigned, and after that the Tenant for Life dies, *J. S.* ſhall not have the Remainder, becauſe he was not a Perſon able at the Time of the Remainder appointed to take it. [n] So if a Leaſe is made for Life, the Remainder to the Mayor and Commonalty of *D.* who have not then Capacity to purchaſe Lands, and afterwards they have Capacity to purchaſe, and after that the Tenant for Life dies, the Mayor and Commonalty ſhall not

[f] 2. Co. 51. a. Moor. 164. Winch. 55. 1. Rol. R. 254. *Per Coke.* Noy's Max. 126.

[g] H. 3. H. 7. 2. b. agreed. Bro. Pleadings, 69. Poſt. 33. *Per Mountague*, C. J. Doc. Pla. 87. Heath's Max. 55. Kitth. 456. 466.

[h] S. P. Heath's Max. 55.

[i] Dr. & Stud. l. 1. c. 2. 1. Finch. 4. 2. Finch. 4.

[k] Dr. & Stud. l. 1. c. 8. Noy's Max. 17. Co. Litt. 11. a. 67. a. 343. a.

[l] See 1. Finch. 56. 2. Finch. 70, 71. Many Caſes of this Nature there put.

[m] Noy's Max. 127.

not take the Remainder, *causâ qua supra*. [a] So if the Remainder is limited to him whom the Tenant for Life shall name, and afterwards he names one, he shall never have the Remainder, *causâ qua supra*. [b] But if the Remainder is limited to the right Heirs of *J. S.* who is then alive, and he dies, and afterwards the Tenant for Life dies, the right Heir of *J. S.* shall have it. And I have read in our Books two Causes thereof, one Cause is, for that it shall be intended, that *J. S.* is then dead, the other Cause is, for that the Law presumes that *J. S.* shall have an Heir whom it will appoint to take the Remainder *nolens volens*, so that in respect of the Certainty of an Heir, the Remainder shall be good; but where it stands indifferent whether he, to whom the Remainder is appointed, shall be a Person able or not, there the Remainder shall not be good. And there is another Maxim concerning Remainders, which my Brother *Pollard* has divided into divers Branches, but I shall only mention one of them, and that is, [c] that the Remainder ought to pass out of the Lessor at the Time of the Livery. And this *Littleton* saith in his Book in the Case of *Richil*, [d] where the Father made a Gift in Tail upon Condition, that if the Donee aliened, *&c.* then his Estate should cease, and should remain to another of his Sons; this Remainder he holds void for divers Causes, whereof one Cause was, for that it did not pass out of the Donor at the Time of the Livery, so that Remainders ought always to pass by the first Livery. And in the other Cases which I have put before of a Monk, or of a Corporation who have not Capacity, this Cause may also be assigned to make such Remainders void, for there it does not pass presently, and then it shall never pass: And so one Cause holds Place in both the Maxims. And it cannot be said but that it does not pass here at the Time of the Livery, for the Condition precedes the Commencement of the Remainder, *viz.* "if *William* die living the Husband and Wife, that then it shall remain to the Defendant," in which Case it is not in him before the Condition performed: And therefore it does not pass out of the Lessor at the Time of the Livery, for which Reason it shall be void. But if the Remainder had preceded, and the Condition been subsequent, then the Remainder should have been good, but otherwise it shall be void; wherefore, *&c.* And so it seems to me that the Plaintiff shall recover.

[a] Perkins, § 56. Vin. Abr. tit. Remainder, D. pl. 7.
[b] See ante 25. (°), and the Books there cited.
[c] Ante 25. Cro. Eliz. 360. *Cogan v. Cogan* adjudged *Per tot. Cur.*
[d] Litt. § 720. 1. Co. 131. b. 2. And. 138. Cro. Eliz. 360.

E contra for the Defendant. *Brook* Serjeant to the contrary. As to the Incertainty of the Time of the Entry, the Bar shall be taken in the best Sense for the Defendant, and that is, that he entered immediately; [e] and a Bar which is good to a common Intent is sufficient. [f] And therefore about 20. *Ed.* 3. it is held, that if one pleads in Bar that *J. S.* died seized, and *R. S.* entered as Son and Heir to him, whose Estate he hath, this shall be a good Bar, and yet it may be that he was not his Heir; for it is not expresly said that he is his Son and Heir, but that he entered as Son and Heir, and yet because it is pleaded by Way of Bar the best shall be intended for the Defendant. So is it here. And he argued further much to the same Effect with the Argument of *Cook*.

[e] See ante 26. (b) and the Books there cited.
[f] Heath's Max. 56. Wing. Max. 189. pl. 40.

On the same Side. *Saunders* Serjeant to the same Purpose. It seems that the Bar is good to prove the Condition fulfilled, although it is not certainly expressed that he entered immediately, and although the certain Day thereof is not mentioned for the Information of the Jurors; for a Plea in Bar is always made for two Purposes; one is, to force the Plaintiff to make a Replication; the other is, to compel the Plaintiff to come to Issue. And therefore it is not necessary to shew every Thing certainly in the Bar; for perhaps the Issue will not be joined upon the Bar but upon the Replication, for the Defendant is not compelled to force the Plaintiff to come to Issue presently; for which reason the Bar is good enough if it be certain to a common Intent. [g] And therefore in an Assize, if the Tenant pleads in Bar a Descent to the Plaintiff and two others, and that he has the Estate of one of them, it is good, and yet he might have it by Disseizin, in which Case he shall be also a Disseizor to the Plaintiff, for he may not be a Disseizor to the one without the other; or he might have it lawfully, and so it stands *in dubio*, but yet it shall be taken according to common Intent that he has it lawfully, and therefore the Plea in Bar shall be good. [h] And in 27. *Ass.* in an Assize brought by the Heir, the Tenant said, that the Father of the Plaintiff, being Tenant by the Curtesy, and now alive, leased his Estate to the Ancestor of the Tenant, who died seized of that Estate, after whose Death he was in as Son and Heir, and demanded Judgment if Assize, *&c.* and this was held a good Bar, and yet he did not say that he was the first who entered after the Death of his Father, and if he was not the first that entered he has no Title, for the Land [i] *occupanti conceditur* in such Case, and that is to him that first enters, which might be the Plaintiff, but yet the Bar was held good, for that to common Intent it shall be taken that the Tenant was the first who entered after the Death of his Father, and if he was not, the Plaintiff may and ought to shew it. So a Bar is sufficient if it be good to a common Intent. [k] And in Assize if the Tenant pleads that he recovered in a Formedon *in descender* against one, and that the Title of the Plaintiff is mesne between the Gift and the Recovery, this is a good Bar, as it is held in 21. *H.* 6. and yet it may be that the Plaintiff was disseized by the Donor, and that he entered pending the Formedon, in which Case his Entry was good, and then his Recovery false; but such special Matter shall not be intended, and if in truth it be so, the Plaintiff ought to shew it; but the Bar is good without shewing it, because it answers the common Intent. And so it is a Principle in Law, that a Bar is good if it is certain to a common Intent; which Principle they utterly deny, who argue that the Bar here is not good for the Incertainty of the Day of the Entry. So that although they commend the Maxims in Words, yet they deny them in Fact. Further, as touching the Remainder, it seems to be good; and as they, who have argued to the contrary, have denied the Principle in Pleading, so have they denied the Principle in the Matter, *viz.* that Livery of Seizin shall not be taken most strongly against him that makes it; whereas it has always been held as a Principle, that when a Man makes Livery of Seizin, his Livery shall be taken most strongly against himself, as it may be proved by divers Cases. [l] And therefore if one gives Land to a Man *et hæredibus*, it shall be a Fee-Simple to him, though *(suis)* be omitted; and yet he did not give him a Fee-Simple expresly, but inasmuch

[g] Heath's Max. 56.
[h] 27. Ass. 31. Fitz. Bar. 303. Bro Assize, 271. Wing. Max. reg. 189. pl. 40. Heath's Max. 56.
[i] Co. Litt. 41. b. Palm. 32. *Contra* 2. Rol. Rep. 123. *arguendo*.
[k] M. 21. H. 6. 27. b. *Per Markham*, to which *Ascue* and *Portington* seem to agree. Fitz. Assize 37. Bro. Bar. 26. Entry con. 34.
[l] P. 31. H. 8. Bro. Estates, 4. B. N. C. § 156. Co. Litt. 8. b.

inaſmuch as every Livery ſhall be taken moſt ſtrongly againſt him that makes it, for this Reaſon he ſhall have a Fee ſimple. [a] And in 18. *Ed.* 3. a Man made a Leaſe for Life, and after the Death of the Tenant for Life that the Lands *redibunt* to A. and B. in Fee, this is held a good Remainder, becauſe the Livery of every Man ſhall be taken moſt ſtrongly againſt himſelf. [b] And ſo if a Man makes a Leaſe for Life, the Remainder to the right Heirs of *J. S.* who is alive, this Remainder ſhall paſs out of the Leſſor preſently, and ſhall be in Abeyance rather than be void, or that the Leſſor ſhould take Benefit by it againſt his own Livery and Limitation. Which Caſe proves how ſtrongly the Law extends it againſt him that makes the Livery, and Limitation of the Eſtate, and yet the Law of its own Courſe oftentimes puts the Fee in Suſpence. But as *Bracton* ſays, *Modus et conventio vincunt legem*, the Manner and Form of the Gift alters the Law. [c] As if Houſes leaſed for Years be thrown down by the Violence of the Wind, the Law will excuſe the Leſſee in Waſte; but if he covenants to repair them, and to leave them in good Repair at the End of the Term, an Action of Covenant ſhall well lie againſt him for not repairing them, for his ſpecial Agreement alters the Law, and makes his Words to be taken moſt ſtrongly againſt himſelf. So that the Law interprets the Words and Actions of every Man moſt ſtrongly againſt himſelf. And then in our Caſe the Leſſor has made Livery and Seizin, and thereupon has annexed a Remainder to paſs upon a Condition firſt to be performed, and the Law ſays, that every Limitation of an Eſtate ſhall be taken moſt ſtrongly againſt him that appoints the ſame; from whence it follows that the Remainder ſhall be good. And although the Remainder does not paſs preſently to the Defendant, yet it has its Commencement upon the Livery, and ſhall have its Perfection upon the Performance of the Condition, and in the mean Time it ſhall be as a Thing ambiguous. And *Bracton* ſaith, *Terminus et feodum poſſunt ſimul incipere in unâ perſonâ, ſed non ſimul ſtabunt, et non paribus paſſibus incedant: ſed unus eorum ſtabit, et alter eorum erit in pendenti.* And therefore if I give Land to one upon Condition that if he marry my Daughter, that then he ſhall have the Land in Fee, he ſhall have it accordingly upon the Condition performed; for by the Livery it takes its Commencement, by the Performance of the Condition it takes its Perfection, and in the mean Time it is a Thing ambiguous. So if I make a Leaſe for Years upon Condition that one Month afterwards he ſhall have Fee, he ſhall have it after the Month accordingly, for the Thing ſhall paſs according to the Agreement moſt ſtrongly againſt the Donor. So ſhall it be where the Remainder is appointed to a Stranger, as if a Leaſe is made to two upon Condition, that if one die within ſeven Years, that then after the Death of the other it ſhall remain to a Stranger in Fee, this Remainder is good, for the Reaſon of the Condition to give the Eſtate to Privies or to a Stranger is all one, inaſmuch as there is an Eſtate firſt given, to which the Condition may be annexed, for the Livery and Limitation ſhall be taken moſt ſtrongly againſt him that makes it. And a Man ſhall have three Things by a Remainder, viz. firſt, he ſhall have the Remainder to veſt, ſecondly, Poſſeſſion in Law, and thirdly, Poſſeſſion in Deed, and if he to whom is is appointed be able to take it when the Poſſeſſion in Law is caſt, it is ſufficient. [d] And therefore it has been taken, that if Land is given to one, *et filio ſuo primogenito*, and he has no Son at the Time of the Gift, but afterwards he has a Son, this Son ſhall have the Land by Way of Remainder, and yet the Remainder was not out of the Leſſor, neither did it veſt at the Time of the Livery, but the Law conſtrues the Livery and Limitation moſt ſtrongly againſt the Leſſor: So that rather than the Remainder ſhall be void, it ſhall be *in pendenti*, as *Bracton* ſaith, as a meſne Thing performable by Poſſibility. And inaſmuch as the Son is able to take the Poſſeſſion in Law at the Time when it is caſt and fallen, the Remainder ſhall be good enough. [e] So in 39. *Aſs.* a Man gave Lands to Huſband and Wife, and to one Heir of their Bodies lawfully begotten, and to one Heir of the Body of that Heir only, and the Huſband and Wife had no Iſſue at that Time, but afterwards they had a Son, and they died, and the Donor entered, and the Son ouſted him, and the Donor brought Aſſize, and the Opinion of all the Juſtices there was, that the Plaintiff had no Cauſe to have Aſſize, but that the Son ought to have the Land, as a Remainder, as I take the Book, and not otherwiſe: and yet the Remainder did not paſs out of the Donor, nor veſt in the Son at the Time of the Livery, but inaſmuch as he was *in eſſe* at the Time of the Poſſeſſion in Law caſt it is ſufficient: For the Law continues the Livery and Limitation moſt ſtrongly againſt the Leſſor and Donor. [f] But if the Remainder is limited upon a Contrariety, then it ſhall not be good: as in *Richil's* Caſe in *Littleton*, for when he had made a Feoffment, it could not remain over: But the other Reaſon which *Littleton* aſſigns, viz. becauſe it did not veſt at the Time of the Livery, is no Reaſon, as it is proved by the Caſes before put. [g] And if Land be given to a Man and to his Heirs, as long as *J. S.* ſhall have Heirs of his Body, and if *J. S.* die without Heir of his Body, that then it ſhall remain to another in Fee, this Remainder is void for the Contrariety, for the firſt Eſtate was a Fee ſimple determinable, upon which a Remainder may not depend. [h] And ſo if a Leaſe for Life is made upon Condition that if a Stranger pay to the Leſſor 20 *l.* then immediately the Land ſhall remain to the ſame Stranger, this Remainder is void for the Contrariety, for the Tenant for Life ought to have it during his Life, and during that Time the Stranger cannot have it; but if it had been limited, that after the Death of the Tenant for Life it ſhould remain to the Stranger, this had been a good Remainder, for there is no Contrariety. So here it is appointed, that if *William* die living the Huſband and Wife, that then it ſhall remain to the Defendant, this is not to be intended that the Defendant ſhall have the Land immediately living the Huſband and Wife, but that it ſhall remain as a Remainder ought to do, viz. after the Death of the Huſband and Wife, in the ſame Manner and Form as *William* ſhould have had it; for which Reaſon there is not any Contrariety here, and therefore the Remainder is good. And as to the Condition which is ſubſequent, viz. *ſi ipſe vellet inhabitare, &c.* it ſeems that if he inhabit and be reſident once in the *Grange*, he has performed the Condition, for the Condition does not appoint any Time for his Reſidence, and therefore inaſmuch as it is referred to the Law, the Rule of Law before mentioned

[a] T. 18. Ed. 3. 28. Fitz. Feoff. 61. Bro. Done. 36. Hob. 282. 1. Rol. Rep. 319. Poſt. 179. 542. Sed *contra* 2. Rol. Abr. 416. E.

[b] See Ante 25. (o) and the Books there cited.

[c] H. 40. Ed. 3. 5. b. Fitz. Covenant 16. Bro. 4. Waſt 19. H. 49. Ed. 3. 1. pl. 1. Bro. Waſt. 54. Dr. & Stud. lib. 2. cap. 4. Perk. § 738. 1. Finch. 46. 2. Finch. 64. Noy's Max. 16. Allen 27. *Per Cur.* Lit. R. 89. Palm. 549.

[d] 2. Leon. 15. *Per Mounſon. J.* Palm. 34. *Per Haughton.* Acc. but the better Opinions ſeem to the contrary, as it has been often adjudged, P. 17. Ed. 3. 29. pl. 30. H. 18. Ed. 3. 59. pl. 91. Fitz. Feoffments 60. 2. Rol. Abr. 417. pl. 8. Dal. 93. *arguendo.* 1. Co. 100. b. Cro. Eliz. 121. *Stevens v. Lawton* adjudged: Ibid. 334. *Per Walmſley. J.* 1. Leon. 213. *arguendo.* For if the Son had been in *eſſe* at the Time, he ſhould have taken jointly, and as he was incapable of that he ſhall not have any Eſtate,

[e] 39. Aſs. pl. 20. Fitz. Tail 19. Bro. 23. Eſtates 38. Dal. 93. *arguendo.* Palm. 33. agree that he ſhall take it as a Remainder. See Co. Lit. 22. a.

[f] Wing. Max. reg. 167. pl. 42.

[g] M. 18. H. 8. 3. b. *arguendo.* Co. Litt. 18. a. 10. Co. 97. b. *Per Reporter.* Palm. 138. 2. Rol. Rep. 220. *Per Cur.* 1. Rol. Rep. 333. *Per Dodder J.* 357. *arguendo.* 1. Finch. 102. 2. Finch. 112, 113. Vaugh. 269. the C. J. ſeems to make a Doubt of this Caſe. And ſee 2. Leon. 114. *Per Coke*, Common Experience is that upon a Fee ſimple determinable another Fee-ſimple may be limited; which *Gawdy J.* granted. But in caſe of a Deviſe, the Limitation in the Caſe here would be good, tho' not as a Remainder, yet as an executory Deviſe, *per Vaugh.* C. J. Vaugh. 270.

[h] Wing. Max. reg. 167. pl. 43. Vin. Abr. tit. Remainder W. pl. 3.

conſtrues that the Words of the Condition ſhall be taken moſt ſtrongly againſt him that ſpeaks them, *viz.* the Leſſor. And therefore foraſmuch as the Condition has two Intendments, one whereof is, that he ſhall inhabit there all the Term, and the other, at any Time during his Life, it ſeems to me that the Condition ſhall be taken ſtrictly againſt the Leſſor, and in the beſt Senſe for the Leſſee, and that is, that if he inhabit there at any Time during his Life, he has performed the Condition. As if a Feoffment in Fee is made upon Condition to pay 20 *l.* to the Feoffor, and no Time is limited for it, he has all the Time during his Life to pay it. So if the Condition be to ſerve the Feoffor in ſuch an Office, and it is not ſaid when, if he does it at any Time during his Life he has performed the Condition. So is it in the principal Caſe; and this makes an End of the Exception moved with Regard to the Incertainty of the Time, for if he has Time during his whole Life, then his Entry immediately after the Remainder fell is not requiſite, for which Reaſon it ſeems to me that the Pleading is good, and that the Plaintiff ſhall be barred.

On the ſame ſide. And at another Day *Harris* Serjeant argued thus to the ſame Purpoſe. As to the Exceptions taken becauſe the Defendant has not ſhewn that he has been reſident all the Time ſince the Remainder fell, nor has ſhewn the Day of his Entry in certain for the Knowledge of the Jurors, Sir, I ſhall make one Anſwer to both theſe Exceptions: And that is, that the ſhewing of the Condition by the Defendant is Surpluſage, and not material, which may as well be omitted as ſhewn by him, for the Condition here is ſubſequent, and goes in Defeaſance of the Eſtate, which the Party who claims the Eſtate ſhall not ſhew, but the other who ſhall defeat the Eſtate. [a] And therefore there is a Diverſity when the Condition comes after the Eſtate, and defeats the Eſtate, and when it comes before the Eſtate, and makes the Eſtate to continue. For if I grant to a Man a Rent-Charge out of my Land upon Condition that he ſhall do ſuch an Act, there he ſhall avow for the Rent without ſhewing the Act done, for the Condition is ſubſequent, and goes in Defeaſance of the Eſtate, which he who will have the Eſtate to continue ſhall not ſhew; but if I grant to one, that if he do ſuch an Act, then he ſhall have a Rent-Charge, &c. there he ſhall not avow, except he firſt ſhew the Performance of the Condition, for it is that which enables him to have the Rent. [b] So in 14. *H.* 8. *Wheeler* granted his Term to one upon Condition that he ſhould obtain the good Will of the Leſſor, there it is agreed that the Term paſſed preſently, becauſe the Grant precedes, and the Condition is ſubſequent to the Grant: but if he had granted, that if he ſhould obtain the good Will of the Leſſor, then he ſhould have his Term, there he ought to ſhew the Performance of the Condition before he may enable himſelf to have the Term. So in our Caſe the Remainder precedes the Condition, and by his Entry he has agreed to the Remainder, and the Condition goes in Defeaſance of the Remainder, which ought to be ſhewn by him who ſhall take Advantage of the Condition, and that is the Plaintiff, and the Defendant's ſhewing of it is Surpluſage, and not material, and then the Incertainty of Surpluſage ſhall make no Plea bad, [c] inaſmuch as the Omiſſion of all that is Surpluſage ſhall not vitiate it. And ſo the Pleading is good, notwithſtanding the ſaid Exceptions. And he argued further that the Bar was good, becauſe it was certain to a common Intent. And he ſaid, that the Remainder was good, and that a Remainder, which commences upon Condition, ſhall be good: and he argued much to the ſame Effect that *Saunders* did.

Hales J. At another Day *Hales* Juſtice ſaid, It ſeems that for the Inſufficiency of the Pleading only the Plaintiff ſhall recover, *viz.* becauſe the Defendant has not averred his continual Reſidence ſince the Remainder fell. For in the firſt Place, where the Remainder is appointed to the Defendant, *ſi ipſe vellet inhabitare*, &c. it ſeems to me that this Word *(vellet)* is a Condition, and is all one as if it had been, *if he will inhabit*, &c. And if the Words had been *ſi ipſe habitabit* it had been a Condition. And ſo the Sentence *ſi ipſe vellet inhabitare* is to be taken in the future Tenſe, and is the ſame in Senſe with the Words *ſi ipſe inhabitabit*; and therefore the Sentence is conditional. And further, it ſeems to me that theſe Words *durante termino ſuperius expreſſo*, are to be intended during the *whole* [d] Term, that is, from the Beginning, *viz.* from the Time that the Remainder firſt fell, until the End thereof. [e] As if a Man makes a Leaſe for Years rendering 20 *s.* Rent during the Term, this is during the whole Term. So if the Leſſee covenants to maintain the Houſes in all Repairs during the Term, this ſhall be during the whole Term. And ſo it is taken in *Dockray*'s Caſe in 27. *H.* 8. [f] And if a Man is bound that his Feoffees ſhall make a Feoffment, hereby is underſtood all his Feoffees. [g] So that Conditions have always a reaſonable Conſtruction. And for the ſame Reaſon it ſhall be intended here that he ought to dwell upon the *Grange* during the whole Term, and not once during his Life, as it was argued at the Bar, for that would be contrary to Reaſon and the apparent Intent of the Leſſor. But if he does not inhabit all the Time upon the Land, but has been abſent for ſome reaſonable Cauſe, the Defendant ought to ſhew the ſame, and may excuſe himſelf for it. As if he was diſtant 200 Miles from the *Grange* at the Time of the Death of the Survivor of the Huſband and Wife, ſo that he could not have Notice of their Death until ſuch a Time, and he came immediately afterwards, &c. this ſhould excuſe him, and the Time thereof ſhould be tried by the Diſcretion of the Juſtices, as in another like Caſe, which is holden for Law in our Books, viz. [h] Tenant for Life makes a Leaſe for Years and dies, the Leſſor brings an Action of Treſpaſs againſt the Leſſee, who ſays, that as ſoon as he could after he had Notice of the Death of the Tenant for Life he drove his Cattle out of the Land, and alſo ſays, that the Treſpaſs was meſne between the Death of the Tenant for Life and the Driving, and this is held no Plea, for by the Death of the Tenant for Life the Leaſe for Years was [i] determined, and none was bound to give him Notice; and there it is held, that he ought to ſay, that ſuch a Day he drove out his Cattle, and he may ſhew that the Leſſor died in [k] another County, ſo that he could not have Notice ſooner, and it ſhall be tried by the Diſcretion of the Juſtices, whether the Avoidance was within a reaſonable Time. And ſo might the Defendant here alledge in Excuſe of his Entry, that the Place where the Survivor of the Huſband and Wife

[a] Same Diverſity 7. Co. 10. a. Poph. 28. Hardr. 9. 79. 1. Bulſt. 168. *Per Yelverton* J. 2. Brownl. 98. Doc. Pla. 91. Palm. 83. Ld. Raym. 421. Wing. Max. reg. 25. pl. 20. reg. 168. pl. 4. Poſt. 32.

[b] H. 14. H. 8. 17. pl. 6. Bro. Condition 67. Poph. 28. Lit. R. 219. Poſt. 482.

[c] Poſt. 32. 503. 6. Mod. 41. 8. Mod. 377, *Turner* v. *Moſs*.

[d] O. Bendl. 182. Palm. 482. 2. Bulſt. 136. *Per Coke* C. J. Ante 23. 27.

[e] T. 27. H. 8. 19. a. *Per Audley*. O. Bendl. 183.

[f] M. 21. H. 6, 10. pl. 22. Fitz. Bar. 154. Bro. Condition 56. Ante 23. Poſt. 34. 291. Perkins, § 790. 2. Bulſt. 178.

[g] Poſt. 34. *Per Mountague* C. J.

[h] M. 22. Ed. 4. 27. pl. 77. Bro. Treſpaſs 368. Notice 15. Palm. 73.

[i] 24. H. 8. Bro. Debt 123. Leaſes 19. B. N. C. § 54. Poſt. 264. *Per Dyer*. 1. Rol. Rep. 441. *arguendo*.

[k] Poſt. 272.

Wife

Wife died was 200 Miles diſtant, &c. and that he could not have Notice ſooner. And as there he ought to ſhew the Day of his Avoidance for the Knowledge of the Jurors, ſo here he ought to ſhew the Day of his Entry for the ſame Reaſon. And as to that which has been ſaid, that a Bar ſhall be good if it is certain to a common Intent, it is true, [a] but that common Intent is not ſuch an Intent as ſtands indifferent, but ſuch as hath a more vehement Preſumption than any other Intent. [b] As to plead *fully adminiſtred* all the Goods which were the Teſtator's the Day of his Death is a good Bar, and yet it may be that he has Aſſets in his Hands of other Goods, which never belonged to the Teſtator, as Debts paid ſince, or Goods which came in lieu, &c. But this is not the moſt common Intent; but the moſt common Intent is, that he had no other Goods but thoſe which were the Teſtator's. [c] So in a *Formedon* in Deſcender *ne dona pas* is a good Bar, notwithſtanding it may be that he has recovered in Value, in which Caſe other Lands were given, and yet the *Formedon* lies, but this ſhall not be intended, but the common Intent is to expreſs the plain Gift by Livery. [d] But if I plead in Bar a Leaſe *pur auter vie*, there the Bar is not good, without averring the Life of *Ceſtuy que vie*, for it ſtands indifferent whether he is alive or not, and the Intent one Way is as ſtrong as it is the other Way, for which Reaſon his Life ought to be expreſly averred. So in Debt upon an Obligation, if the Defendant pleads in Bar a Releaſe bearing Date after the Obligation made, this is not a good Bar, except he ſhews expreſly that it was delivered after the Obligation was made, and yet there *prima facie* one would preſume that it was delivered when it bore Date, but it may alſo be preſumed on the other Hand that the Party would not have brought an Action of Debt, if the Releaſe had been delivered afterwards. So that the Preſumption is equally ſtrong either Way, and becauſe the Intent ſtands indifferent, it is not good except it be ſhewn by the Plea that it was delivered after the Obligation was made. And ſo is the Diverſity in Pleas which are good to a common Intent. Then in the principal Caſe it is incertain and ſtands indifferent whether or no he has inhabited all the Time ſince the Remainder fell, and the Preſumption one Way is as ſtrong as it is the other, for which Reaſon it ſhall not be taken according to common Intent, and therefore the Plea in Bar is not good without ſhewing the Continuance of his Habitation ſince the Remainder fell; for the continual Reſidence makes the Continuance of his Eſtate, without which he cannot plead in Bar, and then inaſmuch as the ſame is effectual and material, the Defendant ought to ſhew it, which he has not done, and for this Reaſon the Plea in Bar is not good. Then as to the Matter in Law, it ſeems to me that the Remainder is good. [e] For God has committed all worldly Things to the Order and Diſpoſal of Men, ſo that when a Perſon has a lawful Property in any Thing, he may give or convey away the ſame, where, when, and how he pleaſes, ſo that his Intent be not againſt Law or Reaſon, nor repugnant in itſelf. And here when the Leſſor appoints the Remainder to the Defendant *ut ſupra*, his Intent may be perceived herein, and it is reaſonable that the ſame ſhould be fulfilled, *viz.* that the Defendant ſhould have it in ſuch Manner and Form as it is appointed. And this Limitation of the Remainder is not againſt Law, nor againſt any Principle thereof, as I ſhall prove hereafter, neither is it repugnant in itſelf, *ergo* it is good. And to prove that it is not againſt Law, I ſhall put ſome Caſes founded upon like Reaſon, and which will alſo anſwer the Reaſon of that which has been alledged, *viz.* that the Remainder ought to paſs out of the Leſſor preſently, which I utterly deny. And therefore if I make a Leaſe for Years, the Remainder for Life, upon Condition that if he in the Remainder do not ſuch an Act, the Remainder ſhall be void, now before the Condition be broken the Remainder is good, and in him to whom it is appointed, but if the Condition be broken, then the Remainder is out of him, and in the Perſon of the Leſſor again, which proves that a Freehold by Agreement had upon the Livery may be transferred from one to another by Matter *ex poſt facto*. So if one grants a Rent or Reverſion, and afterwards Attornment is had, now the Reverſion ſhall paſs thereby, and yet it did not paſs preſently by the Grant, which Caſe proves that upon the Aſſent firſt had, and Act done afterwards a Freehold may be deveſted out of one and veſted in another. [f] So if a Man makes a Leaſe for Life by Deed, the Remainder to the King, and makes Livery and Seizin, the Remainder does not paſs preſently, but if the Deed is afterwards enrolled, then the Remainder ſhall be in the King from the Time of the firſt Livery. So that by the Limitation declared upon the Livery, the Remainder which did not paſs out of the Leſſor at the Time of the Livery ſhall paſs by Act done afterwards. [g] So in 6. *R.* 2. in *Pleſington*'s Caſe one Condition was, that if the Leſſor died within the Term, then the Leſſee for Years ſhould have the Land for Life, and it is there held, that if the Leſſor died, his Eſtate ſhould be enlarged *cauſa qua ſupra*. [h] So if one makes a Diſſeizin to the Uſe of *J. S.* now the Freehold is not in *J. S.* but if *J. S.* afterwards agrees to it, then the Freehold is in him. Which Caſes prove that when Livery is made, or when a Man firſt meddles with the Poſſeſſion of Land, and thereupon Words are ſpoken, there by Force of ſuch Words, and of ſome Act afterwards done a Freehold may be transferred from one to another. So in the principal Caſe Livery is made, and thereupon the Leſſor hath declared and appointed, that if *William* die living the Huſband and Wife, then it ſhall remain to the Defendant, in which Caſe I will readily agree that the Remainder does not paſs out of the Leſſor until *William* is dead, and when he is dead, it ſhall well paſs by Force of the firſt Words annexed to the Livery. And the Reaſon of this, and of the other Caſes before put is all one, although they differ *in terminis*, and ſo like Reaſon makes like Law. [i] And alſo if a Woman is Tenant for Life, and Confirmation is made to her and to her Huſband, this ſhall enure as a Remainder to the Huſband, and yet it did not paſs out of the Leſſor at the Time of the firſt Eſtate. And to make a Difference where the Fee is appointed upon Condition to a Privy, and where to a Stranger, is but an idle and inſignificant Conceit. And, Sir, he that will argue that the Remainder ſhall be void, admits thereby that Words ſhall not be taken moſt ſtrongly againſt him that ſpeaks them, which is abſolutely contrary to the Rules of our Law, and therefore when the Law ſays, that every Man's Words and Actions ſhall be taken moſt ſtrongly againſt himſelf, it does

[a] Kitch. 452.

[b] M. 3. H. 6. 4. b. adjudged. Fitz. Iſſue 41. Ante 26. *Contra* P. 7. H. 4 39. a.

[c] M. 3. H. 6. 4. b. *Per Martin.* Fitz. Iſſue 41. Ante 26. *Per Cook.*

[d] T. 13. H. 8. 15. b. *Per Wilby.* T. 19. H. 6. 73. b. 74. a. Bro. Pleadings 24. Eſtates 18. P. 38. H. 6. 27. b. Bro. Pleading 57. M. 10. Ed. 4. 18. a. b. 26. H. 8. Bro. Pleading 147. Co. Lit. 303. b. Doc. Pla. 57. Hard. 80, 82.

[e] Wing. Max. reg. 22. pl. 4.

[f] T. 1. H. 7. 30. b. 31. a. *Per Collow et Brian.* Fitz. Feoffments 30. Hob. 222. 3. Co. 29. a.

[g] H. 6. R. 2. Fitz. quid. juris clam. 20 Bellew's C. 266.

[h] P. 12. Ed. 4. 12. pl. 23. Fitz. Diſſeizin 3. Bro. 66. Agreement 4. M. 18. Ed. 4. 12. b. *Per Cateſby.* Dal. 92. *arguendo.* Ante 8. 27.

[i] Litt. § 525. Cro. C. 478. *per Croke J.* 9. Co. 139. b. *arguendo.* Poſt. 160. Vin. Abr. tit. Remainder C. 4. pl. 9.

does at the ſame Time affirm the Remainder here to be good. And as to what has been ſaid, that it is the Nature of a Condition to give Benefit only to thoſe who are Privies, and here he in the Remainder was no Privy, *&c.* Sir, this is not ſo, for he is privy enough, for if the Leſſor had reſerved a Rent out of both Eſtates, the Remainder ſhould be charged with it, and he in the Remainder ſhall have an Action of Waſte, and ſo he is Privy to the Leſſor, and to the particular Eſtate alſo. And as to what has been ſaid touching the Words *if William die living the Huſband and Wife, then it ſhall remain to* the Defendant, which Word *(then)* ſhall be intended preſently during the Lives of the Huſband and Wife, ſo as to deſtroy their Eſtate; Sir, the Sentence is not to be ſo underſtood, [a] but it ſhall have a beneficial Conſtruction, *viz.* that then it ſhall remain as a Remainder ought to do, and that is, to veſt and to be executed after the Death of the Huſband and Wife. As if a Gift in Tail is made to one upon Condition that if he does ſuch an Act, then the Land ſhall remain to his right Heirs, this Word *(then)* is not ſo to be underſtood as to avoid the Eſtate Tail, and to be executed preſently upon the Performance of the Act, but it muſt be taken in this Manner, *viz.* that upon the Performance of the Act the Remainder ſhall veſt, and after the Eſtate ended it ſhall be executed. So ſhall it be underſtood here, and then there is no ſuch Repugnancy as hath been alledged, nor is there any Prejudice to a Stranger. But if any Prejudice ſhould ariſe to a Stranger thereby, then the Remainder ſhould not be good. [b] As if it was, that if *William* die, then the Defendant ſhould have the Land during the Lives of the Huſband and Wife, this ſhould be void in reſpect of the Prejudice to the particular Eſtate, for Things which are done in Prejudice of others ſhall be void. [c] As in the Caſe in 21. *Ed.* 4. where the King had granted to an Abbot that he ſhould not be Collector when any Tithe was granted *per Clerum Angliæ*, and the Clergy of the Province of *Canterbury* granted a Tithe to the King, with a *Proviſo*, that no Collector returned by the Biſhop ſhould be diſcharged by any Letters Patent of Exemption made by the King, and the Biſhop returned the ſaid Abbot to be Collector, and there it is held that this Grant made by the Clergy in this Point, *viz.* to charge Perſons exempted is void, becauſe it is prejudicial to others. And ſo the Remainder here ſhould be void, rather than a Stranger ſhould be prejudiced by it. But as I ſaid before, the Limitation of the Remainder is confirmed by the Law to take Effect in Execution after the firſt Eſtate ended, and not otherwiſe, and ſo no Prejudice ariſes to a Stranger. * And if the Remainder had been appointed to commence upon an Impoſſibility precedent, or upon a Thing againſt Law, or upon a Repugnancy, as in [d] *Pleſington*'s Caſe, there the Remainder ſhould be void, for ſuch a Condition ſhall always be void. And ſuch Conditions endorſed upon Obligations make the Obligations ſingle. [e] As if a Feoffment is made upon Condition that the Feoffee nor his Heirs ſhall not take the Profits of the Land, this is a void Condition, and the Feoffment is ſimple. So here if there had been any ſuch Contrariety or Repugnancy, I would readily acknowledge the Remainder to be void, but there is none; wherefore ſeeing it appears to be the Intent of the Leſſor, that the Defendant ſhould have the Term, it is reaſonable that he ſhould have it accordingly, and foraſmuch as neither his Intent nor the Limitation is againſt Law, nor repugnant, it follows that the Remainder is good. But for the Default before alledged in the Pleading the Plaintiff ought to recover.

Hinde Juſtice. It ſeems to me that the Plaintiff ſhall be barred. And as to that which was moved at the Bar, *viz.* that the Defendant ought to ſhew the Day on which *William* died, as alſo the Day on which the Survivor of the Huſband and Wife died, Sir, this [f] is not neceſſary, for it is not Matter of Subſtance, but only of Conveyance to the Execution of the Remainder; [g] And therefore a Man does not ſhew the Death of the particular Tenant in a *Formedon* in Reverter or Remainder, becauſe it is but Conveyance, and not traverſable nor iſſuable; for if the Plaintiff would traverſe the Death, and ſay that they are alive, thereby he would confeſs that he has no Title to the Land during their Lives, and ſo he would deſtroy his own Action; for which Cauſe it is not neceſſary to ſhew the Day; *quod fuit conceſſum* by all the other Juſtices who argued after him. And as to the other Exceptions, *viz.* becauſe he has not ſhewn his continual Reſidence ſince the Remainder fell, as well as the Day of his Entry, Sir, the Pleading is good notwithſtanding theſe Exceptions. [h] For the Condition that he ſhall be reſident is ſubſeqent to the Eſtate, and goes in Defeaſance of it, and ſhall be ſhewn by him who ſhall take Benefit by it. [i] For the Law will not force any Man to ſhew that which makes againſt him, and the Condition here makes againſt the Defendant, for which Reaſon he is not compelled by Law to ſhew it. [k] As if one grants to another an Annuity *pro conſilio impendendo*, the Grantee ſhall have a Writ of Annuity without ſhewing that he has given him Counſel, for the ſhewing thereof is not for his Benefit, and the Denial of Counſel goes in Defeaſance of the Annuity, which ought to be ſhewn by the Defendant, becauſe he ſhall have Benefit from the Defeaſance. [l] So in 15. *H.* 7. it is held if an Annuity be granted to a Man until he be promoted to a Benefice, he ſhall have a Writ of Annuity, without ſhewing that he is not advanced to a Benefice, for this goes in Defeaſance of the Annuity, which ought to be ſhewn by him that ſhall take Advantage of the Defeaſance; but it is there held, that if he had granted that if the Party ſhould do ſuch a Thing, then he ſhould have an Annuity, there he ought to ſhew the Performance of the Thing in his Count, in order to enable himſelf to have the Annuity, becauſe the Condition precedes the Eſtate and entitles him thereto, and ſo is the Diverſity. Here then the Law would not have compelled the Defendant to ſhew the Condition, and therefore the ſhewing of it is Surpluſage, and might have well been omitted. [m] And then the Incertainty of that which may well be omitted, and which is not material, ſhall not make the Plea bad, for it never was heard that the Incertainty and Imperfectneſs of Surpluſage makes any Plea vicious. For which Reaſon the Plea in Bar is good notwithſtanding the ſaid Exceptions. And as to the Matter itſelf, the Remainder is good. And with Regard to what has been ſaid to the contrary, *viz.* that the Remainder commences upon Condition, Sir, I deny that, for the Remainder is limited to the Defendant if *William* die living the Huſband and Wife, which is not a Condition, but a Limitation when the Remainder ſhall commence,

for

[a] Wing. Max. reg. 167. pl. 43. 188. pl. 8.

[b] Wing. Max. reg. 86. pl. 41.

[c] M. 21. Ed. 4. 44. by the better Opinion. Fitz. Grant. 29. Bro. Exemption 9.

[d] Vin. Abr. tit. Remainder W. pl. 4. S. P. 11. Mod. 120.

[d] H. 6. R. 2. Fitz. Condition 19. Stath. 15. Bellew's C. 101.

[e] H. 6. R. 2. *Per Clopton.* Fitz. Quid Juris Clam. 20. Bellew's C. 103. P. 21. H. 7. 24. b. *Per Fineux* C. J. Perk. §731. Co. Lit. 206. b. Godb. 299. 2. Rol. R. 303. 2. Brownl. 138. 1. Rol. Abr. 419. A. pl. 2. Cro. E. 35. 107. Vin. Abr. tit. Condition Z. pl. 29.

[f] Heath's Max. 65.

[g] Wing. Max. reg. 152. pl. 21.

[h] That the Words *Si ipſe vellet inhabitare* &c. in this Caſe are a Condition ſubſequent. See, S. P. cited accord. Lit. R. 258. *Per Hetley arguendo.* Cro. E. 360. *Per Walmeſley* J. Vin. Abr. tit. con-T. pl. 33. And Winch 116. *arguendo* cites it as agreed in the caſe of *Jennings v. Cowman* that theſe Words are a ſubſequent condition, becauſe it is a thing of continuance, which may be infringed and broke every year.

[i] *Regula.* 5. Co. 78. b. 7. Co. 10. a. Hardr. 80. Ld. Raym. 241. Touch. of Preced. 193.

[k] M. 39. H. 6. 27. a. *Per Priſot, quod curia conceſſit.* Bro. Annuity 28. H 9. Ed. 4. 48. a. *per Choke.* Bro. ibid. 23. H. 22. Ed. 4. 43. a. *Per Vaviſor*, Hob. 41. Hardr. 82. Doc. Pla. 90. Cro. E. 546.

[l] Same Diverſity H. 15 H. 7. 1. pl. 1. Bro. Annuity 22. Count 43. 7. Co. 10. a. Hardr. 9. 10. 82 1. Bulſt. 168. Doc. Pla. 91, 92. Palm. 83. 321. Ante 25.

[m] Ante 30. Poſt. 502. 6. Mod. 41. 8. Mod. 377, *Turner v. Moſs.*

[a] for no Words make a Condition, unleſs ſuch as reſtrain the Thing given, as upon Condition that he ſhall not do ſuch an Act, or the like; but here theſe Words limit the Time when the Remainder ſhall commence, and do not reſtrain the Thing given, and therefore may not be called a Condition, but rather a Limitation. * And if I make a Leaſe for Life upon Condition that if the Leſſee die I may enter, this is only a Limitation of the Time of my Entry, which is void, becauſe it is no more than the Law itſelf ſays, and it is no Condition, becauſe it does not reſtrain the Eſtate. So if I make a Leaſe for Life upon Condition that if the Leſſee does waſt, and I recover the Place waſted, I ſhall enter into it, this is no Condition, becauſe it is no more than the Law ſays; but if it was upon Condition that if I recover in Waſt any Parcel, that I ſhall enter into the whole Land, *&c.* this is a Condition for that Part in which no Waſt was done, for the Condition is reſtrictive, and goes in Defeaſance of that Part. And the Common Caſe of Fines are, where an Eſtate Tail is, that if it happen the Donee die without Iſſue, that then it ſhall remain to a Stranger, which is not a Condition, but a Limitation of the Time when the Remainder ſhall commence. So in the principal Caſe, it is but a Limitation and an Explanation of the Time when the Remainder ſhall commence; and I do not ſee any Cauſe or Reaſon why I may not make a Remainder to commence and veſt in the midſt of a particular Eſtate, as well as I may at the Beginning or End of a particular Eſtate, for there is no repugnancy, but that it may commence to veſt at any Time during the particular Eſtate; for when the Fee-Simple is in me, I may condition with it as I pleaſe, if it be not contrary to Law, which it is not in our's, or in ſuch like Caſes. But if I make a Leaſe for Life upon Condition that if *J. S.* pays me 20 *l.* then I ſhall enter upon the Tenant for Life, and then it ſhall remain, *&c.* this Remainder is void, becauſe by the Entry the firſt Livery is annulled and defeated; and then there is no particular Eſtate continuing whereupon the Remainder may depend: but here there is no ſuch Matter, for which Reaſon the Remainder ſeems to me to be good. And if it be a Condition, yet the Remainder may commence upon it well enough, ſeeing it is the Will of the Leſſor that it ſhould do ſo, wherefore it ſeems to me that the Plaintiff ſhall be barred.

[a] Vin. Abr. tit. Condition. H. pl. 13.

* So a Gift in Tail upon Condition that if the Donee die the Donor may enter, this is taken as a Limitation, *cauſâ eadem.* Moor, 292. Co. Litt. 224. b. Bac. Max. reg. 21. Wing. Max. reg. 65. pl. 13.

At another Day *Brown* Juſtice ſpoke to the ſame Purpoſe. And he argued that the Bar here was good to a common Intent, and that it ſhall be taken that he entered immediately after his Title accrued. And as to the Matter itſelf he argued that the Remainder ſhould be good upon Condition. And if it ſhould not be good upon Condition, he ſaid it ſhould be good to the Defendant as a Grant of the Reverſion; and therefore the Plaintiff ſhould be barred.

Brown J.

Mountague Chief Juſtice to the ſame Purpoſe: As to the Exception which has been taken, *viz.* that he has not ſhewn his Entry immediately, it ſeems to me that the Bar is to be ſo underſtod, for that is the moſt common Intent. [b] And if a Bar be good to the moſt common Intent, it is ſufficient. [c] As in Aſſize, if the Tenant pleads that his Father was ſeized, and died ſeized, after whoſe Death the Land deſcended to him as Son and Heir, and he entered, this is a good Bar, and yet it may be, and that conſiſtently with the Words of the Bar, that the Father of the Plaintiff abated after the Death of the Father of the Tenant, and died ſeized, and that the Plaintiff is in as Son and Heir, in which Caſe the Tenant may not enter, but this is not to be intended, but the moſt common Intent is, that the Tenant entered immediately after the Death of his Father; ſo ſhall it be here intended that he entered immediately after the Remainder fell. [d] And in 9 *Ed.* 4. in Debt againſt five Executors, at the Diſtreſs three of them made Default, and the other two appeared, and pleaded a Recovery againſt them two of 300 *l.* and that they had nothing in their Hands beſides: And Exception was taken to this Plea becauſe as there were five Executors, the two might have abated the firſt Suit, ſo that the Recovery was not duly had; but the Plea was held good, and the Recovery duly had, becauſe it might be that they two only then adminiſtred, in which Caſe the Action was duly brought againſt them two only, and foraſmuch as the moſt common Intent will ſay it was ſo, rather than that they would loſe the Advantage to have abated the Writ, the Plea in Bar was held good; and if it was not ſo, but that the others then adminiſtred with them, the Plaintiff ought to have ſhewn it; and ſo a Plea in Bar, which ſatisfies the common Intent, ſhall always be good. [e] And it is held in 21. *Ed.* 4. in a *Formedon* in Deſcender, that if the Tenant pleads a Releaſe of the Demandant without Warranty in Bar, the Plea is good, and yet it may be that the Releaſe was made by the Demandant in the Life of his Father, in which Caſe the Iſſue ſhall not be barred; but if it be ſo, the Demandant ought to ſhew it by way of Replication, or elſe it ſhall be taken that he made it after the Death of his Father. Wherefore a Bar that is certain to a common Intent is good. So in our Caſe it ſhall be intended that the Defendant entered immediately after the Death of the particular Tenants. But it is to be noted always for a general Rule, that if he who pleads in Bar is preſcribed to a certain Time he ought to ſhew the Day of his Act certainly; [f] as he who pleads in Bar by Entry for Mortmain ought to ſhew the certain Time of his Entry, ſo that it may appear to be within the Year. So if one juſtifies for common between *Lammas* and *Candlemas*, he ought to ſhew in certain the Time of his uſing it, ſo that it may appear to be done between that Time. And ſo he who juſtifies by Licence, by Warrant, or by Authority, ought always to ſhew the certain Time of his Juſtification. But he who pleads in the negative has no Need to plead certainly. [g] But he that pleads in Abatement of the Writ, or pleads a Plea after the laſt Continuance, ought to plead it certainly; and theſe are obſerved as Principles in our Law, and therefore I have ſhewn them briefly without multiplying Caſes upon them, becauſe they need not much Proof, being ſo well known. And further it ſeems to me here, that this is no Condition, for the Words are, *ſi ipſe vellet inhabitare, &c.* and this Word *(vellet)* is not conditional, but is of the ſame Effect as if it had been ſaid, *if he pleaſes*; and if it had been ſo expreſſed, then the Act would have been

Mountague C. J.

[b] See ante 26. (b) and the Books there cited.

[c] M. 21. H. 6. 17. Fitz. Aſſize. 37. Bro. Bar. 26. Ante 26.

[d] T. 9. Ed. 4. 12. Fitz. Executors. 34. Bro. 88. Heath's Max. 54. Touch of Preced. 192.

[e] H. 21. Ed. 4. 81. b. *Per Cateſby.* Bro. Formedon. 50. Heath's Max. 60.

[f] H. 3. H. 7. 2. Bro. Pleading 69. Ante 27. Doc. pla. 87. Heath's Max. 55 Kitch. 456 460.

[g] M. 7. H. 6. 17. a. *Per Chaund.* M. 32. H. 6. 12. a. *Per Cheke.* & 13. a. *Per Littleton.* Bro. Pleading, 155. M. 7. H. 7. 7. a. *Per Huſſey*, Co. Litt. 303. a. Doc. pla. 297. Poſt. 56.

been referred to his free Election and Choice to do it or not, without any Reſtraint or Prejudice; and if it is without Reſtraint or Prejudice, then it is quite contrary to the Nature of a Condition, which is always compulſive, and is attended with ſome Prejudice to the Party if it is not performed. And here in our Caſe the Act is referred to his Will and Election, ſo that he may either do it or not without being prejudiced by it, but on the contrary he ſhall receive Benefit from it in either Caſe, which is directly oppoſite to the Nature of a Condition, and therefore it cannot be a Condition; and if it is not a Condition, then the Want of ſhewing the Time of his Entry ſhall not make the Plea vicious, becauſe it is not material whether he is reſident or not. And ſuppoſe it was a Condition, yet it cannot be denied but that it is [a] ſubſequent to the Eſtate, and goes in Defeaſance thereof, and therefore the Party, who ought to have Benefit by the Breach of the Condition, ought to ſhew it. As if the Condition enlarges the Eſtate, then the Defendant ought to ſhew it, becauſe he takes Benefit by the Enlargement. But inaſmuch as the Condition goes in Defeaſance of it, he that ſhall take Benefit by the Defeaſance ought to ſhew it, and that is the Plaintiff; for which Reaſon the Defendant was not compellable to ſhew it, and although he has ſhewn it, and that imperfectly, when it might have been well omitted, yet that is not material, ſeeing it is but Surpluſage as hath been ſaid; wherefore this makes an end of all the Incertainty. And alſo if it was a Condition, yet the Plaintiff has not enabled himſelf to take Benefit of it, (for as hath been ſaid) [c] none but Privies ſhall take Benefit of a Condition by Entry, by the common Law. And now by the Statute of 32. *H.* 8. *cap.* 34. the Grantees and Patentees [d] of the King ſhall alſo take Advantage of Conditions. And here the Plaintiff has not conveyed to himſelf a Capacity to take Benefit of the Condition, as Privy, nor as Grantee or Patentee of the King, nor in any other Manner. For the Defendant has pleaded in Bar without acknowledging the Reverſion in the Plaintiff, and the Plaintiff has not made himſelf any Title to the Land, nor has he enabled himſelf any Way to take Advantage of the Condition, but he has demurred generally upon the Bar, in which Caſe he does not appear by the Record to be any other than a meer Stranger, and then he ſhall not take Benefit of the Condition, nor of the incertain Pleading thereof; for which Reaſon there ſeems to be no ſort of Colour for the Plaintiff to take Advantage of the Condition. And ſo the Pleading is not good to prove him able to take Benefit of the Condition, (if it had been a Condition, which it is not, as I have ſaid before). But if it was a Condition then I would readily admit that it ought to be taken according to the Intent of it, that he ſhould be reſident all the Term, *viz.* from the Beginning, which is, from the Time that the Remainder fell, until the Death of the Defendant. [e] As if I am bound to perform the Covenants in ſuch an Indenture, all the Covenants are underſtood thereby. [f] Or if I am bound that my Feoffees ſhall make an Eſtate, it is to be intended that all my Feoffees ſhall make it. [g] So that Conditions have a reaſonable Intendment; and if ſometimes he be abſent from thence, and his Family be there, this ſhall be a Performance of the Condition; for our Law conſtrues all Things with Reaſon. But (as it ſeems to me) it is no condition, and therefore he is not forced to ſhew the certain Time of his Entry, nor that he has been always reſident; and if it is a Condition, yet it is ſubſequent, and the Incertainty is not material, and alſo the Plaintiff is not enabled as Privy or otherwiſe to take Benefit of it, for which Reaſon the Plea in Bar is good enough. And further the Remainder ſeems to be good, for in the firſt Place it appears to me that there is not any Condition here whereupon the Remainder depends, but that it is a Limitation and an Appointment of the Time when the Remainder ſhall veſt, and in this Point I agree in Opinion with my Brother *Hinde*. But even admitting it to be a Condition, or call it a Limitation, or give it what other Term you pleaſe, yet it ſeems to me that the Remainder is good; for every Man who is lawful Owner of any Land, may give it to what Perſon, in what manner, and at what Time he pleaſes, ſo that his Gift be not contrary to Law, nor repugnant. And here it ſeems to me that the Form of his Gift is not contrary to Law. [h] And therefore in 10. *Ed.* 3. a Man made a Leaſe for Years to *J. S.* and in Surety of his Term he made him a Charter of Feoffment upon Condition that if the Leſſee was diſturbed within the Term, that then he ſhould hold the Tenements to him and to his Heirs, and *J. S.* was diſturbed, and afterwards ouſted, and he brought an Aſſize, and it was awarded that he ſhould recover; which proves that a Freehold may paſs by a Conditon well enough, where the Condition was expreſſed at the Time of the Livery. And by the Reaſon of this Caſe a Man may make as many Remainders as he will to commence upon the like Condition, and although in the one Caſe he is immediately privy, and not in the other Caſe, this is no Matter to ſtay the Remainder, for his Livery ſhall be taken moſt ſtrongly againſt himſelf. And when I was at the Bar, I was of Counſel with one Mr. [i] *Melton*, and the Caſe was thus, that a Fine was levied *ſur grant & render*, whereby the Conuſee granted and rendered to the Conuſor the Tenements in Tail upon Condition that the Conuſor and his Heirs of, *&c.* ſhould bear the Standard of the Conuſee when he went to Battle, and if the Conuſor or his Heirs failed to do it, then the Land ſhould remain to a Stranger; and I moved the Caſe then to the Court, and it was greatly wondered that the Fine [k] upon Condition was received: But *Fitzherbert* then held the Remainder good, and they did not wonder at it, nor held it any great Queſtion but that it might commence upon Condition. So a Remainder may be to marry [l] my Daughter, or upon any other lawful Condition [m] precedent. But if the Condition is to kill a Man, or the like, or upon a Condition [n] impoſſible, there the Remainder ſhall not be good, for a Condition unlawful or impoſſible is of no Effect to gain any Thing by the doing of it in our Law. And in *Pleſington*'s Caſe it is held, that an Eſtate of Freehold might commence upon Condition, but the Reaſon why he had not the Freehold upon the Performance of the Condition was for the Repugnancy. And ſo if a Gift in Tail is made upon Condi-

tion

[a] See ante 32. (h). and the Books there cited.

[c] Litt. § 347. Co. Litt. 214. b. Perk. § 810. Dr. & Stud. lib. 2. cap. 20 1 Finch. 96 2 Finch. 107. Ante 21.

[d] 4. M. 1. Bro. Entry congeable. 19. B. N. C. § 483 Co. Litt. 215. a. Poſt 177.

[e] M. 6. Ed. 4. 1. b. *Per Young.*

[f] M. 21. H. 6. 10. pl. 22. Fitz. Bar. 154. Bro. Condition. 56. Perk. § 790. Ante 23. 30. Poſt 291.

[g] Ante 30. *Per Hales* J.

[h] T. 10. Ed. 3. 30. pl. 33. Fitz. Affize. 161. 10. Aſſ. pl. 15. Bro. Conditions 101. Co. Litt 217. a. 8. Co. 91. b. Poſt 135. 482.

[i] M. 27. H. 8. 24. pl. 2. Bro. Done. 3. Fines Levies 5. Kitch. 304. 2. And. 104. Vin. Abr. tit. Fine O. pl. 9. *in Notis.* And S. P. viz. a Fine levied in Tail upon Condition with Remainder held good, M. 24. Ed. 3. 62. pl. 61.

[k] That a Fine levied upon Condition ſhall not be received, T. 44 Ed. 3. 22. pl. 25. Fitz. Fines, 36. M. 33. H. 6. 52. b. *Per Priſot.* Fitz. Fines, 15. Bro. 10. 2. Rol. Abr. 18. pl. 9. Perk. § 629. But if received it ſhall ſtand, for *fieri non debuit, ſed factum valet,* 5. Co. 38. b. *Per Curiam.*

[l] Ante 27. *Per Cook.*

[m] Litt. R. 255. S. P. cited accord. *Per Hetley* arg. But Cro. E. 360. *Cogan v. Cogan.* is Adjudged contrary viz. that a Remainder may not take Effect upon a Condition precedent, but muſt paſs at the firſt by the Livery, and *Anderſon*, C. J. denied this Point of the Caſe here to be Law. See 1. Leon. 283. 2. And. 10.

[n] 11. Med. 120. *arguendo.*

tion that if the Donee alien it ſhall remain to another, [a] this is repugnant, for when he has aliened to a Stranger, it is contrary to the Alienation to remain over. [b] But as to Remainders, we have a Learning in our Law that a Remainder ought to have án Eſtate precedent. [c] And therefore if a Leaſe for Life is made to Monk, the Remainder in Fee, this Remainder is void, becauſe the Monk had not Capacity to take the Eſtate for Life, ſo that the Eſtate which precedes the Remainder is void, and then *ex conſequente* the Remainder is void. And alſo we have another Learning touching Remainders, *viz.* that although there be an Eſtate precedent, yet if the Thing was not in *eſſe* before, the Remainder ſhall be void. [d] As if I grant a Rent out of my Land, the Remainder in Fee, this is a void Remainder, becauſe the Rent was not in *eſſe* before. And as to what has been ſaid, that the Remainder did not paſs out of the Leſſor preſently by the Livery, Sir, I abſolutely deny this, for it paſſed out of the Leſſor, altho' it did not veſt in the Defendant until the Death of *William*, and it was in Abeyance until the Performance of the Condition, in reſpect of the Poſſibility that it might be performed. [e] As if Land be given to a Man that has a Wife, and to another Woman that has a Huſband, and to the Heirs of their two Bodies begotten, the Fee-Tail paſſes out of the Donor preſently for the Poſſibility there is that they may intermarry, for if the Wife of the Man Donee, and the Huſband of the Woman Donee die, then they may well marry, and in the mean Time the Inheritance, *viz.* the Tail, ſhall be in Abeyance. So here the Remainder paſſed preſently out of the Leſſor upon the Poſſibility to be afterwards performed, and was in Abeyance until the Death of *William*. Upon the whole therefore I do not ſee any Reaſon why the Remainder ſhould not be good, for it is not contrary to Law, nor repugnant, and there is an Eſtate precedent, and the Thing was in *eſſe* before, and it paſſed by the Death of *William*, for which Reaſon the Remainder is good, and the Pleading alſo. And therefore the Plaintiff ſhall be barred.

[a] H. 21. H. 7. 11. pl. 12. Poſt 155. 2. And. 104.
[b] 8. Co. 75. a. 1 Leon. 201. Vin. Abr. tit. Remainder W. pl. 6.
[c] 9. H. 6. 24. b. *Per Godred.* Bro. Deviſe, 5. Grants. 133. 2. Rol. Abr. 415. pl 4. Perk. § 568. 2. Bulſt. 292. *Per Coke*, C. J.
[d] M. 15. Ed. 4. 9. a. *Per Brian.* But the Law ſeems to be held clearly otherwiſe, as appears by the Books H. 7. H. 4. 6. pl. 2. Bro. Done 8. H. 8. H. 4. 10. pl. 5. 1. Sid. 285 *Smith v. Farnaby* adjudged in Error. Carter 52. 2. Rol. Abr. 415. B. pl. 2. Co. Litt. 298. a. Jenk. 30. pl. 58. Lutwy. 1225. *Per Powel*, J.

6. Mod. 112. Off. Exec. 234, 235. [e] T. 15. H. 7. 10. pl. 16. *Per Fineux.* C. J. Fitz. Tail. 32. Bro. 16. Eſtates, 22. Dal. 93. Co. Litt. 20. b. 25. b. 10. Co. 50. b. 3. Bulſt. 168. 1. Rol. Rep. 321. 2. Sid. 117. Winch. 55. 2. Lev. 59. 1. Finch. 23. 2. Finch. 34. Kitch. 306. Wing. Max. reg. 105. pl. 11.

The Reſidue of the Record.

At which Day here came as well the aforeſaid *Matthias* as the aforeſaid *Peter* by their Attornies aforeſaid, whereupon the Plea of the aforeſaid *Peter* by him above pleaded being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the Court of the King here that the ſaid Plea is good and ſufficient in Law to preclude the aforeſaid *Matthias* from having his Action aforeſaid againſt the ſaid *Peter* in Form aforeſaid. Therefore it is conſidered that the aforeſaid *Matthias* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim therein. And that the aforeſaid *Peter* go thereof without Day, *&c.*

The Judgment.

A Report of a Caſe argued in the Exchequer *before the Barons of the* Exchequer, *in* Eaſter *Term in the* fourth *Year of the Reign of King* Edward *the Sixth, between* Richard Platt, *Adminiſtrator of the Goods of* Henry Platt, *Plaintiff and* William Lock *and* John Ayliff *Knights, late Sheriffs of* London *and Keepers of the Goal of* Ludgate, *Defendants, in a Bill of* Debt *brought by the Plaintiff againſt the Defendants. And the Record is entered in* Hillary *Term* 4. Ed. 6. Rot. 4.

The CASE. A Priſoner in *Ludgate* in Execution for Debt goes into *Southwark* with a Servant of the Keeper, it is an Eſcape; and the Adminiſtrator of the Creditor may recover againſt the Sheriffs of *London* by Bill of Debt. Vide Latch, 168.

THE Caſe was thus. *Richard Platt* demanded by his Bill 94 *l.* 2 *s.* 5 *d.* and counted that *Henry Platt* the Inteſtate recovered the ſaid Sum in *Guildhall* in *London*, by a Plaint of Debt brought upon an Obligation againſt one *John Goodlad*, then being a Priſoner in *Ludgate*, and that it was awarded that the ſaid *Goodlad* ſhould remain in *Ludgate* in Execution for the ſaid Sum, who continued there as Priſoner until the Death of the Inteſtate, and afterwards, and after the Adminiſtration committed to the Plaintiff, until the *ſecond* Day of *April* in the *third* Year of the Reign of the preſent King, at which Day the Defendants being Sheriffs of *London* and Keepers of the ſaid Goal permitted the ſaid *Goodlad* to go at large into *Southwark* in the County of *Surry* the Plaintiff not being ſatisfied, by which an Action accrued to him. And the Defendants traverſed that they did not permit him to go at large, and upon this they were at Iſſue. And it was given in Evidence for the Plaintiff to the Jurors, that the ſaid *Goodlad* was in *Southwark* in Manner and Form as the Plaintiff had declared. And on the other Side, it was given in Evidence for the Defendants, that at the ſaid Time of the Eſcape ſuppoſed, one *Thomas Fierman*, a Servant to *Roger Holt* Keeper of the Goal of *Ludgate*, was attending upon the ſaid *Goodlad* by the Command of the ſaid *Roger Holt*, for which Reaſon the Defendants ſaid that *Goodlad* was not at large in Manner and Form, *&c.* And upon this Evidence the Plaintiff demurred in Judgment. And it was ſaid for the Defendants by their Counſel, that a Bill of Debt does not lie againſt them, becauſe the Statute 1. *R.* 2. *cap.* 12. gives the Action againſt the Warden of the *Fleet*, who is an Officer of a certain Place, and therefore ſuch Action given againſt the Officer of a peculiar Place ſhall not be extended by Equity to others, eſpecially where the Statute is penal. And further as to the Eſcape it was ſaid, that inaſmuch as the Officer of the Sheriffs was with the Priſoner, although he was in another County, yet this is a Reſtraint of his Liberty, ſo that he was always in Impriſonment. And the Plaintiff is concluded to ſay the contrary but that he was impriſoned and in Cuſtody in *Surry*, for the Bill of Debt is brought againſt the Defendants for ſuffering him to eſcape there, and he could not eſcape there if he was not impriſoned there; for as *Atkins* ſaid, the End of his Impriſonment is the Beginning of his Liberty, which Liberty is the Eſcape, ſo that the Impriſonment and the Eſcape are all at one Inſtant, and therefore the Party who has brought his Bill for the Eſcape in *Surry*, and thereby has admitted him to be lawfully impriſoned and detained in *Surry* by the Sheriffs of *London*, has not proved that he eſcaped there, for if he was once impriſoned there he was always,

For the Defendants.

always impriſoned there, for the ſervant of the Goaler, who was the Servant of the Sheriff, was with him by Baſton always. And therefore the Action does not lie, nor is it an Eſcape.

E contra for the Plaintiff.

On the contrary it was argued, that the Action lies by the common Law, and if not, yet that it lies by the Statute: for the Effect of every Suit implies in itſelf three Things, firſt, that the Truth of the Matter be ſhewn to the Judge, and this is the Duty of the Party to do; ſecondly, that Judgment be had to recover, and to have Execution awarded, which belongs to the Judge to give; thirdly, that Execution be done by taking the body of the Defendant, and detaining it in Priſon, or otherwiſe, and this is the Buſineſs of the Officer; and if any of theſe three Things is not obſerved, the Order of the Suit is confounded, and he is to be corrected by whoſe Default ſuch Confuſion is occaſioned. And here, inaſmuch as the Party has done his Duty in ſhewing the Truth, and the Judge his Duty in giving the Judgment, and awarding Execution, and the Officer has not done his Duty in detaining the Body in Priſon, it is reaſonable that the Plaintiff and the Judge, who have well diſcharged their Duty, ſhould be excuſed, and that the Officer, who has offended, ſhould be puniſhed by being made reſponſible to the Plaintiff for the Loſs he has ſuſtained. [a] For where the Defendant is once impriſoned upon Execution, and eſcapes, the Plaintiff ſhall never have Remedy againſt him again, nor ſhall the Goaler ever retake him, becauſe he was once at large, and ſo diſcharged for that Time. [b] And if a perſonal Thing is once in Suſpence, or the Perſon of a Man once diſcharged for a perſonal Thing it is a Diſcharge for ever. [c] As if the Debtee makes the Debtor and another, who ſurvives the Debtor, his Executors, yet the Debt is extinct for ever, *cauſâ quâ ſupra*. Wherefore here inaſmuch as after the Eſcape the Plaintiff ſhall not have another Execution, ſo that he is without Remedy againſt the Defendant in the firſt Suit, the common Law, which is no other than common Reaſon, provides that the Plaintiff ſhall have an Action of Debt againſt the Goaler, by whoſe Default the Execution of the Plaintiff was diſcharged; and if it was otherwiſe the common Law would be greatly defective in this Point, which it is not. [d] And therefore in 45. *Ed.* 3. it appears that one had recovered Damages to the Value of 10 *l.* in Court of Piepowders of a Priory dative and removeable, and the Defendant was committed to the Cuſtody of the Prior in Execution for it, who let him eſcape, upon which the Plaintiff brought an Action of Debt for the 10 *l.* againſt the ſaid Prior, who was dative and removeable, and againſt the Abbot alſo who was his Sovereign, and becauſe the Prior, who was no more than one of the Monks, was named with the Abbot, where he could not be a Debtor, the Writ was abated, for it ought to have been brought only againſt the Abbot; by which it ſeems that if the Prior had been omitted in the Writ, the Writ would have been maintainable enough; and from hence it appears [e] that the Action lay in ſuch Caſe by the Courſe of the common Law, for this Caſe was before the Statute of *Rich.* 2. And ſo it ſeems upon the Matter that the Action was maintainable, although there was no Contract between them. [f] For upon a *Liberate* delivered to the Clerk of the Hanaper, who has Aſſets in his Hands, an Action of Debt lies againſt him, as appears by 2. *H.* 7. and yet there is no Contract between them, nor any Privity in Words; and ſo is it in many other like Caſes, as well as in the Caſe here; and therefore the Statute of *Rich.* 2. was made in Affirmance of the common Law. But although the Action ſhould not be maintainable by the common Law, and although the Statute was not made in Affirmance of the common Law, but was a new Ordinance, yet the Bill ſhall be maintainable by Equity of the Statute of *Rich.* 2. notwithſtanding the Statute does not give the Action by expreſs Words againſt any other than the Warden of the *Fleet*, for although it is penal againſt the Warden, yet it is beneficial to all others, and therefore ſhall be extended by Equity, for every Statute is penal to ſome Body. But inaſmuch as the taking it by Equity ſhall be more beneficial than prejudicial to the greater Number of Men, this is the Reaſon why it may be extended by Equity by the Rules of Law. [g] And therefore the Statute *de circumſpecte agatis* which ſays, *uſe yourſelves circumſpectly in all Matters concerning the Biſhop of* Norwich *and his Clergy*, is nevertheleſs extended to all other Biſhops. [h] And ſo the Statute which ſaith, that the Executor who firſt comes by Diſtreſs ſhall anſwer, is extended by Equity to Adminiſtrators. From whence we may ſee, that a Statute, which ſpeaks of a Perſon or Officer of a particular Place, ſhall be extended by Equity to others. [i] And ſo this Statute here, which gives an Action of Debt againſt the Warden of the *Fleet*, ſhall be extended to other Goalers and Officers. [k] And in 9. *H.* 6. an Action of Debt was brought againſt the Mayor of the Staple for letting one in Execution eſcape, and there by Award he was put to anſwer to the Writ; and in Excuſe of himſelf he ſaid that the Party was taken and in Cuſtody by force of a Plaint, *abſque hoc* that he was impriſoned by Way of Execution; by which it appears that an Action of Debt upon an Eſcape lay againſt another Officer than the Warden of the *Fleet* by Equity of the Statute, if any will ſay that it lay not by the common Law. And the ſame Statute of *Rich.* 2. is taken by Equity in another Point, *viz.* where it ordains, that the Warden of the Fleet ſhall not ſuffer any one who is in Execution to go out of the Priſon by Mainprize, Bail, or Baſton, it is taken by Equity of this Statute, that if any other Goaler lets ſuch an one, who is in Execution, go out of the Priſon by Mainprize, Bail, or Baſton, that this ſhall be an Eſcape. But notwithſtanding that this extends to all other Goalers as fully as if it had been expreſsly mentioned, [l] yet the Sheriffs of *London* uſe to let ſuch go at large by Baſton in any Place within their Juriſdiction, and this ſhall not be adjudged an Eſcape in them, as it ſhall be in the Warden of the *Fleet*, and the Reaſon of this is not becauſe the Statute or the Equity of it does not extend to them, but becauſe they claim a Preſcription in this Point, and all their Cuſtoms and Preſcriptions are [m] confirmed by Statutes, for which Reaſon they may preſcribe againſt the Equity and Words of Statutes that are contrary to their Cuſtoms and Preſcriptions; as againſt the Statute of *Silva*

[a] So were the Opinions formerly, as appears T. 10. Ed. 4. 11. a. *Per Billing.* M. 14. H. 7. 1. pl. 1. 5. Ed. 6. Bro. Eſcape, 45. B. N. C. § 412. Dy. 67. pl. 17. Hob. 202. But the Law is now held otherwiſe, 1. Vent. 4. 269. 1. Sid. 330. Lutwy. 1268. 1. P. Wms. 692. Strange, 435. Stat. 8. & 9. W. 3. cap. 27.

[b] P. 21. Ed. 4. 3. pl. 4. *Per Vavaſor.* Dyer, 140. pl. 39. Moor, 855. 1. Brownl. 76. W. Jones, 345. Cro. C. 373. Hob. 10. 12. Mod. 293. 1. Finch. 300. Poſt 184.

[c] H. 20. Ed. 4. 17. a. *Per Brian.* Bro. Executors, 114. Salk 300. *Per Gould.* J. Poſt 184. Wing. Max. reg. 46. pl. 1. Hutt. 128.

[d] M. 45. Ed. 3. 9. pl. 1. Fitz. Debt 130. Non nab. 25. Bro. Debt 40. Moign. 2.

[e] Yet ſee that no Action of Debt lay at common Law, for an Eſcape, but the Party was driven to his ſpecial Action upon his Caſe. M. 7. H. 6. 5, 6. P. 14. Ed. 4. 3. b. *Per Fairfax.* Dy. 322. pl. 25. 2. Inſt. 382. 1. Rol. Rep. 204. 2. Rol. Rep. 283. Cro. J. 658. 1. Sid. 397. 2. Sid. 103. 1. Saund. 37. Hardr. 30. 34. 2. Bac. Abr. 245. 1. Show. 176. 2. Mod. 145.

[f] H. 2. H. 7. 8. pl. 1. Fitz. Bar. 124. 1. Finch. 148. 2. Finch. 181. Poſt 186.

[g] 2. Inſt. 487. 2 Lev. 159. T. Jones, 62. 10. Mod. 95. Ld. Raym. 1297. Strange, 256. Bunb. 13.

[h] Stat 9. Ed. 3. cap. 3. S. P. M. 3. H. 6. 14. pl. 18. *Per Cur.* Fitz. Reſpond. 41. Bro. 1. 2. Brownl. 302. 303. Moor. 44, 45. *Per Cur.* Poſt 163. 467.

[i] Bro. Eſcape, 9. 1. Saund. 38. Hardr. 32. 2. Lev. 159. 2. Brownl. 302. T. Raym. 129, 130. 1. Keb. 392. T. Jones, 62. Bunb. 13. Wing. Max. reg. 143. pl. 8. reg. 197. pl. 33. Vin. Abr. tit. Statutes E. 6. pl. 95.

[k] T. 9. H. 6. 19. b. Fitz. Juriſdiction, 6. Bro. 1. Eſcape, 2. T. Raym. 62.

[l] Heath's Max. 280. Palm. 542. See Dy. 66, 67.

[m] 8. Co. 126. a. Hardr. 303. Cro. C. 347. Palm. 542.

cædua, and ſo they may preſcribe to hold a Leet at other Times than the Statute appoints, and the like; and ſo they may preſcribe to let thoſe who are in Execution go at large within their Liberty by Baſton; but others ſhall be bound by the Equity of the ſaid Statute. And then inaſmuch as this Statute, which ſpeaks only of the Warden of the *Fleet*, ſhall be extended by Equity to other Officers in Point of Eſcape, ſo ſhall it be extended in Point of Action to charge other Officers, and therefore the Action ſhall be maintainable againſt the Sheriffs of *London*. And ſome argued that the Action ſhould be maintainable againſt them by the Statute of *Weſtminſter* 2. *cap.* 11. which gives an Action of Debt againſt the Goaler, who lets one at large that was committed to Priſon by Auditors for the Arrears of Account; but it was ſaid, that whether it be maintainable by the Common Law, or by the one Statute or the other, certain it is that the Action lies; and here the Action is confeſſed to be maintainable, and is admitted by the Defendants, for they have demurred in Judgment upon the Evidence, whether it be an Eſcape or no; whereby it is not to be now diſputed whether or no the Bill lies. And as to the Eſcape, it was argued by the Counſel for the Plaintiff, and by all the Barons of the Exchequer, that this is an Eſcape, and that he was out of Cuſtody by coming into *Surry*, for no Man may be lawfully impriſoned or in Cuſtody without a Keeper. [a] For if a Woman is Warden of the *Fleet*, and one impriſoned in the Fleet marries her, it is an Eſcape in the Woman, (as *Chomley* Chief Baron ſaid) and the Law adjudges the Priſoner to be at large, for he cannot be lawfully impriſoned but under a Keeper, and he cannot be under the Cuſtody of his Wife, for which Reaſon the Law muſt neceſſarily adjudge him to be at large. [b] So (he ſaid) if the Warden of the *Fleet*, who hath his Office in Fee, die ſeized, his Son and Heir being then impriſoned there, and the Office deſcends to him being in Priſon, the Law will adjudge him to be out of Priſon, although he has Fetters upon him, becauſe he cannot be his own Priſoner; ſo that no Man may lawfully be detained in Priſon without a Goaler or Keeper. [c] But here when the Priſoner came into *Surry*, he had no Goaler nor Keeper, as a Priſoner for the firſt Duty, for he that waited upon him by Baſton in the County of *Surry* could not be called a Servant to the Sheriff of *London*, who is an Officer of another County, [d] for the Power of a Sheriff does not extend beyond his County, and he ſhall only be adjudged a Sheriff and Officer within his County, and not elſewhere. [e] And therefore it is held in 13. *Ed.* 4. that if a Juſtice of Peace in one County purſues a Man into another County for a Felony done in the County where he is Juſtice, and takes him in the other County, he is his Priſoner in the County where he takes him, and there he ought to impriſon him, and he cannot carry him to a Goal in the County where he committed the Felony, for he is not his Priſoner there; for the Purſuit in ſuch Caſe is not material, and therefore he has no more to do in the County where he took him than a private Perſon has. By which it is proved, that a Juſtice of Peace in one County has no Authority in another County; no more has a Sheriff, for if he ſhould have Power in another County, then there would be two ſeveral Sheriffs in one ſame County, whereas in this Realm there are divers Authorities, and none may exceed his Limits and Bounds. [f] And therefore if the Marſhal holds Plea of a Thing done out of the Verge, [g] or the Admiral of a Thing done within the Body of a County, it ſhall be void, for their Authority extends to a certain Place, and within a certain Precinct, and not elſewhere, and if he who takes Sanctuary goes out, any one may take him, for he is not priviledged out of it, ſo that the Precinct of the Liberty may never be exceeded. And here the Sheriff has nothing to do in any Place but in *London*, and therefore when the Priſoner went out of the Liberty of *London*, at that Inſtant he was at large. And true it is that the End of the Impriſonment is the Beginning of the Eſcape, but yet it does not follow that he was in Cuſtody in *Surry*, as hath been ſaid, for the laſt Inſtant of Time when he was in the Liberty of *London* was the End of his Impriſonment, and the firſt Inſtant of Time when he came into *Surry* was the Beginning of the Eſcape, ſo that it is true that the End of his Impriſonment was the Beginning of the Eſcape, and yet he was not impriſoned in *Surry*. And if the Sheriff lets one go at large in *London*, and he goes into divers other Counties, the Party may have an Action of Debt againſt the Sheriff in every County where he who is let at large ſhall go; for the Words are true, that *he ſuffered the Priſoner to go at large* in every [h] County he came into. [i] And in 30. *H.* 6. a Man brought an Action of Debt againſt the Goaler of the *Cinque Ports* for letting one who was condemned in Debt and committed to his Cuſtody within the *Cinque Ports* go at large into *London*, and the Writ was adjudged good, and the Plaintiff recovered; for the Words are true, that *he ſuffered him to go at large* in all the Counties; and the ſame Exception was taken there as is here, for there it was ſaid that he could not be impriſoned for the Debt out of the *Cinque Ports*, and then the Goaler could not let him go out of Priſon at *London*, becauſe he was not impriſoned in *London*; but it was there anſwered that the Words are, *quod permiſit ipſum ire ad largum* in *London*, and this was true, for he let him go at large in all the Counties and Places where he was at large; and therefore it was adjudged *ut ſupra*. The ſame Reaſon holds Place in our principal Caſe. [k] But if the Sheriff had brought the Priſoner here by Force of the King's Writ or Command, or had ſent him here by *Baſton*, although he had come through divers other Counties, yet he ſhould be ſuppoſed to be in the Cuſtody of the firſt Sheriff continually, becauſe the Sheriff had Authority from the King to do it, by Reaſon of which Authority he ſhall be adjudged the Priſoner of the ſame Sheriff in every County; and by this Means there may be two Sheriffs in one County, *viz.* one to a ſpecial Intent, and the other to all general Intents and Purpoſes. But here it is entirely his own Folly, voluntarily to ſuffer him to go into another County. But if he had eſcaped, and the Sheriff having the View had made freſh Suit after him, and had taken him in *Surry*, there perhaps he ſhould have been his Priſoner in *Surry*, and he might have juſtified the taking of him there, notwithſtanding he is not Sheriff there. [l] As if one comes to diſtrain for Rent Service, and the Tenant perceiving it

[a] Dalt. Sher. 486. 3. Co. 72. a. Hetl. 36. 2. Vent. 19. Vaugh. 243. Wing. Max. reg. 19. pl. 52. reg. 214. pl. 9. 3. Danv. Abr. 113. pl. 6. 2. Bac. Abr. 239. Vin. Abr. tit. Eſcape. A. pl. 23.

[b] Wing. Max. reg. 19. pl. 52. reg. 54. pl. 26.

[c] Wing. Max. reg. 19. pl. 51.

[d] 3. Co. 44. b.

[e] P. 13. Ed. 4. 9. a. *per Brian.* Bro. Freſh Suit 3. 1. H. H. P. C. 580. 2. H. H. P. C. 115. Hal. P. C. 92, 93. 2. Hawk. P. C. 118. Dalt. Juſt. cap. 170. § 16. Cromp. Juſt. 172. b. Vin. Abr. tit. Juſtice of P. D. pl. 2. Sed *contra* 2. Bulſt. 264. *Rex v. Underel.* But if the Felon be arreſted in proper County, and afterwards eſcapes into the foreign County, and is there taken, then he may be brought to a Goal in proper County, for in Suppoſition of Law he was always in Cuſtody upon the firſt Arreſt. See the Books *ſupra*.

[f] 10. Co. 77. 2. *Per Cur.* 13. Co. 52. Wing. Max. reg. 19. pl. 53.

[g] T. 30. H. 6. 6. b. *Per Priſot.* 31. H. 8. Bro. Prohibition 17. 13. Co. 52. Hob. 11. 70. Moor 122. 891, 892. Lit. R. 164. Cro. J. 514. *Violet v. Blague.* 1. Finch. 387.

[h] S. P. W. Jones 145. 1. Freem. 260. *Per Cur.* Hardr. 19. *Per Atkins arguendo.*

[i] T. 30. H. 6. 6. Fitz. Debt 53. Bro. Cinque Ports 26. Lieu. 82. Eſcape 44.

[k] But ſee Dyer 162. pl. 50. and 297. 1 H. 16. Ed. 4. 10. b. *per Cur.* Bro. Diſtreſs. 51. P. 2. Ed. 4. 6. b. *Per Litt.* Bro. Treſpaſs 296. M. 33. H. 6. 53. a. *per Choke.* Bro. ib. 83. T. 44. Ed. 3. 20. pl. 18. Bro. ibid. 91. M. 11. H. 7. 4. pl. 11. Bro. ibid. 100. M. 21. H. 7. 45. pl. 59. M. 34. H. 6. 18. b. *per Priſot.* Bro. Avowry. 13. *in fine.* 1. Rol. Abr. 671. N. pl. 1. Co. Litt. 161. a. 268. b. 9. Co. 22. a. 2. Inſt. 131.

[l] But if before the Stat. 8. *Ann. cap.* 14. the Tenant before the Lord had View of 'em had chaſed them away, or if the Tenant for other lawful Reaſon, even after the View, had chaſed them away, or if after View the Cattle went out of themſelves, the Lord could not diſtrain them. See 2. Bac. Abr. 110. Vin. Abr. tit. Diſtreſs. N.

drives

drives the Cattle out of the Land, the Lord may purſue them within the View, and take them in whoſeſoever Land they are, and yet now they are out of his Authority, but the Purſuit and the Poſſeſſion afterwards ſhall be adjudged as a continual Poſſeſſion when it is for Rent Service: But otherwiſe it is for Damage feaſant; and ſo is the Diverſity, as it is held in 16. *Ed.* 4. But in our Caſe there was no ſuch involuntary Eſcape, but a voluntary Folly, by Reaſon whereof he was out of Cuſtody when he came into *Surry*, and when the Servant by Baſton waited upon him, this was an Impriſonment, for every Reſtraint of Liberty is an Impriſonment, and the Party might have had an Action of falſe Impriſonment againſt him for it; for he was not in his Cuſtody as Servant of the Sheriff of *London*, nor was lawfully detained, but wrongfully impriſoned there, for which Reaſon he might have had a Writ of falſe Impriſonment well enough; and therefore he ſhall be adjudged to be let at large, and ſo the Plaintiff ought to recover. And afterwards it was awarded that the Plaintiff ſhould recover. And the Judgment was as follows:

The Judgment. Whereupon all and ſingular the Premiſſes being ſeen and read by the Barons aforeſaid, and fully underſtood, it is conſidered by the ſame Barons that the aforeſaid *Richard Platt* recover againſt the aforeſaid *William Lock* and *John Ayliff* his Debt aforeſaid of 94 *l.* 2 *s.* 5 *d.* aforeſaid, and his Damages aforeſaid, as well by Reaſon of the unjuſt detaining of the Debt aforeſaid, as for his Coſts, Charges, and Expences laid out in this Behalf about his Suit aforeſaid, taxed by the ſame Barons at 100 *s.* which ſaid Sums amount in the whole to the Sum of 99 *l.* 2 *s.* 5 *d.* And that the aforeſaid *William Lock* and *John Ayliff* be in Mercy of the Lord the King, *&c.*

Nota Bene by the Reporter. *It ſeems to ſome hard that this Bill of Debt ſhould be maintainable againſt the Sheriffs, for in* 42. Aſs. pl. 11. *a Bill of Debt was brought againſt the Warden of the* Fleet *for the Sum wherein one whom the Warden had let at large was condemned, and there it was declared to be the Opinion of the whole Court, that the Bill was not maintainable, (and therefore the Plaintiff was nonſuited) for the Suit was given by the Statute of* Weſtminſter 2. *by Writ and not by Bill, and then if the Suit had been maintainable by the Common Law againſt the Warden, the Bill would have been maintained there; but by the ſaid Opinion it is proved, that it was not maintainable by the Common Law. And if the Suit here ſhould be taken againſt the Sheriffs by the ſaid Statute of* Weſtminſter 2. *then the Bill would not be maintainable here no more than it was there againſt the Warden of the Fleet, but he ſhould be put to a Writ; and the Statute of* Rich. *gives the Suit againſt the Warden by Writ of Debt, for the Words of the Statute are,* " The Plaintiffs ſhall have their Recovery againſt the ſame Wardens " by Writ of Debt," *ſo that this Statute ſpeaks only of a Writ of Debt. And then inaſmuch as the the Statute of* Weſtminſter 2. *which ſpeaks of a Writ of Debt, ſhall not be extended by Equity to a Bill of Debt, ſo by their Opinions ſhall not this Statute of* Rich. *And therefore if the Opinion in* 42. *Aſs. be good, this Bill ſhall not be maintainable by either Statute, nor by the Common Law.* Quære, *for this Exception was not taken to it, and it is a good and ſure Way to give Credit to the lateſt Judgment* †.

* Fitz. Bill 15. Bro. 23. Brief 310. Eſcape 30. 42.

† See 2. Inſt. 382. it is ſaid that altho' the Statute of *Weſtm.* 2. and the Stat. of 1. *R.* 2. ſpeak *per Breve*, yet a *Bill* of Debt lies alſo by the Equity of the ſame Statutes, albeit it has been holden to the contrary, (citing the Book of 42. *Aſs.* 11) butſince it has been often adjudged that a Bill of Debt is maintainable upon the ſaid Acts. And S. P. Accord. Hardr. 32. *per Hardreſs, arguendo.* See Godb. 389. 390.

A Report of a Caſe argued in the Common Bench *before all the Juſtices of the ſame Bench, in* Michaelmas *Term, in the* fourth *Year of the Reign of King* Edward *the Sixth, between* Thomas Wimbiſh *and* Elizabeth *his Wife Plaintiffs, and* Elizabeth Tailbois *Defendant, in a Writ of* Treſpaſs *brought by the ſaid Plaintiffs againſt the Defendant. And the Record was as follows:*

Trin. Term. 1. Ed. 6. Rot. 444. *Lincoln.* Declaration. *Elizabeth Tailbois* late of *Golthough* in the County aforeſaid Widow was attached to anſwer *Thomas Wimbiſh* Eſquire and *Elizabeth* his Wife of a Plea, wherefore with Force and Arms the Cloſe of them the ſaid *Thomas* and *Elizabeth* ſhe broke, and their Graſs to the Value of 40 *l.* there lately growing with certain Cattle eat up, tread down, and deſtroyed, and other Wrongs to them did, to the great Damage of the ſaid *Thomas* and *Elizabeth*, and againſt the Peace of the Lord *Henry* the *Eighth* late King of *England*, Father of the Lord the King now, ‡ and againſt the Peace of the Lord the King now, *&c.* And whereupon the ſame *Thomas* and *Elizabeth* by *Roland Durant* their Attorney complain, that the aforeſaid *Elizabeth Tailbois* Widow the *third* Day of *Auguſt* in the *thirty-ſixth* Year of the Reign of the ſaid Lord *Henry* the *Eighth* late King of *England*, Father of the Lord the King now, with Force and Arms the Cloſe of them the ſaid *Thomas* and *Elizabeth* at *Golthough* broke, and their Graſs to the Value, *&c.* there lately growing, with certain Cattle, *viz.* Horſes, Oxen, Cows, Hogs, and Sheep, eat up, tread down, and deſtroyed, the Treſpaſs aforeſaid, as to the eating up, treading down, and deſtroying the Graſs aforeſaid, from the aforeſaid *third* Day of *Auguſt*, in the *thirty-ſixth* Year aforeſaid, until the Day of obtaining the Writ original of them the ſaid *Thomas* and *Elizabeth*, viz. the *fourth* Day of *April* in the *firſt* Year of the Reign of the Lord the King now, at divers Days and Times continuing. And other Wrongs, *&c.* to the great Damage, *&c.* and againſt the Peace, *&c.* Wherefore they ſay that they are injured, and have Damage to the Value of 100 Marks. And therefore they bring Suit, *&c.*

‡ Note here the Treſpaſs alledged to be againſt the peace of both Kings, when he counts of part done in a former King's Time, and part in the preſent King's Time. Hale on F. N. B. 86. i. 1. Rol. R. 259. *Cuddington v. Wilkins* adjudged. Notes on 1. Finch 307.

Bar. And the aforeſaid *Elizabeth Tailbois* by *John Poley* her Attorney comes and defends the Force and Injury when, *&c.* And as to the coming with Force and Arms, ſays that ſhe is not guilty thereof. And of this ſhe puts herſelf upon the Country; and the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife do the like. And as to the Reſidue of the Treſpaſs aforeſaid above ſuppoſed to be done, the ſame *Elizabeth Tailbois* ſays, that the aforeſaid *Thomas* and *Elizabeth* his Wife their Action aforeſaid againſt her ought not to have, becauſe ſhe ſays, that the Cloſe aforeſaid, and alſo the Places in which the Treſpaſs aforeſaid is ſuppoſed to be done are, and at the aforeſaid Time of the Treſpaſs aforeſaid above ſuppoſed to be done were, 40 Acres of Meadow, and 206 Acres of Paſture, with the Appurtenances in *Golthough* aforeſaid, which ſaid 40 Acres of Meadow,

and

and 206 Acres of Paſture are, and at the aforeſaid Time of the Treſpaſs aforeſaid above ſuppoſed to be done, and alſo from Time whereof the Memory of Man is not to the contrary were, Parcel of the Manor of *Golthough* with the Appurtenances in the County aforeſaid. Of which ſaid Manor with the Appurtenances whereof, *&c.* long before the aforeſaid Time when, *&c.* one *George Tailbois* Knight, Grandfather of the aforeſaid *Elizabeth*, the Wife of the aforeſaid *Thomas Wimbiſh*, whoſe Heir the ſame *Elizabeth* is, was ſeized in his Demeſn as of Fee. And the ſame *George* being ſo ſeized of the Manor aforeſaid with the Appurtenances whereof, *&c.* by the Name of *George Tailbois* Knight Lord of *Kince*, by his certain Deed indented ſealed with the Seal of the aforeſaid *George*, and inrolled of Record in the Court of *Chancery* of the ſaid late King, (which the aforeſaid *Elizabeth Tailbois* here brings into Court, the Date whereof is the *eighteenth* Day of *January* in the *fourth* Year of the Reign of the ſaid late Lord the King) at *Golthough* aforeſaid, gave, granted, and by his ſame Deed confirmed to one *Richard* by the Grace of God then Biſhop of *Wincheſter*, *William* by the ſame Grace then Biſhop of *Lincoln*, *Thomas Wolſey* then Dean of *Lincoln*, *William Tirwhit*, *Robert Dimock*, *Robert Conſtable* Knights, *John Conſtable* then Archdeacon of *Huntingdon*, *Edward Derby* then Archdeacon of *Stowe*, *Thomas Burgh Junior*, *Robert Tirwhit*, *Numan Markenfield* Eſquires, *Henry Gaſcoign* and *John Ridley* Clerks, the aforeſaid Manor of *Golthough* with the Appurtenances, amongſt other Things, whereof, *&c.* to have and to hold the ſame Manor with the Appurtenances whereof, *&c.* amongſt other Things, to the aforeſaid *Richard* Biſhop of *Wincheſter*, *William* Biſhop of *Lincoln*, *Thomas Wolſey*, *William Tirwhit*, *Robert Dimock*, *Robert Conſtable*, and *John Conſtable*, *Edward Derby*, *Thomas Burgh*, *Robert Tirwhit*, *Numan Markenfield*, *Henry Gaſcoign*, and *John Ridley*, their Heirs and Aſſigns to the Uſe of the aforeſaid *George Tailbois* and the aforeſaid *Elizabeth Tailbois* then his Wife, and the Heirs of their Bodies between them lawfully begotten, and for Default of ſuch Iſſue of the Bodies of the ſame *George* and *Elizabeth* lawfully begotten, then to the Uſe and Behoof of the aforeſaid *George Tailbois*, and the Heirs of the Body of the ſame *George* lawfully begotten: And for Default of ſuch Iſſue of the Body of the ſame *George*, to the Uſe and Behoof of the right Heirs of the aforeſaid *George* for ever. By Virtue of which Feoffment, they the ſame Biſhop of *Wincheſter*, Biſhop of *Lincoln*, *Thomas Wolſey*, *William*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward*, *Thomas Burgh*, *Robert Tirwhit*, *Numan*, *Henry*, and *John Ridley* were ſeized of the aforeſaid Manor with the Appurtenances whereof, *&c.* in their Demeſn as of Fee, to the Uſe and Behoof aforeſaid. And the ſame Biſhop of *Wincheſter*, Biſhop of *Lincoln*, *Thomas Wolſey*, *William*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward*, *Thomas Burgh*, *Robert Tirwhit*, *Numan*, *Henry*, and *John Ridley* being ſo ſeized of the Manor aforeſaid with the Appurtenances whereof, *&c.* to the ſame Uſes, the aforeſaid Biſhop of *Wincheſter*, Biſhop of *Lincoln*, *Thomas Wolſey*, *William Tirwhit*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward Derby*, *and John Ridley* died. And the aforeſaid *Thomas Burgh*, *Robert Tirwhit*, *Numan Markenfield*, and *Henry Gaſcoign* ſurvived them, and held themſelves in the ſame Manor with the Appurtenances whereof, *&c.* and were ſeized thereof in their Demeſn as of Fee to the ſame Uſes by Right of Survivorſhip, *&c.* at and until the *fourth* Day of *February* in the *twenty-ſeventh* Year of the Reign of the ſaid late Lord the King; on which Day, by Statute, *&c.* the aforeſaid *George Tailbois* and *Elizabeth* his Wife were ſeized of the ſame Manor with the Appurtenances whereof, *&c.* in their Demeſn as of Fee Tail, to wit, to them and to the Heirs of their Bodies between them lawfully begotten; and the ſaid *George* and *Elizabeth* being ſo ſeized thereof, the ſame *George* afterwards and before the aforeſaid Time when, *&c.* at *Golthough* aforeſaid of ſuch Eſtate of and in the Manor aforeſaid with the Appurtenances whereof, *&c.* died ſeized. And the aforeſaid *Elizabeth Tailbois* ſurvived the ſaid *George*, and held herſelf in the ſame Manor with the Appurtenances whereof, *&c.* and was thereof ſole ſeized in her Demeſn as of Fee Tail in Manner and Form aforeſaid by Right of Survivorſhip, *&c.* And the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife claiming the Manor aforeſaid with the Appurtenances whereof, *&c.* by Colour of a certain Deed of Demiſe thereof made to them for Term of their Lives by the aforeſaid *George* long before the aforeſaid Feoffment by the ſame *George* to the aforeſaid Biſhop of *Wincheſter*, Biſhop of *Lincoln*, *Thomas Wolſey*, *William*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward*, *Thomas Burgh*, *Robert Tirwhit*, *Numan*, *Henry*, and *John Ridley* of the Manor aforeſaid with the Appurtenances whereof, *&c.* in Form aforeſaid made, where nothing of the ſaid Manor with the Appurtenances whereof *&c.* ever paſſed by that Deed into the Poſſeſſion of the ſaid *Thomas Wimbiſh* and *Elizabeth* his Wife, entered into the Manor aforeſaid with the Appurtenances whereof, *&c.* before the aforeſaid Time when, *&c.* upon which Poſſeſſion thereof of the ſaid *Thomas Wimbiſh* and *Elizabeth* his Wife, the ſame *Elizabeth Tailbois* afterwards, to wit, the ſame Time when, *&c.* into the Manor aforeſaid with the Appurtenances whereof, *&c.* re-entered, and the Cloſe aforeſaid broke, and the Graſs aforeſaid in the aforeſaid 40 Acres of Meadow, and 206 Acres of Paſture then growing, with the Cattle aforeſaid eat up, tread down, and deſtroyed, as it was lawful for her to do. And this ſhe is ready to verify, wherefore ſhe prays Judgment if the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife their Action aforeſaid againſt her ought to have, *&c.*

Colour.

And the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife ſay, that for any Thing before alledged, they ought not to be precluded from having their Action aforeſaid, becauſe they ſay that well and true it is, that the aforeſaid *George Tailbois* Grandfather of the aforeſaid *Elizabeth* now Wife of the ſaid *Thomas Wimbiſh* was ſeized of the Manor aforeſaid with the Appurtenances whereof, *&c.* in his Demeſn as of Fee. And being ſo ſeized thereof, he the aforeſaid 18th Day of *January*, in the *fourth* Year of the Reign of the ſaid late Lord the King aboveſaid, at *Golthough* aforeſaid, by his Deed indented aforeſaid gave, granted, and confirmed to the aforeſaid *Richard* Biſhop of *Wincheſter*, *William* Biſhop of *Lincoln*, *Thomas Wolſey*, *William Tirwhit*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward Derby*, *Thomas Burgh*, *Robert Tirwhit*, *Numan*

Replication.

Markenfield, *Henry*, and *John Ridley* the aforeſaid Manor of *Golthough* with the Appurtenances whereof, *&c.* amongſt other Things, to have and to hold the ſaid Manor with the Appurtenances whereof, *&c.* to the aforeſaid *Richard* Biſhop of *Wincheſter*, *William* Biſhop of *Lincoln*, *Thomas Wolſey*, *William Tirwhit*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward Derby*, *Thomas Burgh*, *Robert Tirwhit*, *Numan*, *Henry*, and *John Ridley*, their Heirs and Aſſigns to the Uſe of the aforeſaid *George Tailbois* and the aforeſaid *Elizabeth* then Wife of the ſame *George*, and the Heirs of their Bodies between them lawfully begotten, and for Default of ſuch Iſſue of the Bodies of the ſame *George* and *Elizabeth* lawfully begotten, then to the Uſe and Behoof of the aforeſaid *George Tailbois* and the Heirs of the Body of the ſame *George* lawfully begotten, and for Default of ſuch Iſſue of the Body of the ſame *George*, to the Uſe and Behoof of the right Heirs of the aforeſaid *George* for ever. By Virtue of which Feoffment, the ſame Biſhop of *Wincheſter*, Biſhop of *Lincoln*, *Thomas Wolſey*, *William*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward*, *Thomas Burgh*, *Robert Tirwhit*, *Numan*, *Henry*, and *John Ridley* were ſeized in the aforeſaid Manor with the Appurtenances whereof, *&c.* in their Demeſn as of Fee to the Uſe and Behoof of the ſaid *George* and *Elizabeth* his Wife, and the Heirs of their Bodies between them lawfully begotten, and for Default of ſuch Iſſue of the Bodies of the ſame *George* and *Elizabeth* lawfully begotten, then to the Uſe and Behoof of the aforeſaid *George Tailbois*, and the Heirs of the Body of the ſame *George* lawfully begotten, and for Default of ſuch Iſſue of the Body of ſame *George*, to the Uſe of the right Heirs of the aforeſaid *George* for ever. And the aforeſaid Biſhop of *Wincheſter*, Biſhop of *Lincoln*, *Thomas Wolſey*, *William*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward*, *Thomas Burgh*, *Robert Tirwhit*, *Numan*, *Henry*, and *John Ridley*, being ſo ſeized of the Manor aforeſaid with the Appurtenances whereof, *&c.* to the ſame Uſes, the aforeſaid *Richard* Biſhop of *Wincheſter*, *William* Biſhop of *Lincoln*, *Thomas Wolſey*, *William Tirwhit*, *Robert Dimock*, *Robert Conſtable*, *John Conſtable*, *Edward Derby*, and *John Ridley* died. And the aforeſaid *Thomas Burgh*, *Robert Tirwhit*, *Numan Markenfield*, and *Henry Gaſcoign* ſurvived them, and held themſelves in the ſame Manor with the Appurtenances whereof, *&c.* and were thereof ſeized in their Demeſn as of Fee to the ſame Uſes by Right of Survivorſhip, *&c.* at and until the aforeſaid *fourth* Day of *February* in the *twenty-ſeventh* Year of the ſaid late Lord the King aboveſaid, on which Day the aforeſaid *George Tailbois* and *Elizabeth* then his Wife were ſeized of the ſame Manor with the Appurtenances whereof, *&c.* in their Demeſn as of Fee Tail to them and the Heirs of their Bodies between them lawfully begotten, as is aforeſaid. And the ſaid *George* and *Elizabeth* his Wife being ſo ſeized thereof, the ſame *George* afterwards, and before the aforeſaid Time when, *&c.* at *Golthough* aforeſaid, of ſuch his Eſtate of and in the aforeſaid Manor with the Appurtenances whereof, *&c.* died ſeized, and the aforeſaid *Elizabeth Tailbois* now Defendant ſurvived the ſaid *George*, and held herſelf in the ſame Manor with the Appurtenances whereof, *&c.* and was thereof ſole ſeized in her Demeſn as of Fee Tail (as is aforeſaid) by Right of Survivorſhip. And the aforeſaid *Elizabeth Tailbois* being ſo ſeized of the Manor aforeſaid with the Appurtenances whereof, *&c.* one *William Tailbois* Clerk the *fifth* Day of *July* in the *thirty-third* Year of the Reign of the ſaid late Lord the King, ſued forth of the Court of Chancery of the ſaid late Lord the King, (the ſame Chancery then being at *Weſtminſter* in the County of *Middleſex)* a certain Writ original of the ſaid late Lord the King in Form of a Gift in *Deſcender* againſt the ſame *Elizabeth Tailbois* now Defendant, by the Name of *Elizabeth Tailbois* Widow, concerning the aforeſaid Manor of *Golthough* with the Appurtenances whereof, *&c.* directed to the then Sheriff of *Lincoln*, by which ſaid Writ the ſame late Lord the King commanded the ſame then Sheriff of *Lincoln* to command the ſame *Elizabeth Tailbois*, that juſtly and without Delay ſhe ſhould render to the aforeſaid *William Tailbois* the aforeſaid Manor with the Appurtenances, which *John Tailbois* of *Stalingburgh*, *John Fulmerley*, *John Turney*, *Henry Morley*, and *Lawrence Moine* gave to *Walter Tailbois* Eſquire, and *Alice* his Wife, and to the Heirs Males of the ſaid *Walter* of the Body of *Alice* begotten, and which after the Death of the aforeſaid *Walter* and *Alice*, and *William* Son and Heir of the ſame *Walter* and *Alice*, and *Robert* Son and Heir of the ſame *William*, and *George* Son and Heir of the ſame *Robert*, and *Gilbert* Son and Heir of the ſame *George* the Son of *Robert*, and *George* Son and Heir of the ſame *Gilbert*, and *Robert* Brother and Heir of the ſame *George* the Son of *Gilbert*, ought to deſcend, according to the Form of the Gift aforeſaid, to the aforeſaid *William* Brother of the aforeſaid *Gilbert* the Son of *George* the Son of *Robert*, and Couſin and Heir Male of the ſaid *Robert* Brother of the ſaid *George* the Son of *Gilbert*, as he ſaid: And unleſs ſhe ſhould do this, and the aforeſaid *William Tailbois* ſhould make him the then Sheriff ſecure of proſecuting his Claim, that the ſame then Sheriff ſhould ſummon by good Summoners the aforeſaid *Elizabeth*, that ſhe might be before the Juſtices of the ſaid late Lord the King at *Weſtminſter* from the Day of *St. Michael* in *fifteen* Days then next coming, to ſhew wherefore ſhe did not do it. And that he ſhould have then there the Summoners and that Writ. At which ſaid *fifteen* Days of *St. Michael*, before *John Baldwin* Knight and his Companions then Juſtices of the ſaid late King of the *Bench* at *Weſtminſter* aforeſaid, came as well the aforeſaid *William Tailbois* by *George Pullen* his Attorney, as the aforeſaid *Elizabeth Tailbois* by *Edward Bohun* her Attorney, and *Robert Tirwhit* Eſquire then Sheriff of the County aforeſaid returned the Writ aforeſaid to him in Form aforeſaid directed in every Thing ſerved and executed, to wit, that the aforeſaid *William Tailbois* had found to the ſame then Sheriff Pledges of proſecuting that Writ, to wit, *John Doe* and *Richard Roe:* And that the aforeſaid *Elizabeth Tailbois* was ſummoned by *Richard Fen* and *Henry Den.* Whereupon the aforeſaid *William Tailbois* Clerk declaring againſt the aforeſaid *Elizabeth Tailbois* late Wife of the aforeſaid *George* the Grandfather, upon the Writ aforeſaid by the aforeſaid *George Pullen* his Attorney, demanded againſt the ſame *Elizabeth* the aforeſaid Manor of *Golthough* with the Appurtenances, which *John Tailbois* of *Stalingburgh*, *John Fulmerley*, *John Turney*, *Henry Morley*, and *Lawrence Moigne* gave to *Walter Tailbois* Eſquire and *Alice* his Wife, and to the Heirs Males of the ſaid *Walter* of the Body of the ſaid *Alice* begotten, and which after the Death of the aforeſaid *Walter* and *Alice*, and *William* Son and Heir of the ſame

Walter

Walter and *Alice*, and *Robert* Son and Heir of the ſame *William*, and *George* Son and Heir of the ſame *Robert*, and *Gilbert* Son and Heir of the ſame *George* the Son of *Robert*, and *George* Son and Heir of the ſame *Gilbert*, and *Robert* Brother and Heir of the ſame *George* the Son of *Gilbert*, ought to deſcend, according to the Form of the Gift aforeſaid, to the aforeſaid *William* Brother of the aforeſaid *Gilbert* the Son of *George* the Son of *Robert*, and Couſin and Heir Male of the ſaid *Robert* the Brother of the ſaid *George* the Son of *Gilbert*, *&c.* And whereupon he ſaid, that the aforeſaid *John Tailbois*, *John Fulmerley*, *John Turney*, *Henry* and *Laurence* gave the Manor aforeſaid with the Appurtenances to the aforeſaid *Walter* and *Alice*, and to the Heirs Males of the ſaid *Walter* of the Body of the ſaid *Alice* begotten in Form aforeſaid, by which Gift they the ſame *Walter* and *Alice* were thereof ſeized in their Demeſn as of Fee and Right, by Form, *&c.* in Time of Peace, in the Time of the Lord *Henry* late King of *England* the Sixth from the Conqueſt, taking thereof Explees to the Value, *&c.* And from the ſaid *Walter* and *Alice* the Right deſcended by Form, *&c.* to one *William* as Son and Heir, *&c.* And from that *William* the Right deſcended by Form, *&c.* to one *Robert* as Son and Heir, *&c.* And from that *Robert* the Right deſcended by Form, *&c.* to one *George* as Son and Heir, *&c.* And from that *George* the Right deſcended by Form, *&c.* to one *Gilbert* as Son and Heir, *&c.* And from that *Gilbert* the Right deſcended by Form, *&c.* to one *George* as Son and Heir, *&c.* And from that *George* the Son of *Gilbert*, becauſe he died without Heir Male of his Body begotten, the Right deſcended by Form, *&c.* to one *Robert* as Brother and Heir, *&c.* And from that *Robert* the Brother of *George* the Son of *Gilbert*, becauſe he died without Heir Male of his Body begotten, the Right deſcended by Form, *&c.* to that *William* who then demanded as Brother and Heir, *&c.* And that after the Death, *&c.* And thereupon he brought Suit, *&c.* And the aforeſaid *Elizabeth* by *Edward Bohun* her Attorney then came and defended her Right, when, *&c.* and ſaid that ſhe could not deny the aforeſaid Action of the aforeſaid *William* then Demandant, nor could ſay but the Manor aforeſaid with the Appurtenances was the Right of the ſaid *William* then Demandant, nor could ſay but the aforeſaid *John Tailbois*, *John Fulmerley*, John *Turney*, *Henry Morley*, and *Laurence Moign* gave the ſaid Manor with the Appurtenances to the aforeſaid *Walter* and *Alice*, and to the Heirs Males of the ſaid *Walter* of the Body of the ſaid *Alice* begotten, as the aforeſaid *William* then Demandant by his Writ and Declaration aforeſaid above ſuppoſed. And becauſe the Juſtices of the *Bench* aforeſaid would then adviſe of and upon the Premiſſes before they gave Judgment thereon, Day was given as well to the aforeſaid *Walter* then Demandant, as to the aforeſaid *Elizabeth* then Tenant, before the aforeſaid Juſtices of the *Bench* here at *Weſtminſter*, on the *Octave* of *St. Hillary* then next coming, to hear their Judgment thereon, becauſe the ſame Juſtices thereof then, *&c.* At which ſaid *Octave* of *St. Hillary* before the aforeſaid *John Baldwin* and his Companions Juſtices of the ſaid late Lord the King then of the *Bench* at *Weſtminſter* aforeſaid, came as well the aforeſaid *William Tailbois* the Demandant, as the aforeſaid *Elizabeth Tailbois* then Tenant by their Attornies aforeſaid, whereupon the Premiſſes being ſeen and by the ſame Juſtices more fully underſtood, it was conſidered in the ſame Court of the ſaid late Lord the King of the *Bench* aforeſaid at *Weſtminſter* aforeſaid, that the aforeſaid *William Tailbois* then Demandant ſhould recover his Seizin againſt the aforeſaid *Elizabeth* of the Manor aforeſaid with the Appurtenances. And that the ſaid *Elizabeth* ſhould be nothing in Mercy, [a] becauſe ſhe came the firſt Day by Summons, *&c.* as by the Record of the Recovery aforeſaid here remaining in Court more fully appears. And further the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife by proteſting that the aforeſaid *William Tailbois* was not Couſin and Heir Male of the aforeſaid *Walter Tailbois* Eſquire of the Body of the aforeſaid *Alice* his Wife begotten, for Plea further ſay, that the Recovery aforeſaid of the Manor aforeſaid with the Appurtenances whereof, *&c.* in Manner and Form aforeſaid, was had by Covin between the aforeſaid *William Tailbois* and the ſaid *Elizabeth Tailbois* now Defendant, without the Conſent or Aſſent of them the ſaid *Thomas Wimbiſh* and *Elizabeth* his Wife or either of them. And moreover the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife ſay, that ſhe the ſame *Elizabeth* now Wife of the aforeſaid *Thomas Wimbiſh*, at the Time of obtaining the Writ original aforeſaid of the aforeſaid *William Tailbois* to wit, the aforeſaid *fifth* Day of *July* in the *thirty-third* Year of the Reign of the ſaid late Lord the King aboveſaid, and at the Time of the Judgment aforeſaid given upon the ſame Writ, was the Perſon to whom the Intereſt and Title of the Manor aforeſaid with the Appurtenances whereof, *&c.* belongs after the Deceaſe of the aforeſaid *Elizabeth Tailbois* Widow. By Reaſon of which Premiſſes the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife, as in Right of the ſaid *Elizabeth*, by virtue of a certain Statute made at a Parliament of the Lord *Henry* the *Seventh* late King of *England*, in the *eleventh* Year of his Reign, before the aforeſaid Time when, *&c.* entered into the Manor aforeſaid with the Appurtenances whereof, *&c.* And were thereof ſeized in their Demeſn as of Fee-Tail in Right of the ſame *Elizabeth*, to wit, to them and to the Heirs of the Body of the ſame *Elizabeth* lawfully begotten, until the aforeſaid *Elizabeth Tailbois* Widow the aforeſaid *third* Day of *Auguſt*, in the *thirty-ſixth* Year of the Reign of the ſaid late Lord the King *Henry* the *Eighth* aboveſaid, with Force and Arms the Cloſe of them the ſaid *Thomas Wimbiſh* and *Elizabeth* his Wife at *Golthough* aforeſaid broke, and their Graſs to the Value *&c.* there lately growing with the Cattle aforeſaid eat up, tread down, and deſtroyed, againſt the Peace of the ſaid late Lord the King *Henry* the *Eighth*, and againſt the Peace of the ſaid Lord the King now, as they above complain againſt her. And this, *&c.* wherefore for that the aforeſaid *Elizabeth Tailbois* Widow the Treſpaſs aforeſaid done in the aforeſaid 40 Acres of Meadow, and 206 Acres of Paſture with the Appurtenances above acknowledges, they the ſame *Thomas Wimbiſh* and *Elizabeth* his Wife pray Judgment, and their Damages by Reaſon of the ſaid Treſpaſs to be adjudged to them, *&c.*

[a] Vide H. 14. Ed. 3. Fitz. Amercement 16. T. 8. R. 2. Fitz. ibid. 26. Bellew's C. 29. 1. Rol. Abr. 212. H. pl. 1. Co. Litt. 126. 5. Co. 49. a. 8. Co. 61. b.

Defendant demurs:

And the aforeſaid *Elizabeth Tailbois* ſays, that the aforeſaid Plea of the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife in Manner and Form above in replying pleaded is inſufficient in Law for the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife to have and maintain their Action aforeſaid againſt her the ſaid *Elizabeth Tailbois*, and that ſhe has no Neceſſity, nor is by the Law of the Land bound to anſwer the Replication aforeſaid in Manner and Form aforeſaid pleaded: And this ſhe is ready to verify. Wherefore for want of a ſufficient Replication in this Behalf, the ſame *Elizabeth* prays Judgment, and that the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife may be precluded from having their Action aforeſaid againſt the ſame *Elizabeth Tailbois*.

Joinder.

And the aforeſaid *Thomas Wimbiſh* and *Elizabeth* his Wife for that they have above in replying alledged ſufficient Matter in Law to have and maintain their Action aforeſaid againſt the aforeſaid *Elizabeth Tailbois*, which they are ready to verify, which ſaid Matter the aforeſaid *Elizabeth Tailbois* doth not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſes to admit, pray Judgment, and their Damages by Reaſon of the ſaid Treſpaſs to be adjudged to them, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the Octave of *St. Michael*, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.*

Continuance.

The CASE. *Michael. Term. 4. Edw. 6.* *G. T.* ſeized in Fee inteoffs others to the Uſe of himſelf and his Wife in Special Tail, and has Iſſue *T.* and *W.* and dies, and *E.* his Wife ſurvives. *T.* has Iſſue *Eliz.* married to *T. W.* and dies, and afterwards *W.* by Covin of *E.* his Mother, brings a *Formedon* in Deſcender againſt his Mother, and ſhe appears at the firſt Day, and *W.* recovers by *nient dedire*, and *T. W.* and *Eliz.* his Wife Heir to *G. T.* entered by virtue of the Statute of 11. *H.* 7. *cap.* 20. and the Entry adjudged lawful by the ſame Statute, which ſaith, that the Recovery is void, and it is not neceſſary to ſay, that the Recovery was executed, for inaſmuch as if is void, it ſhall never be executed: And *Eliz.* the Heir averred that ſhe was the ſame Perſon to whom the Reverſion belonged, and did not ſhew how ſhe was Heir to it, and yet well by ſome, others *contra*, but all agreed that it was a Recovery by Covin, notwithſtanding it was upon a true Title; and tho' the Cauſe of Covin was not ſhewn, yet well. 8. C. 32. H. 8. Bro. Entry congeab. 140. B. N. C. § 182. Vin. Abr. tit. Jointure J. pl. 2.

Memorandum, before my coming to the City this Term *Morgan* and *Brook* Serjeants had argued. *Cook* Serjeant recited the Caſe briefly in this Manner. You, my Lords, have well underſtood how that *Thomas Wimbiſh* and *Elizabeth* his Wife have ſued an Action of Treſpaſs againſt *Elizabeth Tailbois* for a Treſpaſs done in Land; And the Defendant ſaith that long before the Treſpaſs ſuppoſed one *George Tailbois* Knight Grandfather of the Wife of the Plaintiff, whoſe Heir ſhe is, was ſeized of the Place where, *&c.* in his Demeſn as of Fee, and being ſo ſeized he, by his Deed ſhewn forth, thereof infeoffed the Biſhop of *Wincheſter* and others in Fee, to the Uſe of the ſaid *George Tailbois* and of the ſaid *Elizabeth Tailbois* then being his Wife, and the Heirs of their two Bodies begotten, and for Default of ſuch Iſſue, to the Uſe of the ſaid *George Tailbois* in general Tail, by Force whereof the ſaid Biſhop and others his Co-Feoffees were ſeized in Fee to the Uſes aforeſaid; and ſhe ſhews in Particular that ſome of the Feoffees died, and the others ſurvived them, and were ſeized in Fee to the Uſes aforeſaid until the Statute of 27. *Hen.* 8. *of Uſes* was made, by Force of which the ſaid *George Tailbois* and *Elizabeth* his Wife were ſeized of the ſaid Land in their Demeſn as of Fee Tail, and being ſo ſeized, the ſaid *George Tailbois* died, and the ſaid *Elizabeth* his Wife now Defendant ſurvived him, and was thereof ſole ſeized in her Demeſn as of Fee Tail by Right of Survivorſhip; and ſhe gives Colour to the Plaintiffs, and ſo juſtifies. And the Plaintiffs by their Replication ſay, that well and true it is, that the aforeſaid *George Tailbois* Grandfather of the ſaid *Elizabeth* the Plaintiff was ſeized of the ſaid Land in Fee, and thereof infeoffed the ſaid Biſhop and the others to the Uſes aforeſaid in manner and form aforeſaid, and that ſome of the ſaid Feoffees died, and that the Survivors were ſeized to the Uſes aforeſaid until the Statute of 27. *Hen.* 8. was made, in manner and form as is alledged. And further they ſay, that after the Death of the ſaid *George Tailbois*, one *William Tailbois* brought a *Formedon* in Deſcender for the ſaid Land againſt the ſaid *Elizabeth* now Defendant, and recovered at the firſt Day by *nient dedire*, and that the Feme Tenant was not amerced becauſe ſhe came the firſt Day; and the ſaid Plaintiffs by Proteſtation ſay, that the ſaid *William Tailbois* was not Couſin and Heir in Tail to the aforeſaid Donees ſuppoſed by his *Formedon*, and for Plea further ſay, that the ſaid Recovery was by Covin had between the ſaid *William Tailbois* and the ſaid *Elizabeth Tailbois* now Defendant, without the Aſſent or Conſent of the ſaid Plaintiffs, or either of them. And further they ſay, that the Wife of the Plaintiff, at the Time of the ſaid *Formedon* purchaſed, and of the Judgment given, was the ſame Perſon to whom the Intereſt and Title of the ſaid Land belongs after the Deceaſe of the ſaid *Elizabeth Tailbois*; by Reaſon of which Premiſſes the ſaid Plaintiffs as in Right of the ſaid Wife of the Plaintiff, by virtue of a certain Act of Parliament made in the *eleventh* Year of the Reign of King *Henry* the *Seventh*, entered into the ſaid Land, and thereof were ſeized in their Demeſn as of Fee Tail in Right of the ſaid Wife of the Plaintiff, *viz.* to them and to the Heirs of the Body of the ſaid Wife of the Plaintiff begotten, until the Defendant entered, and did the Treſpaſs; and upon this the Defendant has demurred in Judgment. And it ſeems to me that the Plaintiffs ſhall be barred, for the Replication is not good, for divers Cauſes. One Cauſe is, becauſe the Plaintiffs in the Replication have not ſhewn certainly how the Wife of the Plaintiff is Heir to the Tail, but have averred generally that the Wife of the Plaintiff is the ſame Perſon, to whom the Intereſt and Title, after the Death of the Defendant, belongs; and this is not good. For the Statute of 11. *H.* 7. *cap.* 20. ſaith, that upon a Recovery by Covin, *it ſhall be lawful for the Perſon, to whom the Intereſt, Title, or Inheritance after the Death of ſuch Women belongs, to enter into the ſame Tenements.* And then ſuch Perſon as will enter for ſuch Cauſe, ought to ſhew certainly how the Title or Inheritance, after the Death of the Woman, belongs to him, and ſo ought the Wife of the Plaintiff here, as to ſay, that ſhe was the Daughter of *A.* Son and Heir of the aforeſaid *George Tailbois* and *Elizabeth* his Wife, begotten of their Bodies, and upon this Iſſue might ariſe, as that *A.* was a Baſtard, or upon ſuch like Matter; but here it altogether wants Certainty. And therefore we may ſee that where ſuch Statutes generally give an Entry to one, who ſhall be in ſuch Degree, yet if he will take Advantage thereof, he ſhall not ſhew generally that he is the ſame Perſon, but he ought to ſhew how. As the Statute of 6. *R.* 2. *cap.* 6. ordains, that if a Woman raviſhed aſſent to the Raviſher, *the next of Blood of thoſe Raviſhers, and of them that be raviſhed, to whom the Inheritance ought to deſcend, remain,*

or

or fall after the Death of the Raviſher, or of her that is ſo raviſhed, ſhall have Title immediately, that is to ſay, after the Rape, to enter upon the Raviſher, or her that is raviſhed: And yet there, if one in the Remainder, being *next of Blood to whom, &c.* will enter upon a Woman Tenant in Tail for ſuch conſent to the Raviſher, [a] he ought to ſhew certainly how he is next of Blood, as it is held in the Aſſize brought by *Babington* in 5. *Ed.* 4. and it is not ſufficient to aver that he is next of Blood, without ſhewing ſpecially how, notwithſtanding the Statute is general. And ſo the Statute of *Weſtminſter* 2. *cap.* 3. which gives Receit upon Default of Tenant for Life, ſaith, that upon Default of Tenant for Life *they unto whom the Reverſion belongs ſhall be admitted if they come before Judgment*, there upon Default of Tenant for Life if one prays to be received, and ſhews that he is in the Reverſion, this is not ſufficient, [b] but he ought to ſhew how he came to the Reverſion, as to ſay, that he leaſed the Land to the Tenant for Life, or that ſuch an one, who leaſed the Land, granted the Reverſion to him, and the Tenant attorned; and yet the Statute is general, as our Statute is here. And ſo the Statute of *Mortmain, anno* 7. *Ed.* 1. ſays, *It ſhall be lawful for the chief Lords of the Fee to enter into the Land ſo alienedwithin a Year from the Time of the Alienation, and to hold it in Fee as an Inheritance:* [c] And yet if one will intitle himſelf, in pleading, by ſuch Entry, it is not ſufficient to ſay that he was the chief Lord, but he ought to ſhew how, as to ſay, that the Tenant held of him by ſuch Service, *&c.* and yet the Statute is general, as the Statute of 11. *H.* 7. is; but nevertheleſs when one makes Title by a Statute which has ſuch general Words, he ought to ſhew in his Title the Matter and Conveyance ſpecially and certainly whereupon Iſſue may be taken, if the other Party chuſes. And ſo here, although the Statute is general, and ſaith, *that it ſhall be lawful for the Perſon, to whom the Intereſt, Title, or Inheritance after the Death of ſuch Women belongs, to enter into the ſame Tenements*, yet it is not ſufficient to aver generally, that the Wife of the Plaintiff is the Perſon, to whom the Intereſt and Title, after the Death of the Defendant, belongs, but they ought to ſhew ſpecially how, and inaſmuch as they have not done it, the Replication is bad. And as to that which was argued the other Day to the contrary, *viz.* that the Defendant, in the Beginning of her Bar, has alledged that *George Tailbois*, the Grandfather of the Wife of the Plaintiff, whoſe Heir ſhe is, was ſeized, *&c.* whereby ſhe has affirmed the Wife of the Plaintiff to be Heir to him; and therefore it is not neceſſary to ſhew particularly in the Replication how ſhe is Heir, Sir, as to that I anſwer, that the Defendant, by the Bar, has only confeſſed her to be Heir general, and that is, to all Fee Simples, but here ſhe conveys herſelf to her Entry as Heir Special, *viz.* as Heir to the Special Tail, and as begotten of the Body of the ſaid *George Tailbois*, and of the Defendant his Wife, ſo that the Defendant has not, by the Bar, alledged the Wife of the Plaintiff to be Heir to them both, but only Heir to the Huſband, *viz.* to *George Tailbois*; wherefore that Objection does not overthrow the Exception to the Replication, which is bad for want of Certainty in this Point. Alſo the Replication is not good for another Cauſe, *viz.* becauſe it is not alledged that Execution of the Recovery was ſued againſt the Defendant, for upon a Recovery without Execution the Recoveror is not Tenant, for his Wife ſhall not have Dower thereof, nor ſhall ſuch Recovery by the Brother make the Siſter to be Heir, if he has not Execution, for without Execution he has not the Poſſeſſion, ſo that the Execution makes the judgment full and perfect. And the Statute which ſays, "if a Woman by Covin ſuffer a Recovery," intends ſuch a Recovery as is full and perfect, and that is, a Recovery with Execution, which is not here ſhewn, wherefore, *&c.* Alſo the Replication is not good for another Cauſe, *viz.* becauſe the Covin is not averred ſpecially, but generally, and then the Covin without the ſpecial Matter of the Covin ſhewn is not well averred, for Recoveries are always to be intended true and upon good Cauſe, ſo that the Law gives the greateſt Credit to them, [d] for if a Recovery had been had by Default againſt Huſband and Wife of the Land of the Wife, ſhe after the Death of her Huſband could not enter upon the Recoveror, nor have any other Remedy than a Writ of Right, by the common Law, (as it is proved by the Recital of the Statute of *Weſtminſter* 2. *cap.* 3.) until the ſame Statute was made, which gives her *a cui in vita*; and the Reaſon why ſhe had no other Remedy at the common Law than a Writ of Right was, becauſe of the Credit the Law gives to Recoveries, which are always preſumed to be true and upon good Title. [e] And upon a feint Recovery againſt Tenant for Life, he in the Remainder had no Remedy before the ſame Statute, by Reaſon of the preſumption in Law of the Truth of the Title. And the Statute *de Religioſis*, which reſtrains Alienations in Mortmain, ordains *that no religious Perſon by Craft or Engine do preſume to appropriate to himſelf any Lands*, [f] yet if any religious Perſons had recovered any Lands by feint Title, this was held to be out of the Prohibition and Penalty of the ſaid Statute, in reſpect of the Truth which the Law ſuppoſed to be in the ſame; and therefore the Statute of *Weſtminſter* 2. *cap.* 32. was afterwards made, which puts a Recovery without Title in the ſame Plight as a Feoffment in Mortmain was; which Statutes prove what Credit the common Law gives to Recoveries, which are always preſumed to be true and upon good Title. And ſo the Recovery here ſhall be intended true and without Deceit, unleſs ſpecial Cauſe be ſhewn, which the Plaintiff ought to ſhew, if there be any, as to ſay, that he who recovered by the *Formedon* was a Baſtard, or that there was no ſuch Gift in Tail made, or ſome ſuch Matter, which proves the Recovery to be without Title and by Covin. [g] And if the Tenant in a *Precite quod reddat* vouch one of the Demandants, he ought to ſhew Cauſe, as it is held in 11. *H.* 4. for that the Law preſumes he has no Cauſe of Warranty againſt one of the Demandants; *a multo fortiore* he ought to ſhew Cauſe here, for in this Point of a Recovery the Law has the ſtrongeſt Preſumption of Truth. [h] And in 15. *Ed.* 4. in a Writ of Dower, the Tenant ſaid that long before the Writ purchaſed one *A.* was ſeized of the ſaid Land, until by the

[a] T. 5. Ed. 4. 6. pl. 24. Fitz. Aſſize 27. Bro. Noſme, 47. Bro. Done 28. Poſt 56. *Per Mountague*, C. J.

[b] Poſt 56. *Per Mountague*, C. J.

[c] Poſt 56. *Per Mountague*, C. J.

[d] P. 46. Ed. 3. 12. a. *Per Finchden.* 2. Leon. 62. 64.

[e] Litt. § 481.

[f] 2. Inſt. 429.

[g] M. 11. H. 4. 19. Fitz. Voucher 52. Bro. 49.

[h] M. 15. Ed. 4. 4. pl. 7. Bro. Colluſion 26. 8. Co. 132. b. Poſt 48. Vin. Abr. tit. Covin. B. pl. 1. *in Notis.*

the Tenant diſſeized, upon whom *A.* entered pending the Writ, Judgment of the Writ; and the Demandant ſaid, that *A.* entered by Covin to abate his Writ: And it is there held by the Opinion of the whole Court, that the Plaintiff's Plea was not good, for inaſmuch as the Tenant has ſhewn the Entry of *A.* by Title, the Demandant may not have ſuch general Averment of Covin, without ſhewing Cauſe. So here inaſmuch as the Law preſumes the Title of the Recovery to be good, ſuch general Averment of Covin is not good without ſpecial Cauſe ſhewn. And further, the Plaintiffs in their Replication have ſaid, that they entered upon the Woman Defendant, and were ſeized in Tail in Right of the Wife of the Plaintiff. And this is not true, for although the Statute gives an Entry, yet they cannot have an Eſtate Tail, for that cannot be but where the Anceſtor in Tail is dead: So that the Eſtate, which they ſhall have upon ſuch Entry, ſhall be rather for Life, than in Tail. Then as to the Matter in Law, it ſeems to me, that the Caſe here is clearly out of the Words and Penalty of the Statute of 11. *H.* 7. *cap.* 20. And therefore although the Statute of 27. *H.* 8. *cap.* 10. has executed the Poſſeſſion to the Uſe, yet the Caſe remains as if the Statute of 27. *H.* 8. had not been made, and it is as if the Woman had continued Tenant in Tail in Uſe, and had ſuffered a feint Recovery, in which Caſe (the Matter being as it is here) ſhe is out of the Penalty of the Statute, for the Penalty of the ſaid Statute extends only to Women who have an Eſtate by one of three Ways. For the Statute has three ſeveral Branches by which the Eſtate of the Women, who are within the Purview and Penalty of the Statute, are expreſſed. The firſt Branch ſpeaks of a Woman that has an Eſtate in Dower, for Life, or in Tail, jointly with her Huſband, or ſolely to herſelf, or to her own Uſe, in any Manors, Lands, Tenements, or other Hereditaments of the Inheritance or Purchaſe of her Huſband; this is all the firſt Branch, and I will prove that the Woman Defendant here is not within this Branch. For an Eſtate in Dower ſhe had not, nor an Eſtate for Life, but an Eſtate Tail, and the Eſtate Tail is not in Lands, but only in Uſe, and then ſuch Woman as hath any Uſe ought to have an Eſtate in the Thing out of which the Uſe iſſues, ſolely to herſelf, or jointly with her Huſband; for the Words are, that ſhe ſhall have an *Eſtate in Lands, Tenements, or Hereditaments to herſelf or to her own Uſe*, and here ſhe has no Eſtate in any Hereditaments to her own Uſe, but ſhe has an Eſtate Tail in the Uſe, for Hereditaments to Uſe, and the Uſe itſelf are two diſtinct Things, for the Hereditaments to Uſe are the Matter and Subſtance out of which the Uſe iſſues, and the Uſe is no more than the Confidence of the Matter and Subſtance, ſo that the Subſtance and the Uſe are two ſeveral Things; and then ſuch Woman, to whom the Uſe is here appointed, ought to have an Eſtate in the Tenement or Hereditament out of which the Uſe iſſues. But it may be objected, that a Woman cannot have a Uſe, where ſhe has an Eſtate in the Land, Hereditament, or Thing out of which the Uſe iſſues, for the Poſſeſſion and Eſtate of the Thing, out of which the Uſe iſſues, ſuſpends the Uſe; to this I anſwer, that true it is ſo, but it is contained in the Statute, that if ſhe hath an Eſtate in Lands, Tenements, or Hereditaments jointly with her Huſband, or ſolely to herſelf, or to her own Uſe, *&c.*; ſo that if ſhe alone hath an Eſtate in the Thing, then ſhe cannot have a Uſe, for then the Uſe is ſuſpended, and ſo the Uſe cannot be referred to a Woman who hath an Eſtate ſolely in the Thing out of which the Uſe iſſues, but it is referred to a Woman where the Huſband and Wife have a joint Eſtate in the Lands, Tenements, or Hereditaments, for ſo it may ſtand together, * for two may have Lands to the Uſe of one of them, and ſo Huſband and Wife may have Lands to the Uſe of the Wife. And therefore the Uſe in the Wife ſhall be intended, where the Wife with her Huſband hath a Poſſeſſion in the Thing out of which the Uſe ariſes, and not where the Wife is ſolely ſeized of the Thing out of which the Uſe iſſues; and in this Manner the Senſe of the Letter of the Statute is full and perfect, and every Word hath its apt Relation. Wherefore inaſmuch as the Woman Defendant in this Action has not an Eſtate in the Thing, out of which the Uſe iſſues, it cannot be denied but that ſhe is out of this Branch of the Statute. And for another Cauſe alſo ſhe is out of this Branch of the Statute, for the Words of this Branch are, *if any Woman hath an Eſtate (ut ſupra) in Manors, Lands, Tenements, or other Hereditaments of the Inheritance or Purchaſe of her Huſband, &c.*; ſo that that which ſhe hath ought to be the Inheritance or Purchaſe of her Huſband, and here the Uſe which the Huſband hath appointed to him and to his Wife is a new thing, which is neither the Inheritance nor the Purchaſe of the Huſband, for it commences at preſent, and was not in *eſſe* before, and ſo never was in the Huſband; *ergo* it is out of the Words of the Statute. And therefore if a Man will grant to another a Rent out of his Land, to the Uſe of the Wife of the Grantor, this is out of the Words of the Statute, for neither the Rent nor the Uſe were in *eſſe* before, ſo that it is not the Inheritance nor the Purchaſe of the Huſband. † And if a Woman has a Seigniory in Tail given by her Huſband for her jointure, and afterwards the Tenancy eſcheats, and the Woman ſuffers a feint Recovery thereof againſt her, this is out of the Statute, for the Land eſcheated is a new Thing, which was not the Inheritance nor Purchaſe of the Huſband. And if the Huſband makes a Feoffment of his Land upon Condition to re-enfeoff him and his Wife in Tail, the Feoffee does it accordingly, the Huſband dies, the Wife ſuffers a feint Recovery, this Caſe is out of the Statute, for the Condition, which was the Cauſe of the Gift in Tail, was a new Thing, and when the Feoffee made the Gift in Tail, the Land then was his Purchaſe, and not the Inheritance or Purchaſe of the Huſband, for by the Feoffment the Land was removed out of the Poſſeſſion of the Huſband, and after that it could not be ſaid his Inheritance or Purchaſe. Wherefore here, inaſmuch as this Uſe is a new Thing, it cannot be ſaid the Inheritance or Purchaſe of the Huſband, and for this Cauſe it is out of the firſt Branch. And ſo it is proved by theſe two Cauſes, that the Woman Defendant is not within the firſt Branch. The ſecond Branch of the Statute is, where a Woman has any Eſtate in Land, *(ut ſupra)* given to the

* Vide Bro. Feoffments al. Uſes 51. B. N. C. § 241.

† S. P. 4. Co. 59. a.

Huſband and Wife in Tail, or for Term of Life, by any of the Anceſtors of the Huſband, *&c.* And the Woman Defendant here is not within this Branch, for ſhe has nothing of the Gift of any of the Anceſtors of her Huſband. And alſo by this Branch ſhe ought to have an Eſtate in the Thing out of which the Uſe iſſues, as ſhe ought to have in the former Branch, and that ſhe had not here. So that for theſe two Cauſes the Woman Defendant is not within the ſecond Branch. The third Branch is, where a Woman hath an Eſtate, *(ut ſupra)* by any other Perſon ſeized to the Uſe of the Huſband, or of his Anceſtors, *&c.* and the Defendant here is not within this Branch. For ſhe does not claim from the Feoffees, for the Uſe was appointed by the Huſband at the Time of the Eſtate of the Feoffees made, and not afterwards, *ergo* the Wife does not claim from them. And although the Statute of 27. *H.* 8. removes the Poſſeſſion from them to the Defendant, being *ceſtuy que uſe*, yet ſhe does not claim the Poſſeſſion by them, but by the Statute, and is in the ſame Courſe that ſhe was before the ſame Statute of 27. *H.* 8. for the Statute does not give the Poſſeſſion in any other Courſe or Degree than the Uſe was before, but in the very ſame Manner and Form. And then the Woman Defendant here is not within any of the three Branches, and ſo no Penalty nor Forfeiture enſues by ſuch Recovery. And admitting that ſhe was within the Words of the Statute, yet the Heir in her Life time could not enter, for the Statute has two Clauſes concerning the Entry. The firſt ſays, that ſuch *Recoveries, Diſcontinuances, &c. ſhall be void and of no Effect, and that it ſhall be lawful for every Perſon, to whom the Intereſt, Title, or Inheritance, after the Death of ſuch Women, ſhall belong, to enter into the ſame Premiſſes, and them to enjoy in the ſame Manner and Form as he ſhould have done, if no Diſcontinuance, Warranty, or Recovery had been had or made.* And then I ſay, that if no ſuch Recovery had been had, the Heir could not have entered until after the Death of the Tenant in Tail, and now the Statute ſaith, that they to whom, *&c.* ſhall enter into the Premiſſes, and enjoy them in the ſame Manner and Form as they ſhould have done if no Recovery had been had or made; and if they ſhall enter and enjoy the Tenements in the ſame Manner and Form as, *&c.* and in no other Manner and Form, then the Heir in Tail may not enter until after the Death of the Tenant in Tail. And as to the ſecond Clauſe of the Statute, it is as follows, *viz. It is enacted, that if the Woman at the Time of ſuch Diſcontinuance, Alienation, Recovery, &c. be ſole, that then ſhe ſhall be barred and excluded of her Title and Intereſt from thenceforwards: and that the Perſon to whom the Title, Intereſt, or Poſſeſſion of them ſhall belong after the Death of ſuch Woman, immediately after ſuch Diſcontinuance, &c. ſhall enter into the ſame Tenements, and them ſhall poſſeſs and enjoy according to his Title in them.* This Clauſe proves one Thing, and gives a Remedy over the other Branch before, that is to ſay, it proves that the Recovery or Diſcontinuance, *&c.* which the firſt Clauſe in the Statute makes to be void as before, ſhall be void againſt the Woman, as well as againſt him that ſhall have the Land after her Death, for if the Woman ſhould be barred by the Recovery before, then this ſecond Clauſe, which ſaith that the Woman ſhall be barred and excluded of her Title, where ſhe was excluded and barred by the Recovery or Diſcontinuance before were vain and Surpluſage. But the firſt Clauſe makes the Recovery void againſt the Woman, and this ſecond Clauſe bars and excludes the Woman, not againſt the Recoverer, but againſt thoſe who ſhall have the Land after the Death of ſuch Woman. So that the firſt Clauſe, which ſaith that the Recovery ſhall be void, is explained by this Clauſe, as it is ſaid before. Now the Benefit and Remedy which this laſt Clauſe of the Statute gives, is an immediate Entry to the Perſon, to whom the Title, *&c.* and a Power to poſſeſs and enjoy the Lands according to his Title, and this cannot be referred to the Heir in Tail, for he has not any Title in the Life of the Anceſtor, no more than the Son and Heir Apparent of Tenant in Fee ſimple has in the Life of his Father. For no Heir has any Right or Title but after the Death of the Anceſtor who has the Inheritance, and not during his Life; and this proves that the Statute, which ſaith that ſuch Perſon ſhall enjoy the Lands according to his Title, cannot be referred to the Heir in Tail, who has no Title in the Life of the Anceſtor, but it ſhall be referred to thoſe to whom it may reaſonably be referred, and that is, to thoſe who have Title and Right in *eſſe*, *viz.* they in Reverſion, for the Statute recites, *Tenant in Dower, Tenant for Life, &c.* And if any Woman, who is Tenant in Dower, or Tenant for Life, according to the Statute, ſuffers a feint Recovery, then he in the Reverſion ſhall enter preſently, and ſo ſhall the Statute be intended, for they have Title in the Life of Tenant in Dower, for Life, or Tenant in Tail after Poſſibility, &c. that is to ſay, they have the Reverſion: and the Intention of the Statute cannot be taken to reſpect the Iſſue in Tail, who has no Title in the Life of his Anceſtor. And therefore the Statute of 6. *Rich.* 2. *cap.* 6. provides, that when Women aſſent to their Raviſhers, *the next of Blood of thoſe Raviſhers, and of them that be raviſhed, to whom, &c. ſhall have Title immediately, that is to ſay, after the Rape to enter upon, &c. and the ſame to hold in State of Inheritance, &c.* The Makers of which Statute well perceived, that the Iſſue in Tail had no Title in the Life of his Anceſtor, and therefore they *gave* him Title, for the Statute ſaith, *ſhall have Title to enter, &c.* And if the Makers of the Statute of 11. *H.* 7. had intended that the Iſſue in Tail ſhould enter immediately, they would have given him Title by the like Words as the Statute of *Rich.* 2. has done; but the End of the Clauſe, which ſaith that they ſhall enjoy according to their Title, expreſſes that their Intention was not ſuch. For which Reaſons it ſeems to me that the Woman Defendant is out of the Penalty of the Statute, and that the Plaintiffs may not enter, and therefore they ſhall be barred.

Whiddon to the contrary. As to what has been ſaid, that the Plaintiffs ought to have ſhewn certainly how the Wife of the Plaintiff is Heir to the Tail, to this I ſay, that in the Beginning of the Bar the Defendant has ſaid, that *George Tailbois* was Grandfather of the Wife of the Plaintiff, and that ſhe was his Heir, and then inaſmuch as this Word *Heir* may be taken two Ways, *viz.* Heir general or Heir ſpecial, and the Replication proves that it is more advantageous for the Wife

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to be Heir ſpecial, for this Reaſon it ſhall be taken that ſhe is Heir ſpecial, for upon the Sequel of the Matter this ſhall be the beſt for the Wife, and a Plea [a] which has two Intendments ſhall be taken moſt ſtrongly againſt him that pleads it. [b] As in Treſpaſs a Releaſe generally is no Plea, for it may be delivered after the Treſpaſs or before, and becauſe it has two Intendments it ſhall be taken that it was delivered before the Treſpaſs, for this is the ſtrongeſt Conſtruction againſt him that pleads it, in which Caſe it is no Plea. [c] So if a collateral Warranty is pleaded in Bar, it is no Plea in Avoidance of the Warranty to ſay that he entered, for the Entry might be in the Life of the Anceſtor or afterwards, and therefore it ſhall be taken moſt ſtrongly againſt him, and that is, that the Entry was after the Deſcent. So here, inaſmuch as this Word *(Heir)* has two intendments, the ſtrongeſt ſhall be taken, and that is, Heir ſpecial. Alſo there is another Reaſon why it is not neceſſary for the Plaintiffs to ſhew how the Wife is Heir, and that is, becauſe ſhe had once entered and was ſeized. [d] And therefore if an Executor brings an Action of Treſpaſs for Goods taken out of his Poſſeſſion, he needs not ſhew the Teſtament, becauſe he was once poſſeſſed of them; but if he had never been poſſeſſed, but had demanded the Thing, then he ought to ſhew the Teſtament. So if the Wife of the Plaintiff here had brought a *Formedon* upon the Tail, ſhe ought to have ſhewn how ſhe was Heir, becauſe then it had been by Way of Demand, but here inaſmuch as ſhe was once ſeized by Entry, it is not neceſſary now to ſhew how ſhe is Heir. And if *in rei veritate* ſhe be not Heir, then the Defendant ought to traverſe that ſhe is not Heir; wherefore the Replication is good notwithſtanding this Exception. Then as to the Covin, I ſay it is not neceſſary to ſhew this certainly, [e] for Covin is a ſecret Thing contained in the Heart of a Man, which by Intendment another Perſon can have no Knowledge of; and then the Law will not force any Man to ſhew that [f] which it preſumes lies not in his Knowledge. [g] And for this Reaſon a Woman ſhall have Dower of a Rent Charge without ſhewing the Deed of Grant, becauſe the Deed does not belong to her. And if there be Lord and Tenant by Knights-Service, and the Tenant makes a Feoffment, and takes back an Eſtate for Life, Remainder to his Heirs, and dies, the Lord ſhall aver it to be by Covin generally. [h] So a Man may juſtify Imprisonment for Suſpicion of Felony, without ſhewing any Suſpicion, for Suſpicion, like Covin, lies ſecretly hid in the Heart of a Man. [i] And in 33. *H.* 6. in Treſpaſs, where the Defendant alledged in Bar that he had bought the Goods in Market overt of one J. O. the Plaintiff ſaid, that the ſaid Purchaſe was by Covin between the Defendant and the ſaid J. O. generally, without ſhewing any ſpecial Circumſtance of Covin, and the Plea was admitted good. And in a *Precipe quod reddat* brought againſt the Lord of ancient Demeſn, and againſt the Tenant of the Land, the Lord ſhall ſhew that he is Lord, and that this Action is brought againſt him by Covin generally. [k] But in 9. *H.* 6. in a *Precipe quod reddat* where the Tenant pleaded in Abatement of the Writ, that one A. after the laſt Continuance had arraigned an Aſſize againſt him, and recovered by Action tried, that is to ſay, by Verdict, and the Demandant ſaid that this Aſſize was brought by Covin between the ſaid A. and the Tenant, to the Intent to abate his Writ, there it is granted by the whole Court that this is no Plea without ſhewing Cauſe of Covin; and I will agree the Law to be ſo, and the Reaſon is, becauſe the Title was tried by Verdict of 12 Men, and his ſaying that it was by Covin ſhall not be intended true againſt the Verdict. But here the Recovery was by *nient dedire*, in which Caſe there is no Trial, but the *nient dedire* of the Defendant was the Cauſe of the Judgment, and therefore in this Caſe, and where the Recovery is by Default, a Man ſhall aver that it was by Covin generally; and ſo is the Diverſity. And as to what has been ſaid, that Execution of the Recovery ought to be ſhewn; Sir, this is not neceſſary, for the Statute ſpeaks only of a Recovery, and it is a Recovery without Execution. And therefore if a Fine be levied of the Reverſion, it is a Record before Attornment is had upon it; for *Quid juris clamat*, and *per quæ ſervitia* iſſue out of a Record. And the *Habere facias ſeizinam* recites, *Cum A. recuperaverit ſeizinam ſuam, &c.* So that this proves that it is a Recovery without Execution; wherefore this Exception is of no Weight. And as to the principal Point, it ſeems to me to be within the Words of the Statute, for the Woman Defendant had a Uſe in Tail of the Appointment of her Huſband, and the Huſband firſt made the Uſe, which making was the Purchaſe of the Huſband. And then when the Statute of 27. *H.* 8. executed the Poſſeſſion, this was in the ſame Manner as the Uſe was, and ſo within the Statute. And although it were not within the Words of the Statute, yet it ſhall be within the Equity of the Statute, notwithſtanding what has been ſaid to the contrary the other Day, that the Statute is penal, and ſhall not be extended by Equity. And he put many Caſes upon the Equity of Statutes, and ſaid it was no ſure Ground [l] that a penal Statute ſhould not be taken by Equity, for in many Caſes we ſee it otherwiſe. And alſo he ſaid, that by the Entry the Wife of the Plaintiff ſhall be ſeized as if the Tenant in Tail had been dead, and that is, in Tail; and for theſe Reaſons he held that the Plaintiffs ſhould recover.

Saunders and *Harris* argued the next Day to the contrary. But I came late, for *Saunders* had begun his Argument before I came, and I was diſturbed in my Place, ſo that I could not very well report all that was ſaid that Day, but *Saunders* firſt commenced his Argument upon the Equity of the Statute, as I heard. And after my coming he ſaid, that the Statute here was penal, inaſmuch as it infers a Penalty upon them who had the Eſtate before, and goes in Deſtruction of the Eſtates before made, and takes away their Power who had the ſame Eſtates, and abridges and puniſhes them, for which Reaſon the Statute ſhall not by the Rules of the Common Law be taken by Equity. And therefore the Statute of *Weſtminſter* 2. *cap.* 40. ſays, *Where any doth alien the Right of his Wife, it is agreed that from henceforth the Suit of the Woman or her Heir, after the Death of her Huſband, ſhall not be delayed by the Nonage of the Heir that ought to warrantiſe, but let the Purchaſor*

[a] H. 3. H. 7. 2. pl. 10. Dal. 96. pl. 27. Co. Litt. 303. b. Cro. C. 50. 1. Freem. 215. Strange 230. Heath's Max. 67. Poſt. 103. 202.

[b] H. 3. H. 7. 2. pl. 10. Bro. Pleading 69. Doc. Pla. 59. Heath's Max. 67.

[c] H. 3. H. 7. 2. b. 3. a. 26. H. 8. Bro. Pleading 147. B. N. C. § 87. Touch. of Preced. 191.

[d] Same Diverſity M. 6. Ed. 4. 1. pl. 2. Bro. Monſtrans de faits 115. M. 42. Ed. 3. 26. pl. 12. *per Finchd.* M. 43. Ed. 3. 31. pl. 24. T. 7. H. 6. 41. pl. 11. Bro. Monſtrans 51. P. 10. Ed. 4. 1. a. *Per Choke.* P. 22. Ed. 4. 12. a. Heath's Max. 141. Poſt. 52.

[e] 9. Co. 110. a. 1. Finch 35. 2. Finch 48. Heath's Max. 67. Wing. Max. reg. 151. pl. 21. Poſt. 55.

[f] *Regula.* 1. Finch 34. 2. Finch 48. Heath's Max. 65.

[g] Anno 7. H. 5. 5. b. *per Lodding.* M. 3. H. 6. 21. a. *per Paſton.* M. 7. H. 6. 1. a. *per Strange.* Bro. Monſtrans 49. M. 20. H. 7. 7. a. *per Brudnel.* Perkins, § 716. Heath's Max. 139. Poſt. 81.

[h] See *contra* that he ought to ſhew the ſpecial cauſe of his Suſpicion, 2. Inſt. 52. 2. H. H. P. C. 78. 2. Hawk. P. C. 77 Dalt. Juſt. cap. 166. fo. 549. 3. Mod. 219.

[i] H. 33. H. 6. 5. Fitz. Replication 15. Bro. Colluſion 4. Property 6. Poſt. 55.

[k] M. 9. H. 6. 41. pl. 18. Fitz. Fauxer de recov. 5. Bro. 3. S. P. T. Raym. 304. Poſt. 55.

[l] See Poſt 468.

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tarry, who ought not to have been ignorant that he bought the Right of another, until the Age of his Warrantor, to have his Warranty: So that the Statute reſtrains the Common Law, and ſaith, *Let the Purchaſor tarry.* [a] Yet it is adjudged in 18. *Ed.* 4. that if he, who is the Purchaſor, makes a Feoffment over, this Feoffee ſhall vouch, becauſe a penal Statute made againſt one Perſon ſhall not extend to others. And therefore the Statute of 32. *H.* 8. *cap.* 33. ordains, "That the dying "ſeized of a Diſſeizor ſhall not take away the Entry of him that at the Time of ſuch Deſcent "had good and lawful Title of Entry, *&c.* except ſuch Diſſeizor have had peaceable Poſſeſſion "before for five Years." [b] Yet if an Abator die ſeized within the five Years, this Deſcent ſhall take away the Entry of him that hath Right, for he is out of the Words of the Statute, and it ſhall not be extended by Equity, inaſmuch as the Statute is penal, and the Words extend but to one Perſon, that is to ſay, a Diſſeizor. [c] And ſo if Tenant for Life is diſſeized, and the Diſſeizor dies within the five Years, and the Tenant for Life dies, he in the Reverſion or Remainder may not enter, for he was not a Diſſeizor to them, but to the Tenant for Life, and alſo at the Time of ſuch Deſcent they had no Title of Entry, but the Tenant for Life had, and therefore they are out of the Words of the Statute, and ſo out of the Equity of it. And thus we ſee where a Statute, which is penal, and abridges the Liberty or Benefit given by the Common Law, is made againſt one particular Perſon, it ſhall not extend to others. Let us then conſider our own Caſe. And I apprehend it cannot be denied but that our Statute is penal for the Cauſe before given, and that the Woman here is out of the Words of the Statute; and therefore I will examine the Statute. And the Statute has three Branches concerning the Eſtates of Women who are within the Purview thereof; the firſt is of Women, who have any of the Eſtates recited in the Statute, of Land of the Inheritance or Purchaſe of the Huſband, and here the Woman Defendant is not proved to have an Eſtate of ſuch Land, for it is ſhewn in the Beginning of the Replication, that *George Tailbois* was ſeized of, *&c.* in his Demeſn as of Fee, and being ſo ſeized made a Feoffment, *ut ſupra*, &c. And it is not ſhewn how he was ſeized, *viz.* by Purchaſe or Inheritance. And the Words *(Inheritance)* and *(Purchaſe)* have two different Meanings, [d] for this Word *(Inheritance)* has Reſpect only to ſuch Land to which a Man comes by Deſcent: As it is well proved by a Caſe in 7. [e] *H.* 4. for there a Woman brought a *Cui in vita*, and the Writ was, *quam clamat eſſe jus et hæreditatem ſuam*, and it was ſhewn that the Woman came to the Land by Purchaſe of the Feoffment of ſuch an one, and for this Cauſe Exception was taken to the Writ, and it was the Opinion of all the Juſtices that the Writ ſhould [f] abate, becauſe a Purchaſe may not be adjudged an Inheritance by common Intent. So that this Word *(Inheritance)* is to be intended a Poſſeſſion of Lands or Tenements, to which a Man comes by Deſcent only, and this Word *(Purchaſe)* is intended [g] a Poſſeſſion of Lands, to which a Man comes by Purchaſe, or by Gift without Recompence. And therefore a Purchaſe is always intended by [h] Title, and this Definition ſtands with *Britton*, and *Littleton* alſo. So that *Inheritance* and *Purchaſe* are two different Things. [i] And agreeable hereunto the Statute of 1. *H.* 5. *cap.* 3. of Forger of falſe Deeds, ſpeaks in the Preamble of thoſe who have Lands or Tenements by Purchaſe, or by Deſcent of Inheritance, &c. Which Statute being in the Disjunctive proves that there is a Difference between the Words. Wherefore, as I ſaid, an Inheritance is intended Land by Deſcent, and a Purchaſe is intended Land by Gift or Purchaſe, and ſo by Title, for if one has Land by Diſſeizin, this is no Purchaſe, for a Purchaſe is by Title, and Diſſeizin is without Title. And therefore where it is ſhewn in the Beginning of the Replication, that *George Tailbois* was ſeized in Fee, this may be by Deſcent, by Purchaſe, or by Diſſeizin, and if it be by Diſſeizin, it is out of the Intent of the Statute, for the Makers of the Statute would never have made Proviſion for a Recovery by Covin againſt a Woman, who had Land of the Aſſurance of her Huſband by Diſſeizin: So that the Plaintiffs ought to have ſhewn how the Huſband came to the Poſſeſſion, if they would have proved the Woman to be within the firſt Branch, for the Manner of his coming to the Land is iſſuable; and for this Cauſe the Woman is not ſhewn to be within the firſt Branch. And alſo, as it hath been ſaid, the Woman ought to have Manors, Lands, Tenements, or Hereditaments to her own Uſe, *&c.* ſo that ſhe ought to have an Eſtate in the Thing out of which the Uſe iſſues, which ſhe had not here, and therefore ſhe is not ſuch a *Ceſtuy que uſe*, of which the Statute ſpeaks; and therefore for both theſe Reaſons ſhe is out of the firſt Branch. And as to the ſecond Branch, the Woman does not claim any Thing of any Anceſtor of her Huſband. And as to the third Branch, the Woman Defendant here is out of it, for ſhe does not claim any Thing of any one ſeized to the Uſe of the Huſband, or of any of his Anceſtors, for the Feoffees were not Feoffees to uſe before the Uſe appointed to him; and ſhe does not claim the Uſe from the Feoffees, but from the Huſband, and the Statute of 27. *H.* 8. does not put the Thing in any other Degree than it was before the Statute, ſo that ſhe does not claim from the Feoffees to the Uſe of the Huſband. And therefore the Law is as it was put by my Brother *Cook*, viz. if the Huſband makes a Feoffment upon Condition to make an Eſtate Tail to him and to his Wife, which is done accordingly, this is out of the Statute, for the Feoffees were not Feoffees to the Uſe of the Huſband. But if the Feoffment had been to the Uſe of the Huſband, and upon Condition *ut ſupra*, and the Feoffees had made an Eſtate Tail to the Huſband and Wife, this is within the Statute, for at the Time of the Eſtate made they were Feoffees to the Uſe of the Huſband, and ſo within the Letter of the Statute. And ſo likewiſe the Caſe put of the Eſcheat is good Law. From whence it appears clearly, that the Woman here is out of the Words of the Statute. And then inaſmuch as the Statute extends in Words to Women who have Eſtates expreſſed in the Statute, and the Woman here is not ſuch a Woman, nor hath any ſuch Eſtate, it follows that this Statute being penal ſhall not be extended by Equity to the Woman

[a] M. 18. Ed. 4. 16. a. b. Bro. Age 43. T. 16. Ed. 3. Fitz. Age 47. 2. Inſt. 455. 4. Co. 50. a.

[b] S. P. Co. Litt. 238. a.

[c] S. P. Co. Litt. 238. a.

[d] *Contra.* Litt. § 9. Regiſt. 4. a. 232. b. Co. Litt. 16. a. T. 49. Ed. 3. 22. a. Sed Vide Acc. M. 10. H. 6. 9. pl. 34. Hale on F. N. B. 193. C.

[e] M. 7. H. 4. 5. pl. 28. Fitz. Brief 221. Bro. Cui in vita 5. Faux latin 19. Vide Poſt. 58. b. Co. Litt. 16. a.

[f] Per Hale on F. N. B. 193. e. it is not abateable for this Cauſe, tho' *hereditas* is properly intended by Deſcent and not by Purchaſe.

[g] Litt. § 12.

[h] Co. Litt. 3. b. 18. b.

[i] Co. Litt. 18. b.

Woman here being a Stranger, and out of the Words of the Statute, no more than in the Caſes firſt put by me, where a penal Statute made againſt a particular Perſon ſhall not be extended by Equity to others. And further, although the Woman Defendant had been within the Words or Equity of the Statute, yet the Plaintiffs cannot enter during her Life. And this I venture to aſſert upon the Strength of the three Branches of the Statute which concern the Entry. The firſt Branch ſays, " That the Recovery ſhall be void, and that the Perſon, to whom, *&c.* ſhall enter, " as if no ſuch Recovery had been had." And if no ſuch Recovery had been had, then the Heir could not have entered in the Life of the Mother, no more can ſhe now. The ſecond Clauſe provides, " That if the Woman be, *&c.* that then ſhe ſhall be excluded, *&c.* and that the Perſon " who, *&c.* ſhall enter, and ſhall enjoy the Tenements according to his or their Title:" And the Iſſue in Tail has no Title in the Life of his Mother, and therefore he cannot be intended thereby. And the Statute of *Rich.* makes a Difference, as before is well ſaid. The third Branch of the Statute, which is the laſt *Proviſo*, ordains, " That it ſhall be lawful for every ſuch Woman being ſole " or married, after the Death of her firſt Huſband to give, alien, or make Diſcontinuance of any " ſuch Lands for Term of her Life only, after the Courſe and Uſe of the Common Law before " the making of the ſaid Act." And then inaſmuch as the Statute ſaith, that it ſhall be lawful for every ſuch Woman, *&c.* this ſhall be intended a Woman who hath ſuffered ſuch Recovery. And therefore it appears to be the Intent of the Statute to make the Recovery void againſt the Woman, and that ſhe ſhall have Power during her Life to diſcontinue, *ergo* during her Life the Heir may not enter by Force of ſuch Recovery. So that it ſeems by the ſaid three Branches that the Plaintiffs cannot enter during the Life of the Defendant being Tenant in Tail. And as to the Covin, it ſeems to me that it is not well averred, for by the Replication the Recovery is ſhewn, and the Title thereof; and then the Plaintiffs have not deſtroyed the Title, but have fully confeſſed it, for when a Thing is ſhewn, and is not afterwards traverſed, nor averred ſpecially to the contrary, it ſhall be taken to be confeſſed. So is it here; and the Proteſtation is not material, for when it is contrary to a Thing confeſſed by Implication, or by expreſs Words, it is to no Purpoſe. And therefore the Title ſhewn is not deſtroyed, but confeſſed, inaſmuch as it is not traverſed, nor confeſſed and avoided. And then the Covin is repugnant to the Confeſſion, for Covin and good Title are meerly contrary. [a] And this is proved by the ſaid Caſe in 15. *Ed.* 4. where in Dower the Tenant ſhewed that he had diſſeized one A. long before the Writ purchaſed, who had entered pending the Writ, Judgment of the Writ, and the Demandant ſaid that A. entered by Covin to abate his Writ, and there by the Opinion of the whole Court the Plea is not good, for inaſmuch as the Demandant had not denied the Title of A. he could not have the general Averment of Covin, for it is repugnant to the Thing confeſſed. And ſo if a Man marry a Woman Diſcontinuee in Tail, and afterwards in a *Formedon* he and the Woman confeſs the Action, if the Title of the *Formedon* is ſhewn, and the Confeſſion, it cannot be averred that he married the Woman, or ſuffered the Recovery by Covin, for there can be no Covin if the Title was good, and if no Wrong is in him that has the Title. [b] And in 19. *H.* 8. where one diſſeizes the Diſcontinuee of Tenant in Tail, and enfeoffs the Iſſue in Tail within Age, he ſhall be remitted, and by the better Opinion the Diſſeiſin by the Diſſeizor averred without making the Iſſue privy may not hinder the Remitter, inaſmuch as the Title is not denied. Whenever therefore the Title is confeſſed, Covin cannot be generally averred, without ſhewing a ſpecial Wrong done in him that has the Title; and here no Wrong is ſhewn to be done, but a *nient dedire* by Covin and Confeſſion, whereas a *nient dedire* is not bad, if the Title is good: For if the Title is not good, the Party is not driven by Law to maintain it, and to ſtand in Defence of it, for that would be contrary to good Conſcience, *quiá a vero non declinabit juſtus.* And therefore Confeſſion of an Action, or *nient dedire* is not ill, if the Title be good. And then when the Title is confeſſed to be good, and the *nient dedire* is averred to be by Covin, and to be bad, this is meerly repugnant to the Title which is confeſſed to be good. But he that will be aided by Covin ought to deſtroy the Title, or elſe to confeſs the Title, and ſhew a Wrong done afterwards in coming to it. [c] And therefore if a Tenant for Years would be received to defend his Term by the Statute of *Glouceſter cap.* 11. it is not ſufficient to ſhew that the Suit was brought by Covin, but he ought to ſhew how the Title is not good; as if it be in a Writ of Entry *ſur diſſeizin*, he ought to traverſe the Diſſeizin, as in many Books it is adjudged; or if he confeſs the Title to be good, then he ought to make him that has the Title privy. [d] As in 41. *Aſſ.* where it was found by Office, that one F. who had good Cauſe of Action of *ad terminum qui præteriit* againſt an Infant by Deſcent, cauſed one H. to diſſeize the Heir by Covin, againſt whom he recovered by his Writ of Entry *ad terminum qui præteriit*, there upon this Office found the King, of whom the Land was held, had Reſtitution of the Land during the Nonage of the Heir, notwithſtanding the Plea and Averment of F. in Maintenance of his Title. [e] So that altho' the Title be good, yet if Covin is practiſed by him that has the Title in coming to it, he ſhall not be remitted; and this ought to be ſhewn by him that ſhall take Benefit by it, or otherwiſe be made to appear. [f] And in 20. *Aſſ.* in Aſſize by an Abbot it was found for him, and that there was no Colluſion. And it was prayed by the King's Serjeant to enquire if the Abbot had releaſed, the Aſſize ſaid that the Abbot without his Convent, by Dureſs done to the Abbot by taking his Cattle, had releaſed all his Right to one A. named in the Writ Purveyor to the King, and it was enquired whether it was by Dureſs of Impriſonment, and the Aſſize ſaid that it was not, and there it is held, that although the Releaſe be found, which *prima facie* imports Covin, yet the King ſhall not have the Land during the Life of the Abbot, becauſe the ſpecial Matter

[a] M. 15. Ed. 4. 4. Bro. Colluſion 20. Ante 43. b. *Per Cook.* 8. Co. 132. b. Vin. Abr. tit. Covin. B. pl. 1. *in notis.*

[b] T. 19. H. 8. 12. b. Bro. Renietter 1. *per Englefield et Porting.* Sed 6. Juſtices *contr.* Et vide *contra* 3. Co. 78. a. Jenk. 193. pl. 98. Lane 44. Poſt. 51. a. Vin. Abr. tit. Remitter C. pl. 4.

[c] M. 14. H. 8. 4. pl. 4. Bro. Colluſion 21. Fauxifier de recov. 48. Receit 67. P. 17. Ed. 3. 29. b. Fitz. Receit 105.

[d] 41. Aſs. pl 28. Fitz. Fauxifier de recov. 4. Bro. 40. Colluſion 31. Remitter 46.

[e] M. 18. H. 8. 5. b. 44. Aſs. pl. 29. Bro. Fauxif. de recov. 43.

[f] 20. Aſs. pl. 14. Fitz. Verdict 32. Bro. Colluſion 26. Dures 12.

there was and ought to be found, which proves the Releaſe void, and ſo no Colluſion. [a] And ſo in 9. *H.* 4. the King may not have Benefit of Colluſion found generally upon the Statute of *Marlbridge cap.* 6. without the ſpecial Cauſe thereof; for which Reaſon I ſay, that if the King ſhall not take Advantage of Colluſion generally found without the ſpecial Cauſe ſhewn, *a multo fortiore* a common Perſon ſhall not take Advantage of it, eſpecially where the Title is confeſſed to be good; and for theſe Cauſes it ſeems to me that the Covin is not here well averred without the ſpecial Cauſe ſhewn. And he argued further, that Execution of the Recovery ought to be ſhewn, for if the Tenant in Tail die before Execution, the Iſſue in Tail ſhall falſify this Recovery, for without Execution it is no Diſcontinuance, and therefore Execution ought to be ſhewn. And he argued alſo, that it ought to be ſhewn how the Wife of the Plaintiff was Heir to the Tail, and that ſhe could not be ſeized in Tail, and that the Statute here ought to be pleaded certainly, and that the Place of the making of it ought to be ſhewn; and for theſe Cauſes he held the Replication ill, and that the Plaintiffs ſhould be barred.

[a] M. 9. H. 4. 6. Fitz. Traverſe 15. Bro. Colluſion 16. 43.

Harris argued to the ſame Purpoſe, and he alſo took the Law to be that there could not be Covin where the Title is good, except a Wrong is done by him that has the Title, and this ought to be ſhewn; for here inaſmuch as the Title is confeſſed to be good, in that it is not traverſed, nor confeſſed and avoided, this Recovery may not be averred to be by Covin, for ſuch Averment is repugnant in itſelf, and it is inconſiſtent to ſay that he did Right by Covin, for if Right is done and no Wrong, then there is no Covin, for Covin is always taken *in malam partem*; and then if the Title be good, (as the Plaintiffs have here confeſſed it is) the *nient dedire* is well done, for if the Woman Defendant ſhould ſtand in Defence againſt a good Title, ſhe would act contrary to good Conſcience, and for this Reaſon the Averment of Covin is repugnant to the former Confeſſion. And the Statute was never intended to puniſh or defeat all Recoveries by Reddition, or *nient dedire*, but only all ſuch Recoveries as are upon a feint Title. And a Recovery upon good Title, where no Wrong is done, is out of the Danger of the Statute, and here the Title is confeſſed to be good, and then the Confeſſion is no Wrong, and without Wrong there can be no Covin, *ergo* the Covin is repugnant; and becauſe the Title is not defaced in any certain Point, the Averment of Covin is not good. And as to the Statute, he took the Caſe here to be out of the Words of it for the Reaſons before ſhewn; and as to the ſecond Clauſe of the Statute touching the Entry upon the Woman being ſole at the Time of ſuch Recovery, which ſaith "That the Woman ſhall be barred and excluded of her Title and Intereſt in the ſame Lands," whereas the Recovery before barred and excluded the Woman, he took it that the Words were not put there in vain. And the Intent of theſe Words (as it ſeemed to him) is thus, *viz.* before the Statute Women would have ſuffered feint Recoveries to the Uſe of themſelves for their Lives, and after to the Uſe of other Strangers, and whereas they ſhould have had the Uſe before, now the Statute has taken away the Uſe, and excludes and bars their Title and Intereſt, *viz.* the Uſe which they ſhould have had, and ſo inflicts a Penalty upon them, but does not give any Entry to the Heir in the Life of the Tenant in Tail; for the firſt Clauſe is, "That they ſhall enjoy the Tenements in the ſame Manner and Form as "they ſhould have done if no ſuch Diſcontinuance, Warranty, or Recovery had been had or made." And if no ſuch Recovery had been had, then the Heir ſhould not have entered upon the Tenant in Tail until after his Death, no more ſhall he now. And the ſecond Clauſe is *ut ſupra*, "and "that they to whom, *&c.* ſhall enter, and enjoy according to his or their Titles therein," and the Title of the Heir is not until after the Death of the Anceſtor, and not before; and ſo is it in the Caſe here. And according to this Expoſition, the ſaid Words, *viz.* "That the Woman ſhall be "barred and excluded," and the other Words alſo may ſtand together. And in this Senſe he took the Statute. And, note, he argued to the ſame Effect with the others before him as to all the reſt of the Points that were moved.

On the ſame Side.

At another Day *Molineux* Juſtice argued. It ſeems to me that the Plaintiffs ſhall recover. Firſt, as to the Covin, it ſeems to me that the Plaintiffs need not to ſhew ſpecial Cauſe thereof; for there is a Diverſity between Covin apparent, and Covin not apparent, for to aver that which is [b] apparent is vain, as to aver ſpecially that a Horſe I have bought, which has no Eyes, is blind, is in vain becauſe it is apparent. [c] And when the Tenant infeoffs his Son within Age by Colluſion, the Lord ſhall ſeize him for his Ward, and ſhall not be forced to ſhew this Colluſion ſpecially. And ſo here it is in vain to ſhew the Colluſion ſpecially, becauſe it is apparent, for the Woman Defendant, when ſhe was impleaded, came at the firſt Day, and therefore was not amerced, and alſo ſhe was not eſſoigned, nor had the View, and ſhe loſt her other Advantages, which the Law gave her, by which Act there appears a voluntary Aſſent in her, and Covin apparent, and then to aver that ſpecially, which appears by the Record, is in vain. [d] And the Statute of *Weſtminſter* 2. *cap.* 4. recites that the Law was, that if the Huſband would confeſs an Action, the Wife ſhould have Dower by the Common Law, for it is intended by the Law to be Covin apparent: But if the Recovery had been by Default, it was doubtful. [e] But here if the Action had been tried by Verdict of 12 Men, then the Cauſe of Covin ought to be ſhewn, for the Law gives Credit to the Verdict. [f] And therefore if a Man brings an Attaint he ſhall not have a *Superſedeas*, for the Law preſumes the Verdict to be true till the contrary is tried, which proves what Credit the Law gives to the Verdict of 12 Men: But upon Error in *fait*, or in the Record, the Party ſhall have a *Superſedeas*, for the Law judges indifferently of the Truth or Falſhood thereof, and therefore the Party ſhall have a *Superſedeas*, but not upon Attaint for the Cauſe aforeſaid, *viz.* for the Credit given to the Verdict. And ſo Covin, which is averred in Avoidance of a Trial by Verdict, ought to be ſhewn certainly. And the Averment of Covin generally is good for another Reaſon, *viz.* becauſe the Statute ſpeaks [g] generally of Recoveries by Covin. As the Statute of 4. *H.* 7. *cap.* 20. ſaith, that if any Recovery be pleaded in Bar againſt the Plaintiff in an Action popular, the Plaintiff may aver that the ſaid Recovery was by Covin; and there by the Generality of the Statute the Party may aver the Covin generally, ſo here. And, Sir, the Statute here, being general, prohibits Covin in Recoveries upon good

Molineux J.

[b] Kelw. 95. pl. 2. 3 Leon. 256. *per Yelv. arguendo.* 8. Co. 126. b. 9. Co. 54. b. 11. Co. 25. a. Co. Litt. 303. b. 10. Mod. 150. 392. Ld. Raym. 13 Heath's Max. 37. Wing. Max. 152. pl. 22. Poſt. 55. *per Mountague* C. J.

[c] 7. Co. 39. b. *per Curiam.*

[d] 2. Inſt. 349.

[e] M. 9. H. 6. 41. pl. 18. Fitz. Fauxer de recov. 5. T. Raym. 304. Ante 46. Poſt 55.

[f] Same Diverſity P. 5. H. 7. 22. pl. 3. Fitz. Superſedeas 6. Bro. 24. Attaint. 122. B. N. C. §196.

[g] 1. Rol. Rep. 18. 326. 1. Finch. 327. 2. Finch. 479. Vin. Abr. tit. Superſedeas M. pl. 4. 82. Rol. R. 4, 8. Poſt. 50.

Titles, as well as upon falſe or feigned Titles, for the Statute is general, and then it follows that the Covin generally ſhewn is good, without falſifying the Title. And as to the other Exception, *viz.* the Entry upon the Recovery, this is not neceſſary to be ſhewn, becauſe the Statute ſpeaks of the Recovery only, and it is a Recovery without Execution, and the Statute intended Recoveries without Execution, as it is proved by a *Proviſo* in the Statute, which ſaith, "That the ſaid Sta- "tute ſhall not extend to any Recoveries to be had, except where ſuch Women were then alive, "and then took the Iſſues and Profits of the ſaid Lands, or ſome other to their Uſe, *&c.*" and if they then took the Profits, it follows that Execution was not had, and ſo the Statute extends to ſuch Recoveries before Execution. And as to the other Exception which was taken, *viz.* becauſe it was not alledged how the Wife of the Plaintiff was the Perſon who, *&c.* Sir, as to this, it is not at all neceſſary, for that the Statute, being general, gives the Averment generally; and beſides inaſmuch as ſhe has alledged that ſhe herſelf was the Perſon to whom the Intereſt and Title, after the Death of the Woman Defendant, belongs, and the Defendant has demurred upon it, although the Replication in this Point were vicious before, yet the Demurrer has made it good, for a Demurrer is a Confeſſion [a] of the Matter of Fact before alledged. And ſo the Demurrer, which is a Matter *ex poſt facto*, has made the Plea, which was bad before, to be good now. [b] As in a *Præcipe quod reddat*, if the Tenant pleads non-Tenure the Day of the Writ purchaſed, it is no Plea, for he might be Tenant afterwards; but if Iſſue is joined upon it, and it is found that he was Tenant the Day of the Writ purchaſed, this has made the Plea good, for the Reaſon why it was bad is now diſproved. So in Debt againſt Executors, if they plead *nothing in their Hands* the Day of the Writ purchaſed, without ſaying, *or ever after*, the Plea is bad, but if Iſſue is joined upon it, and it is found that they had Aſſets, now the Iſſue, which was bad, is by the Verdict made good. So here the Plea, which was bad, is made good by the Demurrer, which is a Confeſſion of the Fact, for the Reaſon why it ſhould be bad is now confeſſed to be good; and ſo the ſaid Exceptions are of no Weight. And as to the Matter, it ſeems that the Caſe is within the Words of the Statute, for inaſmuch as it is here alledged that the Huſband was ſeized in Fee, by this it is proved that the Inheritance was his, for every Fee ſimple which a Man has is his Inheritance: And then ſhe had a Uſe in the Inheritance of her Huſband. And he argued as if theſe Words in the firſt Part of the Statute, viz. *(to her own Uſe)* had been in Uſe, and to ſuch Effect he took them, (as I apprehended him) and then he maintained that the Woman held the Inheritance of her Huſband, that is to ſay, his Land in Uſe jointly with the Huſband, and ſo within the Words of the Statute; and if it was not within the Letter of the Statute, then he argued that it ſhould be within the Equity and Intent of it; and he made no Queſtion but that the Heir in Tail ſhould enter [c] preſently, and ouſt the Woman Defendant; and ſo he held that the Plaintiffs ſhould recover.

Hales J. *Hales* Juſtice to the ſame Purpoſe. And as to the Covin, the Replication is good without ſhewing the Cauſe thereof; for firſt it is to be noted, that the Statute is general, for it is, *if Women by Covin ſuffer any Recovery*, &c. which general Words prohibit Covin in Recoveries upon good Title, as well as upon bad Title, and reſtrain that which was lawful before, for at the Common Law the Woman named in this Statute might lawfully make a Releaſe to the Diſſeizee with Warranty, or ſuch a Woman being *ceſtuy que Uſe* might make a Feoffment, or do other Acts at that Time lawful, which now the Statute prohibits. So that although a Recovery upon good or bad Title had been heretofore without Puniſhment, notwithſtanding they had been by Covin, yet the Statute now prohibits the Covin, as well where the Action is upon good Title, as where it is upon bad Title, and ſuch was the Intent of the Makers of the Statute. [d] For if a Woman had for her Jointure an Eſtate Tail according to this Statute with Warranty, and had been impleaded by Action upon good Title, and by Covin had confeſſed the Action, this is clearly within the Compaſs of the Statute, by the Intent of the Makers of it; for although the Title of the Action be good, yet if ſhe had vouched, and recovered in Value, this Recovery in Value ſhould go to the Benefit of the Iſſue in Tail, which now her Covin has deſtroyed. And ſo although the Title be good, yet this Covin ſhall bring the Woman within the Penalty of the Statute. And therefore Covin may be [e] where the Title is good, [f] for the Makers of the Statute conſidered the Frailty and Inconſtancy of Women, who might eaſily by flattering Words be deluded and enticed to Covin, and therefore they ordained againſt them a Penalty, as a Bridle to their Inconſtancy, and would not make them, who have ſo little Diſcretion, Judges of the Goodneſs or Badneſs of the Title of Actions, but prohibited their Covin. For which Reaſon one may aver the Covin generally. For if the Title be good, then there is no ſpecial Cauſe of Covin which may be alledged, but it ſhall be averred generally, as in the Caſe before put a Man ſhall aver generally that the Recovery in Action popular was by Covin; for there could be no ſpecial Cauſe of Covin there. And ſo by the Statute of 13. *Rich.* 2. *cap.* 17. which ordains, *where Tenants for Life being impleaded are of Covin with the Demandants that the Tenements be recovered, he in Reverſion ſhall be received*, &c. [g] there he ſhall ſay, that the Tenant for Life pleaded feintly, and he ſhall pray to be received, and this Cauſe generally ſhall be good by Reaſon of the Generality of the Statute, for whether the Title of the Action be good or ill, yet if the Tenants were of Covin with the Demandants, the Reverſioner ſhall be received, and then the ſpecial Cauſe of Covin or feint Pleading ſhall not be ſhewn in Reſpect of the Generality of the Statute. [h] So that where Statutes ſpeak of Covin generally, it ſhall be ſhewn generally, but otherwiſe of Covin at the common Law. And if the Makers of the Statute of 11. *H.* 7. had only intended Recoveries by feint Titles, they would have expreſly given the Penalty to Covin in Recoveries upon feint Titles, for it would have been a great Overſight in them to have ſpoken of Covin in Recoveries generally, when they only intended Covin in feint Recoveries. But that was not their ſole Intention. For the Iſſue in Tail might falſify a feint Recovery by Covin before, but whether the Title be feint or good, the Covin is only prohibited by the Statute, and

Covin

[a] See Ante 13. (i) and the Books there cited.

[b] See this and the next Caſe held *Per Cur.* M. 6. H. 7. 7. a. Bro. Verdict. 55. 6. H. 7. 11. a. T. 11. H. 7. 24. a. b. *per Brian.* M. 31. H. 6. 11. b. *per Yelv.* Fitz. Iſſue 88.

[c] S.P. 2. Rol. R. 506. *per Hobart.* C. J.

[d] Vin. Abr. tit. Covin A. 2. pl. 2.

[e] Poſt. 54. *per Mountague* C. J.

[f] Wing. Max. reg. 83. pl. 42.

[g] M. 11. H. 4. 3. a. Fitz. Receit 83. Bro. 36. T. 2. H. 6. 14. a. pl. 11. Fitz. Receit 50. Bro. 2. M. 33. H. 6. 39. b. Vin. Abr. tit. Receipt A. 2. pl. 5. *in notis.*

[h] 2. Rol. R. 448. Ante 49.

Covin may alter the Matter where the Title is good. [a] As in the ſaid Caſe of 19. *H.* 8. where one diſſeized the Diſcontinuee in Tail by Covin, to the Intent to enfeoff the Iſſue in Tail within Age, who had no Knowledge of the Covin, the Feoffee ſhall not be there remitted by the better Opinion, notwithſtanding his good Title, and this is becauſe of the covinous Intent. [b] And there it is put, that if my Anceſtor diſſeizes me, to the Intent to make a Feoffment with Warranty to bar me, although the Warranty is made 20 Months afterwards, yet it is a Warranty which commences by Diſſeizin; ſo that the Intent gives a different Effect to the Act. [c] And if a Woman has good Title of Dower, if ſhe be of Covin that the Tenant ſhall be ouſted by one againſt whom ſhe recovers, yet ſhe ſhall not hold it, but ſhall be a Diſſeizoreſs; and ſo Covin may be here, tho' the Title is good. And as to that which has been ſaid, *a vero non declinabit juſtus*, true it is, [d] but when Truth is mixed with Covin as a noxious Herb, and Covin with Truth, this Conjunction and Mixture makes the whole unſavory, and the Goodneſs is perverted to Wickedneſs. And the Covin here ſhews itſelf apparently, for it appears by the Record that the Woman Defendant being impleaded in the firſt Suit had not View, Voucher, Eſſoign, nor other Delays, which every one that is impleaded upon good Title may with ſafe Conſcience take as Advantages given by the Law, and therefore that which appears here need not be averred, ſo that for theſe Cauſes the Covin is well averred without ſpecial Cauſe ſhewn. And as to the other Exception, *viz.* that Execution of the Recovery is not ſhewn, this is not neceſſary to be declared, for the Statute ſays, that the Recovery ſhall be void, and then it was not the Intent of the Statute that Execution ſhould be ſued upon a void Recovery, for which Reaſon the Recovery ſhewn by itſelf is ſufficient. Then as to the other Exception, *viz.* [e] that it is not ſhewn certainly how the Wife of the Plaintiff is Heir; Sir, this is not neceſſary for four Cauſes; one Cauſe is, for that the Statute is general, *viz. it ſhall be lawful for the Perſon to whom, &c. to enter:* So that the Statute being general gives the Party a general Anſwer according to the Statute. And therefore if a Statute was made, that if any Woman conſent to a Raviſher, the Parſon of the Pariſh where ſuch Woman dwells ſhall enter and hold to him and to his Succeſſors, there if any ſuch Parſon conveys to himſelf Title of Entry, he ſhall ſhew the Conſent to the Raviſher, and ſhall ſhew that he is Parſon, and that he ought to enter, and he needs not ſhew how he was preſented, inſtituted, and inducted Parſon, becauſe he ſhall give an Anſwer as general as the Statute itſelf was. And the Statute of 5. *R.* 2. *cap.* 7. ordains, *That none make Entry into Lands and Tenements, but in Caſe where Entry is given by Law*, there the Writ upon this Statute, and the Count alſo ſhall be general, *viz.* that he hath entered into Lands and Tenements, where the Entry was not lawful, and the Plaintiff ſhall not ſhew any Title in himſelf, or Cauſe why the Entry of the Defendant was not congeable, but as general as the Statute is, ſo general ſhall the Writ and Count be. And ſo the Statute of 8. *H.* 6. *cap.* 9. ordains *than none ſhall enter into Land with forcible Hand*, there the Writ and the Count ſhall be general, *viz.* that the Defendant with forcible Hand hath expelled and diſſeized the Plaintiff of his Freehold, and he ſhall not ſhew Title to the Freehold, nor in what Manner, or of what Kind the Force is, and this is by Reaſon of the Generality of the Statute. And the Statute *of* [f] *Maintenance* ordains, *that none ſhall maintain any Quarrel*, &c. there the Writ and Count ſhall be general, *viz.* that the Defendant hath maintained ſuch an one *in quadam tranſgreſſione*, and he ſhall not ſhew ſpecially what Treſpaſs, *&c.* and this is becauſe of the Generality of the Statute. So here inaſmuch as the Statute is general, the Averment ſhall be general, for which Reaſon it is well averred. The ſecond Cauſe to prove the Averment good is, for that if the Wife of the Plaintiff ought to ſhew certainly how ſhe is Heir, yet it might be that another is now Heir, and yet ſhe ſhall hold the Land. As put the Caſe that the Wife was enſeint with a Son at the Time of the Death of her Huſband, and before the Son was born, the Wife ſuffered a Recovery by Covin, and the Daughter now Plaintiff entered, and afterwards the Son is born, now he is Heir, and yet the Daughter ſhall hold the Land during the Life of the Wife, becauſe ſhe was then *in rerum naturâ*, and took the Advantage which was then given to her alone, and ſhe ſhall hold it, and the Son born afterwards ſhall not recover it of her, no more than in the Caſe in 9. *H.* 6. [g] where a Man deviſed Land to one for Life, Remainder to the right Heirs Males of the Deviſor, and to the Heirs of his Body begotten, and Tenant for Life died, and the next Heir to the Deviſor being a Woman entered, and afterwards ſhe had a Son, and there it is held by the better Opinion, that the Son ſhall not ouſt the Woman, becauſe the Son born afterwards ſhall not take away the Land before veſted in the Woman as Heir for Default of ſuch a Perſon then *in rerum naturâ* to take the Deviſe. And ſo here, the Wife of the Plaintiff might be a Daughter, or the Iſſue of a Daughter, and might enter before a Son was born, in which Caſe ſhe ſhall hold it during the Life of the Tenant in Tail, and no longer, for this Statute has not deſtroyed the Tail, but the Intent of it is to preſerve the Tail; and then if the Wife of the Plaintiff ought to ſhew how ſhe is Heir, (there being a Son born *ut ſupra)* thereby ſhe would give the Defendant an Occaſion to ſhew that the Son was Heir, which would be a Means of joining Iſſue upon that which is not iſſuable, for the Matter may well ſtand together, and yet the Daughter ſhall hold the Land; ſo that this would be an apparent Contrariety in the Face of the Court, and for this Cauſe the Plaintiffs ſhall not be driven to ſhew how ſhe is Heir. The third Cauſe to prove this general Averment good is, for that it may be that he who has Cauſe to enter upon a Recovery by Covin may have one, two, or more Cauſes. As if a Leaſe for Life is made to a Woman for her Jointure according to this Statute, Remainder for Years, Remainder for Life, he in the Remainder for Years makes him in the Remainder for Life his Executor, and dies, the Woman Tenant for Life ſuffers a feint Recovery, he in the Remainder for Life being alſo Executor enters, if afterwards in pleading he in the Remainder might not ſay that he was the Perſon to whom, *&c.* but ſhould be driven to ſhew ſpecially how, then he ſhould ſhew double Matter, and ſo the Cauſe ſhewn would be double, or perhaps treble, which would much inveigle the Court. And alſo if he ſhould be forced to hold

[a] T. 19. H. 8. 12. b. Per 6 Juſtices againſt 2. 3. Co. 78. a. Jenk. 193. pl. 98. Lane 44. Wing. Max. reg. 157. pl. 37. Vin. Abr. tit. Remitter. C. pl. 4 *Contra* Ante 48.

[b] 3. Co. 78. a. 5. Co. 79. b. Cro. C. 483. 484. *Fitzherbert v. Fitzherbert.* Wing. Max. reg. 157. pl. 37.

[c] M. 44. Ed. 3. 46. a. Fitz. Dower 42 Bro. 15. Fitz. Faux. de recov. 29. Bro. 6. Colluſion 10. 31. 41. Aſs. pl. 28. *per Knivet.* Bro. Remitter 46. 44. Aſs. pl. 29. Bro. Faux. de recov. 43. M. 18. H. 8. 4. b. M. 8. H. 4. 6. b. M. 15. Ed. 4. 4. pl. 7. Bro. Colluſion 20. Perk. § 395. 1 Rol. Abr. 549. pl. 3. Co. Litt. 35. a. 357. b. 3. Co. 78. a. 5. Co. 31. a. 6. Co. 58. a. 8. Co. 132. b. 2. Rol. Rep. 17. 1. Finch. 35. 2. Finch 9. Poſt. 54.

[d] See the Opinions of *Huſſey* and *Brian.* P. 7. H. 7. 11. b. O Bendl. 105. Wing. Max. reg. 158. pl. 2.

[e] See B. N. C. § 182. 1. Leon. 78. Gouldſb. 36. Hob. 233. Hutt. 15.

[f] Weſtm. 1. cap. 28.

[g] T. 9. H. 6. 23. Fitz. Deviſe 2. Bro. 5. 37. Deſcent. 2. Done 5. Wing. Max. reg. 103. pl. 30.

hold himſelf to one Cauſe, then it would be an Eſtoppel to him at another Time to ſay that he entered for another Cauſe, which would be miſchievous to him. Wherefore the Averment generally that ſhe is the Perſon to whom, *&c.* is good without ſhewing how. The fourth Cauſe to prove the general Averment good here without ſhewing how, *&c.* is, for that the Wife of the Plaintiff was once in Poſſeſſion, ſo that the Eſtate in the Thing is executed, and upon this the Plaintiffs have brought an Action of Treſpaſs, in which Caſe they ſhall not plead ſo ſpecially, nor be forced to ſhew as much Certainty, as if they were demanding the Execution of a Thing. [a] And therefore if Adminiſtrators bring an Action of Treſpaſs for Goods taken out of their Poſſeſſion, they ſhall not ſhew the Letters of Adminiſtration: Otherwiſe it is, if the Action was brought for Goods taken in the Lifetime of the Inteſtate, for there they never had any Poſſeſſion of the Thing, but it is to be executed. So if a Leaſe is made for Life, Remainder in Tail, and he in the Remainder is ſeized, after the Death of the Tenant for Life his Iſſue ſhall have a *Formedon*, and ſhall declare upon an [b] immediate Gift, and ſhall not ſhew the [c] Deed thereof; otherwiſe it is, [d] if it was to execute the ſame. So here, inaſmuch as the Plaintiffs were once ſeized, they need not ſhew how Heir, as they ought to have done, if they had ſought to execute the Thing; and therefore in this Point the Replication is good. And three Objections have been made to the contrary, which I will anſwer. Firſt, it has been ſaid, that if the Defendant ſhould anſwer and ſay that the Wife is not the Perſon to whom, *&c.* this Iſſue would be too incertain to be tried: Sir, as to this I anſwer, that in many Caſes Iſſues ſhall be joined upon as great an Incertainty as this is here. For in Treſpaſs if the Defendant will ſay it is his Freehold, the Plaintiff may ſay it is his Freehold, and traverſe without that that it is the Freehold of the other; this Iſſue is good and ſhall be received, notwithſtanding there may be many Ways to prove it; and ſo although it is in a Manner incertain how it is his Freehold, yet the Iſſue is good. So in Waſt, *no Waſt done*, or in Treſpaſs, *not guilty*, are good Iſſues, and yet they comprehend no Certainty. [e] And in Treſpaſs for Goods taken, the Defendant juſtified as joint Executor with the Plaintiff to *J. S.* and that the Goods belonged to the Teſtator, *&c.* the Plaintiff ſaid that the ſaid Teſtator deviſed to him all his Goods which remained after the Legacies paid, and ſhewed that he made ſuch and ſuch Legacies, which were all his Legacies, and that they were paid, aud that afterwards the Plaintiff was poſſeſſed of the Goods as of his own proper Goods until, *&c.* and the Defendant ſaid, that the Teſtator made ſuch a Legacy to ſuch an one, which is not yet paid, without that, that the Legacies ſhewn by the Plaintiff are all the Legacies, *&c.* and this was held a good Iſſue, and yet whether or no all the Legacies were paid was an incertain Iſſue, but nevertheleſs the Iſſue was holden good. [f] And ſo if one counterpleads a Voucher, *viz.* that neither he nor any of his Anceſtors ever had any Thing, *&c.* he ought to ſay, *and of this he puts himſelf upon the Country*, ſo that the Iſſue is joined preſently upon an Incertainty. And the like is done in many other Caſes, and ſo is it here. Secondly, it was objected, that if it was ſhewn certainly how the Wife of the Plaintiff was Heir, the Defendant might ſay that ſhe had a Brother, Sir, to this I have already given for Anſwer, that ſo it might be, and yet the Wife of the Plaintiff ſhould hold the Land during the Life of the Woman Defendant. And it was alſo ſaid, that the Defendant might ſay, that the Plaintiff is a Baſtard; Sir, to this I ſay, that the Defendant might not have ſuch, nor any other Anſwer to the Cauſe, no more than upon Receit of him in Reverſion, for that ought to be ſhewn, but it is not traverſable; no more ſhall the Cauſe here be, wherefore this is ſufficiently anſwered. Thirdly, it was objected that Pleas ought to be certain to every Intent, which the Replication here is not in this Point; Sir, this is not ſo, for in Treſpaſs *his Freehold* is a good Plea, and yet it is not certain to every Intent, for it may be that the Plaintiff has an Eſtate for Years, in which Caſe he ſhall puniſh the Defendant notwithſtanding it be his Freehold. And ſo *Diſſeizin by J. S. to the Defendant who enfeoffed the Plaintiff, upon whom the Deſendant entered*, is a good Plea, and yet it may be that the Defendant releaſed after the Diſſeizin. So that Certainty in Pleas is not always requiſite. [g] And there is a Caſe where Tenant at Will brought an Action of Treſpaſs againſt one *Continuando*, *&c.* and recovered Damages by Award; and yet the Replication, in which the Eſtate at Will was firſt ſhewn, was not certain, for he ſhewed in the Replication that ſuch an one was ſeized, and leaſed at Will, *&c.* in which Caſe it might be that he had determined his Will afterwards, but yet the Replication was adjudged good, notwithſtanding the Incertainty; ſo ſhall it be here notwithſtanding any of theſe three Objections. Another Objection was made to the Replication, becauſe the Plaintiffs have ſaid, that upon their Entry they were ſeized in Tail in Right of the Wife of the Plaintiff; Sir, this is well enough ſaid, for they have ſaid, *quorum premiſſorum prætextu*, which Clauſe refers to the whole Matter, *viz.* to the Statute, and to that which is expreſſed in the Anſwer and in in the Replication; and the Defendant hath ſaid in her Anſwer, that the Wife of the Plaintiff was Heir to *George Tailbois*, and then inaſmuch as the Defendant has confeſſed her to be Heir, and the Statute gives the Entry to the Heir ſpecial, *viz.* in Tail, and the Averment is that ſhe was the ſame Perſon *ut ſupra*, which is to be intended in Tail, it ſeems to me that the Plaintiffs ſhall be ſaid to be ſeized in Tail, in the ſame Manner as if the Defendant had been dead; for the Statute ſaith, that *the Perſon to whom, &c. ſhall enter, and enjoy according to his Title*, and upon the whole Matter the Tail is ſhewn to be their Title, and thereof they ſhall be ſeized. And in Treſpaſs, if the Defendant will ſay, that *J. S.* the Father of the Plaintiff, whoſe Heir he is, leaſed the Land to the Defendant for Years by Deed which he ſhews forth, in which there is a Condition to re-enter for Default of Payment of Rent, and the Deed is entered *verbatim*, it is ſufficient for the Plaintiff to ſay that the Rent was in Arrear to him at ſuch a Day, and he entered for Default of Payment, and this Replication is good without ſhewing that he is Heir to the Father, and that the Reverſion deſcended to him &c. for upon the whole Matter diſcloſed by the Plaintiff and Defendant his Entry appears to be lawful. So here, upon the whole Matter the Eſtate, *viz.* the Tail appears, and therefore the Replication is good.

And

[a] See Ante 46. (d) and the Books there cited. See Cro. J. 409. *Cutts v. Bennet.*

[b] H. 14. H. 8. 18. b. *per Porting.* 8. Co. 88. a. Wing. Max. reg. 103. pl. 22. Poſt. 57.

[c] 18. H. 8. 4. a. Bro. Monſtrans. 1. 20. Aſs. pl. 19. *per Norton.* 31. Aſs. pl. 21. *per Lud.* M. 11. H. 4. 39. a. Fitz. Monſtrans. de faits 126 Bro. 34. Formedon 23. Nugation 4. 10. Poſt. 149. Heath's Max. 140.

[d] H. 9. H. 7. 15. pl. 5. *per Brian.* F. N. B. 219. c. Bro. Monſtrans. 110. 31. Aſs. pl. 21. *per Lud.*

[e] T. 6. H. 7. 5. Fitz. Replic. 44. Bro. Traverſe 187.

[f] P. 33. H. 6. 21. pl. 20. Bro. Iſſues joined 3. Replic. 5.

[g] P. 38. H. 6. 27. pl. 8. Fitz. Replic. 23. Bro. Treſpaſs 227.

And as to the Exception taken becauſe it was not ſhewn certainly whether it was an inheritance or Purchaſe, Sir, this is not material to be ſhewn, for it ſhall not be intended to be by Diſſeizin, except it be ſo ſhewn. And as to the Exception taken, becauſe they have not pleaded the Statute certainly, nor the place where it was made, Sir, this is not neceſſary, for it is a general Act, of which all People are bound to take Notice; and therefore it is not neceſſary to ſhew it certainly, *quod omnes Juſticiarii conceſſerunt.* Then as to the Statute, it ſeems to me that the Woman Defendant here is within the Words of the Statute, and if ſhe be not, yet ſhe is included within the Equity of it. For firſt the Words are, that *if any Woman, who hath an Eſtate in Dower, for Life, or in Tail, jointly with her Huſband, or ſolely to herſelf, or to her own Uſe, in any Manors, Lands, &c.* theſe Words may be taken, where ſhe has a Uſe in Land, or Land in Uſe, which is all one, and theſe Words which are obſcure are explained by the Words following in the Statute, which are, that if ſuch Women *ſuffer any Recovery of the ſame Lands againſt them, or any of them, or any other ſeized to their Uſe, or to the Uſe of any of them, according to the Form aforeſaid, that then, &c.* which Words, *viz. or any other ſeized to their Uſe,* fully declare and explain the Senſe and Manner in which the Words aforeſaid are to be taken, which is, that thoſe Women, that have a Uſe, ſhall be within the Words, *&c.* For an Eſtate in Uſe is not mentioned but in one Place in the Premiſſes of the Statute, *viz.* where it is ſaid, *or ſolely to herſelf, or to her own Uſe,* for the other Clauſe which ſpeaks of a Uſe, *viz. or by any Perſon ſeized to the Uſe of the ſaid Huſband, or of his Anceſtors,* is to be intended where the Thing out of which the Uſe iſſues is given, *viz.* the Demeſn, ſo that an Eſtate in Uſe is not mentioned or intended by this Clauſe, nor in any other Clauſe before it, but only in the ſaid Clauſe which ſaith, *or ſolely to herſelf, or to her own Uſe.* And then if this Clauſe only ſpeaks of a Woman *ceſtuy que Uſe,* and the ſaid Clauſe after, which ſpeaks of Recoveries had againſt Women, *or any ſeized to their Uſe, or to the Uſe of any of them,* is only referred to this, it cannot be denied but that the Caſe here, where the Woman had a joint Eſtate in Tail with her Huſband in Uſe of Land of the Inheritance of the Huſband, is fully within the Words of the Statute. And it is to be noted, that this Statute was made within 15 Years of the Statute of 1. *Rich.* 3. *cap.* 1. which ordains, that the Acts of *Ceſtuy que Uſe* ſhall bind him and his Feoffees; and perhaps ſome, who were Makers of the ſaid Statute, were alſo at the making of the Statute of 11. *H.* 7. and therefore they well conſidered the Effect of the firſt Statute, which was, that a Recovery had againſt Tenant in Tail was not good longer than during the Life of the Tenant in Tail. And then if the Statute of 11. *H.* 7. ſhould ordain no other Penalty than only to make the Recovery void againſt the Iſſues, and that they ſhould enter as if no ſuch Recovery had been, then the Statute would be in vain, for it would provide only for that which was provided for before; but the Statute has a quite different Intendment, for it makes that which was lawful before to be now unlawful; and if Tenant in Tail of Land had ſuffered ſuch a feint Recovery, as in our Caſe is alledged, this had been avoidable by the Iſſues in Tail, as it ſhall be by the Iſſues in Tail in Uſe. And then inaſmuch as the Tenant in Tail in Uſe might do as great prejudice as Tenant in Tail in Poſſeſſion, and no more, and they are in equal Degree, it ſeems the Intent of the Statute was to provide as well for the one as the other, and ſo the Intent [a] ſhall aſſiſt the Obſcurity of the Words in the Conſtruction of the Words themſelves. And if ſhe be not within the Words of the Statute, yet the Equity of the Statute will extend to her. For although this Statute reſtrains a Principle of Law, in that it will not ſuffer Tenants in Tail to bind their Iſſues by Recoveries, or Warranty, *&c.* yet it ſhall be extended by Equity, inaſmuch as it was made in Reſtraint of the Liberty which the common Law gave to the Prejudice of others. And upon this Ground there are many ſuch Statutes extended by Equity. As the Statute of *Marlbridge cap.* 6. ſpeaks *of thoſe that fein falſe Feoffments of their Lands, which they will leaſe for Term of Years, to defraud the chief Lords of their Wards*; which Statute ſpeaks only of Eſtates for Years, and Feoffments, yet a Leaſe for Life, or a Gift in Tail to the Iſſue is taken within the Equity of the Statute, becauſe the Statute was made in Reſtraint of that hurtful Liberty, which Tenants enjoyed by the common Law to the Prejudice of their Lords. * So the Statute of 4. *H.* 7. *cap.* 17. ſaith, *that if ceſtuy que Uſe of Land holden by Knight's Service d e, and no Will by him declared, the Lord ſhall have the Ward*, there if he declare a Will in Tail, yet the Lord ſhall have the Ward by the Equity and Intent of the Statute, and not by the Words; for a Will in Tail is a Will, although the Reverſion of the Uſe deſcends; but the Equity of the Statutte extends to it, for the Statute was made to give Remedy, where Wrong, Injury, and Covin were before; for ſuch Uſes [b] were invented and deviſed upon Craft and Subtilty to defraud Lords of their Wards and other Things. So the Statute of *Weſtminſter*, 2. *cap.* 1. ſpeaks only of three Gifts in Tail, *viz.* in ſpecial Tail, in Frank Marriage, and in general Tail, and recites the Words of the Gifts; [c] yet if Land is given to one and to his Heirs, and if the Donee die without Heir of his Body, that it ſhall remain to another, this ſhall be a good Tail by the Equity of the Statute although it be out of the Words: For at the common Law the Intent of the Donor was infringed and eluded, which was contrary to right and good Conſcience, and therefore the Statute, being made to reſtrain that vicious Liberty of breaking ſuch Intents, which was ſuffered by the common Law, ſhall be extended by Equity. [d] And ſo the Statute of *Weſtminſter* 2. *cap.* 3. ſaith, *the Heirs, and they to whom the Reverſion belongeth ſhall be admitted, &c.* by the Equity of which Statute he in Remainder ſhall be received, for the common Law, which would not permit him to be received, ſuffered a Wrong, and this Statute being made for the Relief thereof, ſhall be extended by Equity. [e] And ſo by the Equity of the Statute of 13. *Rich.* 2. *cap.* 17. which gives Receit for feint Pleading, Receit ſhall be had for feint defending. And an Action of Account which is given to Executors by Statute ſhall be extended by Equity to Adminiſtrators.

[a] Vin. Abr. tit. Statutes E. 6. pl. 81. *in Notis.*

* Hardr. 210.

[b] Dr. & Stud. lib. 2. cap. 22.

[c] H. 5. H. 5. 6. pl. 13. Bro. Eſtates 62. Tail 12. T. 19. H. 6. 74. b. *Per Vampage.* 35. Aſſ. pl. 14. Fitz. Tail 17. Bro. Eſtates, 36. Tail 20. 35. Aſſ. pl. 15. Bro. Eſtates 61. Tail 21. 1. Rol. Abr. 838. T. pl. 4. Co. Litt. 21. a. 7. Co. 40. b. Perk. § 169. 2. Rol. Rep. 217. 5. Mod. 268. Salk. 621. 1. P. Wms. 15. Kitch. 306. Vin. Abr. tit. Eſtate T. and T. 5. pl. 2.

[d] M. 24. Ed. 3. 32. pl. 16. Fitz. Reſceit 27. M. 38. Ed. 3. 32. Litt. § 481. Co. Litt. 280. b. 2. Rol. Abr. 436. D. pl. 2. Moor 29. pl. 94. 10. Co. 44. b. 2 Inſt. 346. Vin. Abr. Tit. Reſceipt A. 2. fo. 50.

[e] Vin. Abr. tit. Receipt A. 2. pl. 5. *in Notis.*

tors. For if the Law were defective in theſe Points it would ſuffer a Wrong to be done to others, and therefore Things in like Miſchief ſhall be taken by Equity within the like Purview.

[b] T. 4. H. 6. 25, 26. Fitz. Forger de faits 1. Bro. 14. P. 15. Ed. 4. 24. b. *Per Choke.* Vin. Abr. tit. Forgery H. pl. 1. 6.

[b] And ſo the Statute of 1. *H.* 5. *cap.* 3. gives an Action for forging falſe Deeds, by which the Titles and Poſſeſſions of others are troubled; here the Statute is in the copulative, yet if the Title only be diſturbed, it ſhall be taken within the Equity of the Statute, for the Diſſeizee who hath only a Right ſhall have an Action, as it is adjudged. So that we ſee where the Common Law ſuffers any thing to be done, or gives any Perſon a Liberty or Priviledge, which is hurtful or prejudicial to another, and a Statute is made for the Redreſs of it, that by the Equity of that Statute a like Thing ſhall be taken within the like Purview. And ſuch Conſtruction of Statutes is of great Help and Relief to innocent and guiltleſs Perſons, and a great Diſcomfort and Terror to the guilty and evil Doers, and therefore it is beneficial to the Public-Weal, which the Law principally regards. In our Caſe then, the Liberty which the Law gave to Tenant in Tail to diſcontinue, or ſuffer a Recovery, or to do ſuch Acts, was prejudicial to many; for the Reverſion was thereby deveſted out of the Donor, and Prejudice was done to the Iſſues, for ſuch Recovery (as is here alledged) made by *William Tailbois* was a diſcontinuance to them, which alſo was contrary to the Intent of the Donor; ſo that more received Prejudice than Benefit from it. And thus it was with regard to Tenant in Tail in Uſe, for the Recovery here had by *William Tailbois* for the Time took away the Reverſion of the Uſe, [c] for he who recovers having the Land is ſeized to no Uſe. And then when the Statute was made in Reſtraint of ſuch hurtful Liberty of the Tenant in Tail in Poſſeſſion, and the ſame Miſchief and Prejudice is done by Tenant in Tail in Uſe, I conclude that this ſhall be taken within the Equity of the Statute for the Cauſes before ſhewn. And ſo the Woman Defendant is within the Purview of the Words of the Statute, and within the Equity of it alſo. And therefore for theſe Cauſes the Plaintiffs ſhall recover.

[c] 24. H. 8. Bro. Feoffm. al. Uſe 40. B. N. C. §60.

Brown J.

At another Day *Brown* Juſtice argued. And he was of the contrary Opinion for two Cauſes in the Pleading. One was, for that the Cauſe of Covin is not ſhewn. For although the Statute ſpeaks generally of Covin, yet it refers the Pleading thereof to the Common Law, and therefore inaſmuch as the Cauſe of the Covin is not ſhewn, the Replication is bad. The other Cauſe was [d], for that the Plaintiffs have not ſhewn how the Wife of the Plaintiff was Heir, and therefore ſhe could not be ſeized in Tail as it was pleaded. And as to the Execution, he held that it was not neceſſary to be ſhewn. And as to the Matter in Law, he held the Caſe here within the Words of the Statute, and if it was not, yet he held it to be within the Equity of it, becauſe the Statute was made in Avoidance of Covin, which is to be abhorred, and therefore the Statute is beneficial to the public Weal. But for the ſaid Defects in the Replication, he held that the Plaintiffs ſhould not recover.

[d] Vide B. N. C. § 182. 1. Leon. 78. Gouldſb. 36. Hob. 233. Hutt. 15.

Mountague C. J.

Mountague Chief Juſtice. It ſeems to me, that for one Defect only in the Replication the Plaintiffs ſhall not have Judgment. Firſt it ſeems to me, that Covin is well averred without ſpecial Cauſe ſhewn. [e] For Covin (according to the true Definition of it) is a ſecret Agreement determined in the Hearts of [f] two or more Men, to the Prejudice of another. As if Tenant for Life will ſecretly conſpire with another, that the other ſhall recover to the Prejudice of the Reverſioner, for by this his Reverſion ſhould be taken away; and this Conſpiracy is and may be termed Covin, for all the Parts of the Definition of Covin are there fully performed, for there is an Union of their two Hearts, and it is done ſecretly, and it is to the Prejudice of a third Perſon, and ſo it is a perfect Covin without Defect or Blemiſh. * And, Sir, this Covin to have a Recovery may be as well where the Title of the Recovery is good, as where it is feint or bad. [h] And therefore, if a Woman has Cauſe of Dower, and is of Covin that the Tenant ſhall be ouſted by *A.* againſt whom ſhe recovers, and has Execution, her Eſtate ſhall be adjudged, as againſt the Diſſeize, to be by Diſſeizin, and yet the Title of the Recovery is good and true, but the Covin is the Cauſe why it ſhall be looked upon to be by Diſſeizin. [i] So if the Iſſue in Tail who has good Cauſe to have a *Formedon* in Deſcender upon a Diſcontinuance, be of Covin that *A.* ſhall diſſeize *R.* againſt whom he recovers, he ſhall not be remitted, although his Title be good, but he ſhall be adjudged a Diſſeizor by reaſon of the Covin. And theſe two Caſes are ſo adjudged in our Books, which prove that Covin may be where the Title is good, and the Title ſhall not give Benefit to him that has it, by reaſon of the Covin, for the Mixture of the good and ill together makes the whole bad, and the Truth is obſcured by the falſhood, and the Virtue drowned in the Vice. And ſo here, although the Title of *William Tailbois*, who recovered in the *Formedon*, be good, yet there might be Covin between the Woman now Defendant and the ſaid *William Tailbois*, and then to ſhew Cauſe of Covin to falſify the Title in any Point is not requiſite, becauſe the Title may be good, and yet there may be Covin, and ſo they may ſtand together, and therefore it ſhall not be neceſſary to ſhew Cauſe, *&c.* And, Sir, the Title is to be tried between *William Tailbois* and others, and not between the Plaintiff and the Defendant here, for they are Strangers to the title of the *Formedon*, and it is not the Courſe of Law to try the Title of any Man between Strangers, where he that has the Title is not Party. But if the Plaintiffs had claimed by *William Tailbois*, or under his Title, then it would be more reaſonable to force them to try the Title by whom they claim, but they don't claim by ſuch Title, and therefore by the due Courſe of Law the Diſcuſſion of it does not come now in Debate, and for this Cauſe it ſhall not be ſhewn. Alſo there is another Reaſon to prove that the Cauſe of Covin ſhall not be ſhewn, for at this Time the only Thing to be diſcuſſed is, whether or no the Woman Defendant was Party to the Covin, and (as I ſaid) inaſmuch as Covin is a ſecret Thing, whereof by Intendment of Law a Stranger cannot have Knowledge, for this Reaſon

[e] 1. Finch. 35. 2 Finch. 48. 9. Co. 109. b. Co. Litt. 357. a. b.

[f] Covin may not be but between 2. M. 39. H. 6. 19. b. *Per Priſot.* Bro. Colluſion 73. 1. Rol. Abr. 549. A. But Fraud may be by one alone. 9. Co. 110. b. *Per Cur.*

* Ante 50. *Per Hales* J.

[h] See ante 51. (e) and the Books there cited.

[i] M. 18. H. 8. 4. b.

Reaſon the Law will not force a Stranger to ſhew the Cauſethereof. [a] And if the Defendant pleads that the Plaintiff holds jointly with another, he ſhall not be forced to ſhew of whoſe Feoffment, becauſe by Preſumption of Law he cannot have Knowledge thereof; otherwiſe it is of Jointenancy pleaded on his own Side. And alſo if a Man pleads a Deed which does not belong to him, he ſhall not be driven to ſhew it. So here, foraſmuch as by Preſumption of Law the Specialty of Covin does not lie in the Knowledge of the Plaintiffs, they ſhall not be compelled by Law to ſhew it. Alſo there is another Reaſon to prove that the general Averment of Covin is good. For if the Law be that there may be Covin although the Title is good, then there may be ſpecial Cauſe of Covin. And in all ſuch Caſes a Man ſhall aver the Covin generally, where the Averment of it is given by Statutes, or by the common Law. The Statute of 13. *Rich.* 2. *cap.* 17. gives Receit for feint Pleading, and feint Pleading and Covin are all one: and there he ſhall pray to be received by Allegation of feint Pleading generally. And ſo Tenant for Years by the Statute of *Glouceſter* ſhall be received, and ſhall ſay that the Action was brought by Covin generally, as it is adjudged in many Caſes. [b] And in Aſſize againſt three, one made Default, and a Perſon anſwered for him as Bailiff, and afterwards he came in and diſallowed him for his Bailiff, and ſaid it was his Will that no other ſhould anſwer for him, but he would make Default, and not appear, and the bailiffs of the Place where the Aſſize was brought came and demanded Conuſance by the King's Charter, and ſaid that this Default was of Covin to take from them their Conuſance, and this Averment of Covin generally was held good, for there is not any ſpecial Cauſe of Covin. [c] And in a *Formedon* by two Coparceners againſt one, the Parties were at Iſſue, and the Tenant challenged one of the Jurors, and one of the Demandants agreed to his Challenge, to the Intent that the Inqueſt ſhould not be taken, becauſe he was infeoffed to his own Uſe, and the other Demandant averred the Challenge to be by Covin, and prayed that the Covin might be tried, and the general Averment was held good, and it was adjudged that the Covin ſhould be tried. So that Covin was averred generally, where there could not be any ſpecial Cauſe thereof. And ſo if a Man will alledge Impriſonment in Excuſe of his Default, the other may ſay that this Impriſonment was by Covin generally. [d] And ſo if a Sale in Market-overt be pleaded, the other may aver it to be by Covin generally, *cauſâ qua ſupra*. So if a Feoffment is pleaded, the other may aver that it was by Champerty, generally, without ſhewing any ſpecial Cauſe thereof. [e] And ſo in all Caſes where Averment of Covin, or of any other Thing, is given by Statutes or common Law, there a Man ſhall aver the ſame generally, where there cannot be any ſpecial Cauſe thereof; but where there may be a ſpecial Cauſe it is otherwiſe. As in 9. *H.* 6. where in a *Præcipe quod reddat* the Tenant pleaded in Abatement of the Writ, a Recovery in Aſſize by a Stranger by Action tried, and the Demandant would have averred that the ſaid Aſſize was brought by Covin between the Plaintiff in the Aſſize and the Tenant, and he was not admitted to that general Averment without ſpecial Cauſe ſhewn, for there is a ſpecial Cauſe there to put the Party to anſwer, and therefore the Party ought to ſhew the Title to be falſe, for if the Title is good, there cannot be Covin. But here whether the Title is good or not, yet the Statute prohibits the Covin, and the Covin is a Condition annexed to his Eſtate, which makes the Eſtate defeazible, and therefore it is not the Title which is in queſtion, but the Covin, and for this Reaſon the Covin may not lie in a ſpecial Cauſe, and then it ſhall be generally averred, as it is, and ſo the Averment of it is good. Alſo there is another Cauſe to prove it good. [g] For as the King's Subjects are born to inherit Land and other Things, ſo are they born to inherit and enjoy the Laws of this Realm, and every Man alike may have the Benefit of the Law, and the common Preſumption is, that every Man chuſes to accept of it. But the contrary appears in the Woman Defendant, for when ſhe was impleaded in the *Formedon*, ſhe had not View, nor was eſſoigned: and it is to be preſumed that ſhe had Cauſe of Voucher, inaſmuch as the Tail is ſo old, and ſhe did not vouch, but loſt the Advantages given her by the Law; and alſo ſhe came the firſt Day, (and therefore was not amerced) and ſaid that ſhe could not deny the Action, all which Things prove [h] openly a Covin, and as the common ſaying is, *it hath Meat in its Mouth.* [i] And it is holden in one Book, that where a woman received pleaded in Abatement of the Writ, that another had brought a Writ againſt her Huſband and her, pending this Writ, upon *eign* Title, and had recovered by *nient dedire*, and had ſued Execution, that this was no Plea, becauſe no Title was tried in the other Writ, and a *nient dedire* is no more than a Confeſſion of the Tenant, and his own Act. So here, the Recovery by *nient dedire* is the Act of the Party himſelf, and appears to be covinous, and then to ſhew Cauſe of Covin, or to aver that ſpecially which appears [k] openly is vain. And therefore for all theſe Cauſes the general Averment of Covin is good. And as to the Exception taken becauſe Execution is not alledged to be ſued, Sir, this is not neceſſary, for the Statute ſpeaks of Recoveries by Covin, and it is here a Recovery by Covin, although Execution is not ſued. And as to what has been ſaid to the contrary, [l] that if a feint Recovery is ſued againſt Tenant in Tail, and he dies before Execution, the Iſſue is remitted, and the Recovery is not executory againſt him, and then if this be ſo, it is out of the Miſchief of the Statute; Sir, as to this, if it be ſo, yet it is within the Purview of the Statute. For the Condition, which the Statute has annexed to the Eſtate of the Woman is broken, *viz.* by the Recovery with Covin. [m] For if a Man makes a Feoffment to one upon Condition that he ſhall not infeoff *J. S.* although the Feoffee within Age makes a Feoffment to *J. M.* yet the condition is broken, notwithſtanding the Eſtate is defeazible. So here, although the feint Recovery be defeazible by the Remitter, if Execution is not ſued in the Life of the Tenant in Tail, yet the Covin in the Recovery (which is in Nature of a Condition) is the Cauſeof Forfeiture of the Eſtate. For there was perfect Covin, and a Recovery without Execution, for which Reaſon the Replication is good without ſhewing the Execution. And as to the other Exception

[a] Same Diverſity, H. 21. Ed. 4. 78. pl. 13. Bro. Tenant in common 17. M. 19. H. 6. 32. pl. 64. 78. pl. 6. Fitz. Jointenancy 19. Bro. 18. M. 12. H. 6. 4. a. *Per Cotteſm.* P. 10. Ed. 4. 2. a. *Per Genney.* T. 15. H. 7. 9. b. Bro. Jointenancy 21. Dyer 32. pl. 4. Godb. 85. Hob. 58. Poſt 84.

[b] M. 8. H. 6. 7. b. Fitz. Conuſance 7. Bro. 26. Default 36.

[c] M. 10. H. 6. 15. b. Fitz. Challenge 31. Bro. 191.

[d] H. 33. H. 6. 5. Fitz. Replication 15. Bro. Colluſion 4. Property 6. Ante 46.

[e] Vin. Abr. tit. Covin. B. pl. 4.

[f] M. 9. P. 6. 41. pl. 18. Fitz. Faux. de Recov. 5. Bro. 3. Ante. 46.

[g] Kitch. 4.

[h] 5. Co. 41. a. Wing. Max. reg. 116. pl. 33. reg. 152 pl. 22. Ante 9.

[i] T. 7. H. 4. 15 pl. 1. F. z. Brief 228 Bro. 169. Receit 31.

[k] See ante 49 (b), and the Books there cited.

[l] Vide T. 7. H. 4. 17. pl. 13. Bro. Fauxif. de Recov. 10. Remitter 9. Co. Litt. 361. b. 1. Co. 97. a. Kitch 312. Poſt 14. *Manxel's* Caſe.

[m] 2. Rol. R. 403.

ception taken, becauſe it was not ſhewn certainly how the Wife of the Plaintiff was Heir, [a] it ſeems to me, that for this Cauſe only the Replication is bad. For it is a Learning in our Law, that [b] Replications, [c] Titles, [d] Pleas in Abatement of Writs, and [e] Eſtoppels ought to comprehend Certainty. And the Reaſon why Replications ought to be certain is, becauſe Replications force the Party to Iſſue, and in order that the Court and the Jurors, who try the Iſſue, may not be inveigled or miſled by Incertainty, the Law, which is founded upon Reaſon in this Point, ordains and provides that Replications, which make the Iſſues, ſhall be certain. [f] But a Bar, which contains Certainty to a common Intent, is good: [g] for a Man may plead in Bar *que eſtate*, without ſhewing how; but in the Replication if he pleads *que eſtate* generally, it is not good, as it is held in 2. *Ed.* 4. but he ought to ſhew how he came to the Eſtate for the Reaſon aforeſaid, *viz.* for the ſake of Certainty. And every Replication ought to be directly contrary to the Bar, and then the Party ought to traverſe, or elſe confeſs and avoid the Bar. And here the Bar is good, and the Replication contains a Miſbehaviour of the Woman Defendant, by which her Eſtate is avoidable, whereupon the Plaintiffs ought to make themſelves able to take Benefit of the Miſbehaviour of the Defendant, and if this Ability is not certainly pleaded, then the Bar, which is fully confeſſed, is not fully avoided; for no Man in the World can diſcern or judge by the Pleading how the Wife of the Plaintiff is Couſin to *George Tailbois*, and it may be that ſhe is Couſin by Blood to him, and not Couſin and Heir to the Land, for it may be that he had a Son who had a Son. And theſe Words *prætextu quorum præmiſſorum*, *&c.* don't make the Matter better, for they neither [h] encreaſe nor diminiſh, but are referred to that which is ſaid before, and to no more, as they are well taken and expounded in the Bill of Debt againſt the Warden of the *Fleet* in [i] 7. *H.* 6. And here if Iſſue ſhould be joined, that ſhe was not *the Perſon to whom*, &c. this Iſſue comprehends no Certainty. [k] And therefore in 4. *H.* 7. where the Condition of an Obligation was that the Obligor ſhould not enter nor claim a certain Houſe, and the Defendant ſaid that he did not enter nor claim it, and the Plaintiff ſaid that he did claim it, this Replication was held not good for the Incertainty, but he ought to have ſaid that he came to the Land, and claimed it, and entered into it, and this would make a good Iſſue. [l] And if a Man would make himſelf Title in his Replication by Entry into Land as next of Blood of a Woman raviſhed, who has conſented to the Raviſher, he ought to ſhew how he is next of Blood. [m] And ſo if a Man makes himſelf Title in his Replication as Lord by Entry in Mortmain, he ought to ſhew how he is Lord; and if he in the Reverſion prays to be received, he ought to ſhew how he came to the Reverſion. And all theſe Caſes are given by Statutes, which ſpeak generally, as the Statute here does, but yet for the Cauſes before ſhewn a Man ought to make a ſpecial Conveyance to the Thing or Benefit given by the general Words. And in a Writ of Ward if the Defendant will ſay that the Anceſtor of the Infant held of the Plaintiff in Socage, and not by Knights-Service, this hath been adjudged no good Plea, without ſhewing how in Socage, as by Fealty only, becauſe otherwiſe the Iſſue is incertain. And ſo inaſmuch as this Replication, which ought to be certain becauſe it tenders an Iſſue, is incertain, and alſo inaſmuch as it ought to enable the Plaintiffs to take Benefit of the Miſbehaviour of the Woman Defendant, and makes them Actors in this Cauſe, (for which Reaſon they ought to alledge every Thing certainly, and the whole is incertain) for theſe Cauſes it ſeems to me that the Replication is not good in this Point. And as to what has been ſaid by my Brother *Hales*, that the Averment ſhall be general becauſe of the Generality of the Words of the Statute, I have anſwered that before: And as to the Caſe put by him for an Example, *viz.* if a Statute was made, that the Parſon of the Church ſhould enter for a Rape, he ſhould ſay generally that he was Parſon, without ſhewing Inſtitution or Induction; Sir, I confeſs this to be Law, for if he ſhews that he was Parſon of the Church, he pleads certainly, for that is a Certainty. But if the Caſe had been put that he ſhould ſay he was the Perſon who ought to enter, and did not ſhew that he was Parſon of the Church, this had been more like our Caſe, and I apprehend this would not be a good Title. And as to the Caſes put of Writs of Entry upon the Statute, and Declarations, Sir, they are not like unto a Title, for ſome of the Writs and Declarations are general, and ſome are ſpecial. But Titles ought always to be certain, for he that makes Title is thereby become Actor, and he that is Actor ought always to plead certainly. And as to what is ſaid by my Brother *Hales*, that the Plaintiffs ſhall not be compelled to ſhew how ſhe is Heir becauſe it may be that another is now Heir, as the Son born afterwards, and yet the Wife of the Plaintiff ſhould the Land during the Life of the Tenant in Tail, Sir, as to this I ſay that it is a Matter worthy of Conſideration. And it ſeems to me, [n] that the Son born afterwards ſhall enter and ouſt the Daughter; for the Statute of 11. *H.* 7. ſaith, that *the Perſon, to whom the Title belongs after the Death of ſuch Woman, ſhall immediately enter into the Tenements, and the ſame ſhall poſſeſs and enjoy according to his Title in them*, and then I ſay, that the Title, which the Daughter had to enter was in Tail, and after the Son is born, the Title to the Tail is devolved from the Daughter; then if ſhe ſhall poſſeſs and enjoy the Tenements acording to her Title in them, and in no other Manner, and by the Birth of the Son the Title to the Tail is devolved from the Daughter, and veſted in the Son, then I ſay, that the Son, in whom the Title now is, may enter. And it is not like to the Caſe where a Woman ſeized in Fee conſents to a Raviſher, and the Daughter being next of Blood enters, there I will agree [o] that the Son born afterwards ſhall not take away the Title and Poſſeſſion of the Daughter, for there it is of a Fee-Simple. [p] And ſo where a Remainder is appointed in Fee to the right Heirs of *J. S.* who dies having a Daughter, who enters after the Death of the Tenant for Life, there I agree that the Son born afterwards ſhall not remove the Lands before

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[a] See 1. Leon. 78. Gouldſb. 36. Hobb. 233. Hutt. 15.

[b] M. 2. Ed. 4. 26. a. *Per Danby*. Co. Litt. 303. a. 5. Co. 121. a. 1. Leon. 77. 12. Mod. 665. Doc. Pla. 280. 322. Heath's Max. 57.

[c] M. 2. Ed. 4. 26. a. *Per Danby*.

[d] See ante 33. (g), and the Books there cited.

[e] M. 21. Ed. 4. 51. b. *Per Choke*. Bro. Eſtoppel 172 H. 21. Ed. 4. 83. a. *Per Briggs*. Bro. Eſtoppel 177 M. 7. H. 7. 7. a. *Per Huſſey*. Fitz. Eſtoppel 83 Co. Litt. 303. a. Doc. Pla. 158. 280. Heath's Max. 54. Sed *contra* P. 22. H. 6. 53. b. 54. a. *Per Newton*. Bro. Eſtoppel 90.

[f] See ante 26. (b) and the Books there cited.

[g] Same Diverſity, M. 2. Ed. 4. 26. a. Fitz. Que Eſtate 9. Wing. Max. reg. 162. pl. 69.

[h] S. P. M. 7. H. 7. 4. a. O. Bendl. 127. Cro. E. 766. *Per Fenner* J. Ld. Raym. 412. 3. Salk. 352. Heath's Max. 166.

[i] M. 7. H. 6. 5. pl. 9. Fitz. Debt 26. Bro. Eſcape 41.

[k] T. 4. H. 7. 13. pl. 9. Bro. Condition 130. Replicat. 35.

[l] See ante 43. (a), and the Books there cited.

[m] Ante 43.

[n] S. P. cited and affirmed to be good Law, Poſt 113. 1. Co. 102. a. 3. Co. 62. a.

[o] T. 5. Ed. 4. 6. a. Bro. Done 28 1. Co. 95. a. 3. Co. 61. b. 1. Leon. 258. Kitch. 215.

[p] P. 9. H. 7. 25. *Per Wood*. Bro. Entry congeable 92. 1. Co. 95. a. 3. Co. 61. b. Cro. E. 334, 335. Litt. R. 316. 3. Lev. 408. Kitch. 215.

veſted in the Daughter as a Purchaſe, for there it is a Fee ſimple, to which the Son born afterwards hath no Right, for the Land never was in any of his Anceſtors before. But here the Eſtate is an Eſtate Tail, and the Son ought to have it *per formam doni*. *Et poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem.* [a] But the Poſſeſſion of the Brother of an Eſtate Tail as Heir to his Father will not make the Siſter to be Heir, but it ſhall deſcend to the younger Son of the half Blood. [b] And if the Baſtard *eign* abates into Fee ſimple Land after the Death of the Father, and dies ſeized without Interruption, and his Iſſue enters, he ſhall hold it, and the Right of the *mulier puiſn*, and of his Heirs is bound for ever. [c] But otherwiſe it is of Lands in Tail, for the Right of the *mulier puiſn* or of his Iſſues ſhall not be bound there. So that there is a great Difference between Fee Simple Lands and Lands in Tail. And therefore here inaſmuch as the Title is in Tail, and the Act ſaith that the Perſon ſhall enjoy it according to his Title, which is here in Tail, and the Eſtate of the Woman, who ſuffered the Recovery by Covin, was defeated by the Entry of the Daughter, the Son born may for this Cauſe enter and ouſt the Daughter, for the Title in Tail is in him, and there the common Proverb is verified, *viz. one ſhall beat the Buſh, and another have the Bird.* [d] As if a Man has Land by Deſcent on the Part of his Mother, and he makes a Feoffment upon Condition, and dies without Iſſue, and the Heir of the Part of the Father enters, the Heir of the Part of the Mother ſhall ouſt him; and ſo I have declared my Opinion in the ſaid Caſe: but it was well moved, and it is a cunning Caſe. And as to what was alſo ſaid by my Brother *Hales fo.* 52. that if the Plaintiff ſhould ſhew how ſhe is Heir, then it would give Occaſion to the Defendant to ſay that ſhe was a Baſtard, or had an elder Brother; Sir, whether or no it be reaſonable to give ſuch Anſwer, I myſelf report to the Audience *quaſi diceret* that it is reaſonable, for this deſtroys the Title of the Plaintiffs without ſhewing the ſpecial Matter. And as to what was alſo ſaid by him, that if the Party ſhould be forced to ſhew how he had Title, then it might be that he had double Title, as in the Caſe there [e] put, and the ſhewing of that would make the Plea double, Sir, as to that the Plaintiffs have prevented this well enough, for being afraid that the Plea might be double, they have ſhewn nothing, and now this is worſe than a double Plea, for a double Plea has Matter of Subſtance, but here there is no Matter of Subſtance. And, Sir, in the ſaid [f] Caſe the Title will not be double, for the Remainder for Years, and the Remainder for Life commence at one Time, and upon one Livery, and are no more than one Title, and whether there be one or two Titles, in our Law a Man ought to hold himſelf to one matter, and not to double matter. And as to what has been [g] ſaid, that it would be an Eſtoppel, Sir, this is not ſo, for when one is forced to ſhew a Thing certain, and to rely upon one Point, he ſhall not be eſtopped at another Time to ſhew another Thing, which he could not ſhew before, for if he ſhould the Law would be unreaſonable in this Point, for it would prejudice a Man, where there was no Default in him; for which Cauſe it ſhall not be an Eſtoppel. And as to the other Reaſon moved by my Brother *Hales*, [h] that the Plaintiffs need not ſhew how Heir, becauſe they were once ſeized, as if a Remainder in Tail is once executed, the Iſſue in Tail ſhall have a *Formedon*, and ſhall declare upon an immediate [i] Gift; Sir, I agree to this Caſe, for all paſſes at one Time, and upon one Livery. But if it was by Way of Grant of a Reverſion, there although they were once ſeized it would be otherwiſe; for in [k] 20. *Aſs.* a Diverſity is taken between a Remainder and a Reverſion, for there the Plaintiff in Aſſize after the Bar made himſelf Title by a Grant of the Reverſion, and it was held that he ought to ſhew the Deed of Grant thereof, notwithſtanding he was once ſeized by Force of the ſame. So that he that makes Title is always Actor, and ought to plead certainly. [l] And it is held in 2. *H.* 6. that if one makes himſelf Title by Force of the King's Letters Patents, he ought to ſhew them, notwithſtanding he is once ſeized; and perhaps in the Caſe of the Remainder, if one be to make himſelf Title in his Replication by Force of ſuch Remainder veſted in him, he ought to ſhew the Eſtate precedent, and may not plead a Feoffment to him generally; for when a Man makes Title to himſelf, he pleads as certainly as if the Thing was to be executed, notwithſtanding he is once ſeized, for he is thereby become Actor (as I ſaid). Wherefore for theſe Cauſes the Replication is not good in this Point. And as to the Matter in Law upon the Statute, it ſeems to me that this Caſe is within the Letter of the Statute in one or two Places. Firſt, we have a Learning in our Law, [m] that if the Terms and Letter of any Statute are obſcure and difficult to be underſtood, we ought to have Recourſe to the Intent of the Makers, and thereby we ſhall come at the Meaning of the Letter. And therefore the Statute of *Weſtminſter* 2. *cap.* 3. ſays, *In caſe when a Man doth loſe by Default the Land which was the Right of his Wife, it was very hard that the Wife after the Death of her Huſband had no other Recovery but by a Writ of Right, &c.* Here the Statute ſpeaks, where the Huſband loſt, *&c.* [n] And if the Huſband alone had loſt, the Law always was that the Wife might enter, and ſhe was not driven to her Writ of Right, but the Expoſition of the Statute is, where the Huſband and Wife loſe by Default, for ſuch was the Intent of the Statute. [o] And the Statute of *Weſtminſter* 2. *cap.* 1. ſaith, that if a Fine be levied hereafter upon ſuch Lands, *ipſo jure ſit nullus*; which Words ſeem to make the Fine void, but yet it is not void, but works a Diſcontinuance, though it is void as to barring the Right of the Tail. And thus the ambiguous Words of Statutes have always been expounded according to the Intent of the Makers. And the Statute of *Glouceſter cap.* 3. ſaith, *Likewiſe the Heir of the Wife ſhall not be barred of his Action after the Death of his Father and Mother, to demand the Inheritance of his Mother by Writ of Entry, which his Father did alien in the Time of his Mother, whereof no Fine is levied in the King's Court:* Which Words *whereof, &c.* are doubtful and incertain in the Letter, [p] but the Meaning of them is, whereof no Fine is levied by the Huſband and Wife, for Fines may well be levied by them, and ſuch has been the Expoſition ever ſince according to the Intent of the Makers. So that the Intent of the Legiſlature is to be ſought for in the Expoſition of the ambiguous Words of Statutes, and the

[a] Vet. N. B. 145. Bro. Deſcent. 56. Co. Litt. 15. b. Kitch. 218.

[b] Lit. § 392, 400, 401. Perk. § 49. 1. Finch 408. 2. Finch. 118. 8. Co. 101. a.

[c] M. 39. Ed. 3. 38. pla. ult. Co. Litt. 243. b.

[d] P. 9. H. 7. 24. b. *per Curiam.* 25. a. *per Wood.* Co. Litt. 12. b. Dal. 92. Robinſ. of Gavelk. 119, 120.

[e] Ante 51.

[f] Ante 51.

[g] Ante 52.

[h] Ante 52.

[i] See Ante 52. (b) and the Books there cited.

[k] 20. Aſs pl. 19.

[l] T. 2. H. 6. 14. pl. 13. *per Martin.* Fitz. Monſtrans de faits 74. Bro. 2. H. 15. Ed. 4. 17. b.

[m] Vin. Abr. tit. Statutes E. 6. pl. 89.

[n] H. 10. H 4. Fitz. Diſſeizin 7. *per Hank.* 2. Inſt. 342.

[o] M. 27. H. 8. 23. b. *per Fitzh.* M. 8. H. 4. 10. b. *per Thirn.* M. 33. Ed. 3. Fitz. Eſtoppel 280. 2. Inſt. 336. Sav. 88. 2. Rol. R. 152, 154 Gouldſb. 9. 10. Mod. 179, 245. Ld. Raym. 779. Pig. on Recov. 7. Poſt 82. 137.

[p] Litt. § 731. 2. Inſt. 294. 9. Co. 26. b. Poſt. 82.

Letter ſhall be aided by the Intent. The Words then being doubtful here, we muſt enquire into the Intent of the Legiſlature. And as to this it is firſt to be obſerved, that the Marriages of Women and their Advancement thereby is greatly favoured in our Law, inſomuch that if a Woman gives [a] Land to a Man *cauſâ matrimonii prælocuti*, and he will not marry her, but marries another, ſhe ſhall have a Writ to recover the Land. [b] And if Land is given in Frank-marriage, and the Parties are afterwards divorced, the Woman ſhall have all the Land. [c] And where a *Cui in vita* is given by the Statute of *Weſtminſter* 2. *cap.* 3. upon Recovery by Default againſt the Huſband and Wife, by the Equity thereof a Woman divorced ſhall have a *Cui ante divortium* to recover the Land loſt by the Huſband and Wife by Default before the Divorce. Which Caſes prove how greatly the Proviſion of Marriage and the Eſtate thereof is favoured by the Common Law. And then if they, whoſe Eſtates are ſo greatly favoured by the Law, will be of Covin and Deceit to hurt and impair thoſe Eſtates, and to diſinherit the Heirs, and ſo to reward Benevolence with Wrong and Diſheriſon, certainly it cannot be thought but that every Man would wiſh to ſee ſuch Women puniſhed, and that the Intent of the Makers of the Statute of 11. *H.* 7. was as extreme againſt them as poſſible. And ſo it ſeems to me that the Intent of the Makers of the Statute is to be taken moſt ſtrongly againſt theſe Women, and then if the Words of the ſame Statute are doubtful, they ſhall be interpreted moſt ſtrongly againſt them. And with Regard to the Words, Sir, the firſt Part of the Statute (which is in the Disjunctive) ſaith, that *if any Woman, who hath had, or afterwards ſhall have any Eſtate in Dower, for Term of Life, or in Tail, jointly with her Huſband, or ſolely to herſelf, or to her own Uſe, in any Tenements, &c. of the Inheritance or Purchaſe of her Huſband, &c.* ſo that the Eſtate in Dower may not be referred to theſe Words, *jointly with her Huſband*, for a Woman cannot have an Eſtate in Dower jointly with her Huſband, but theſe Words, *jointly with her Huſband*, ſhall be referred to the two other Eſtates, viz. for Life, or in Tail, and here the Eſtate is in Tail, and ſo within the Words. But then the Eſtate is referred to the Things following, viz. in Manors, Lands, Tenements, or other Hereditaments; and, Sir, here it cannot be denied but that the Eſtate is an Hereditament, that is to ſay, in the Uſe, for a Uſe is an Hereditament, and ſuch an Hereditament, whereof [d] *poſſeſſio fratris in feodo ſimplici facit ſororem eſſe hæredem*, as it is held in 5. *Ed.* [e] 4. and ſuch an Hereditament, that if a Man has to the Value of 40 *s.* therein, he ſhall be [f] ſworn in an Aſſize by the Common Law: And it is ſuch a Thing, as Statutes (ſuch as the Statute *of Pernor of Profits*, and others) have admitted to be an Hereditament. Here then the Woman has an Eſtate Tail in an Hereditament; but there is one Circumſtance wanting, and that is, that the Hereditament ought to be of the Inheritance or Purchaſe of her Huſband. And as to this, I ſay, that here the Uſe and the Land alſo was the Inheritance of the Huſband, for his Heir might inherit it, and an Inheritance is ſuch an Eſtate as may be inherited by the Heir. And as to the Definition of *Britton* which makes a Diſtinction between an Inheritance and a Purchaſe, Sir, I have no great Regard to it, for his Book contains many Errors; but the Book of *Littleton*, according to the firſt Edition, wherein the new Additions are omitted, which is the trueſt and ſureſt Regiſter of the Grounds and Principles of our Law, defines [h] *quod feodum ſimplex idem eſt quod hæreditas legitima vel pura*. So that he takes every Fee Simple to be an Inheritance, and he ſays that this Word *(Inheritance)* is not only intended where a Man has Land by Deſcent, but alſo that every Fee Simple or Tail, which a Man has by Purchaſe, is an Inheritance. [i] And as to the Caſe put in 7. *H.* 4. of a *Cui in vita*, Sir, at the End of the Caſe it appears that *Thirning* had been in the *Chancery* to enquire the Form of the ſaid Writ, and they ſaid that the Form was both the one Way and the other, viz. *quam clamat eſſe jus et hæreditatem, &c.* or *de dono talis, &c.* And I have alſo looked into the [k] *Regiſter*, which is accordingly; wherefore this Reaſon does not at all diſprove the Matter. And another Caſe was put, [l] that if a Woman purchaſe an Advowſon, and a Uſurpation is had when ſhe is covert, ſhe ſhall be without Remedy after the Death of the Huſband, becauſe the Statute ſays, *the ſame ſhall be obſerved in Preſentments made unto Churches being of the Inheritance of Wives, &c.* Which (it has been ſaid) is to be intended of a Deſcent; Sir, as to this, it is referred to the Sentence before, which ſaith, *he ſhall have the ſame Action as the laſt Anceſtor ſhould have had, &c.* and for this Cauſe it is to be intended of Advowſons by Deſcent, for this Statute is like that of *Weſtminſter* 2. *cap.* 41. which gives a *Ceſſavit* of a Chantery. and ſaith, *An Action ſhall lie for the Donor or his Heir to demand the Land ſo given in Demeſn*, where it gives an Action to the Anceſtor, or to his Heir. And ſo the ſaid Statute of *Quare Impedit* gives the Action, which the Anceſtor might have had; which proves that the Statute intended a Deſcent; wherefore neither the ſaid Statute, nor the Caſe put, do at all prove that a Purchaſe is not an Inheritance. And in a Writ of Right of Land of his own Purchaſe the Writ ſhall ſay, *quam clamat eſſe jus et hæreditatem ſuam.* For which Reaſon it ſeems to me, that the Uſe here and the Land alſo are the Inheritance of the Huſband, for his Heir might inherit it, and though the Uſe is the Inheritance of the Huſband and Wife, *ergo* it is the Inheritance of the Huſband. And then all the Words of the Statute are ſatisfied, for here the Woman has an Eſtate, what Eſtate? an Eſtate Tail; in what? in an Hereditament; what Hereditament? a Uſe; in what Manner? jointly with her Huſband; how? to her own Uſe; of whoſe Inheritance? of the Inheritance of the Huſband; and ſo all the Words of the firſt diſjunctive Sentence are fully performed in the Caſe here. And if the Caſe was not within the Words of the firſt disjunctive Sentence, yet ſhould it be within the Words of the ſecond disjunctive Sentence, which is, *or given to the Huſband and Wife in Tail by any Perſon ſeized to the Uſe of the Huſband, &c.* For it cannot be here denied but that the Feoffees were ſeized to the Uſe of the Huſband, until the Statute of 27. *H.* 8. was made, for if they were ſeized to the Uſe of the Huſband and Wife, *ergo* they were ſeized to the Uſe of the Huſband. And the Huſband had the entire Uſe, and the Wife the entire Uſe, for there there are no Moieties [m] between Huſband and Wife. And when

[a] T. 5. Ed. 2. Fitz. Cui in vita. 24. M. 14. H. 8. 7. a. *per Fitzh.* Dy. 147. pl. 75. F. N. B. 205. a. Co. Litt. 204. a. 1. Finch 278. 2. Finch 264. 2. And 84.

[b] T. 13. Ed 3. Fitz Aſſize 91. 19. Aſs. pl. 2. Fitz. Aſſize 83. Bro. Deraignment 8. 8. Ed. Fitz. Aſſize 415. Perkins, § 238. Co. Litt. 22. a.

[c] H. 14. H. 7. 18. b. *Per Wood.* Bro. Parliament 21. Moor 508. Poſt. 59. 178.

[d] Dyer 10. b. 11. a. pl. 40. Co. Litt. 14. b. 1. Co. 121. b. 4. Co. 22. a. T. Raym. 317. Ld. Raym. 876. 1. Finch 15. 2. Finch 21. Bac. Read. on Statute of Uſes.

[e] M. 5. Ed. 4. 7. b. Fitz. Subpena 3. Bro. Deſcent 36.

[f] M. 15. H. 7. 13. b. *per Frowick.* Bro. Jurors 14. Challenge 202. M. 5. Ed. 4. 7. pl. 15. *per Markh.* Bro. Challenge 165. Litt. § 464. Dyer 9. pl. 26. Kelw. 42. b. Ld. Raym. 876.

[h] Litt. § 1.

[i] M. 7. H. 4. 5. pl. 28. Fitz. Brief 221. Bro. Cui in vita. 5. Faux Latin 19. Co. Litt. 16. a. Ante 47.

[k] Regiſt. 232. b.

[l] T. 1. Ed. 2. Fitz. Quare Impedit 43. F. N. B. 34. S. 2. Inſt. 360.

[m] Dy. 9. pl. 23. 10. pl. 36. in Marg. 1. Co. 76. b. 3. Co. 5. b. 14. b. Co. Litt. 187. b. Poſt. 483.

when the Statute of 27. *H.* 8. was made, it gave the Land to them that had the Uſe. It is to be ſeen then, who ſhall be adjudged in Law the Donor after the Execution of the Poſſeſſion to the Uſe. And, Sir, the Parliament, (which is nothing but a Court) may not be adjudged the Donor. For what the Parliament did was only a Conveyance of the Land from one to another, and a Conveyance by Parliament does not make the Parliament Donor; but it ſeems to me that the [a] Feoffees to Uſe ſhall be the Donors, for when a Gift is made by Parliament, [b] every Perſon in the Realm is privy to it, and aſſents to it, but yet the Thing ſhall paſs from him that has the moſt Right and Authority to give it. [c] As if *ceſtuy que uſe* and his Feoffees join in a Feoffment, it ſhall be ſaid the Feoffment of the Feoffees, for they have the greateſt Authority to give it. [d] And if Tenant for Life and he in the Reverſion join in a Feoffment, it ſhall be adjudged the Livery of the Tenant for Life, becauſe he has the greateſt Authority to do it. [e] And ſo if one who is ſeized in Fee of Land, and another who has nothing in it join in a Feoffment, it ſhall be ſaid the Feoffment of him that hath Right, and the Confirmation of the other. So here it ſhall be ſaid the Gift of the Feoffees by Parliament, and the Aſſent and Confirmation of all others. For if it ſhould be adjudged the Gift of any other, then the Parliament would do a Wrong to the Feoffees in taking a Thing from them, and making another the Donor of it. [f] And, Sir, in the Caſe of the Rector of *Edington* 19. *H.* 6. where the King had granted to the Rector and his Brethren, that when a Tithe ſhould be granted to him by the Clergy, they ſhould be diſcharged, and afterwards a Tithe was granted by the Clergy in their Convocation, there it is held by the better Opinion, that the Rector ſhould be diſcharged by the ſaid Grant of the King, notwithſtanding he be adjudged in Law one of the Convocation, and as ſuch one of the Grantors, for the Common Law ſaith, that none ſhall be damnified by ſuch ſpecial Grant made by Parliament. [g] And therefore the Writ of Right Patent in *London* was not taken away by the Statute of *Weſtminſter* 2. *cap.* 1. *De donis conditionalibus*, but it remains at this Day, and the Demandant ſhall make his Proteſtation to ſue in Nature of a *Formedon* in Deſcender, as he ſhall do in other real Actions there. [h] So that Acts of Parliament will not prejudice any. And here the Land is by the Act of Parliament removed from the Owners, that is to ſay, the Feoffees, to the *Ceſtuy que uſe*, and the Statute would do wrong if it ſhould not adjudge them the Donors, for they have the greateſt Authority to give it, and the Parliament is only a Conveyance, and therefore it ſhall be adjudged the Gift of the Feoffees by Parliament, and ſo the Gift of the Feoffees who were ſeized to the Uſe of the Huſband, and then within the Words of the ſecond disjunctive Sentence of the Statute of 11. *Hen.* 7. And if the Feoffees ſhould not be adjudged the Donors, then *George Tailbois* ſhould, but this ſeems repugnant for him to be taken to be [i] Donor to himſelf, and therefore the Feoffees ſhall be adjudged the Donors *ut ſupra*, and ſo within the Words of the Statute. And if the Caſe here was out of the Words, yet it ſhould be within the Equity of the Statute. For it is to be conſidered, that the Statute was made for the Redreſs of falſe Covin, and to give a ſpeedier Remedy to Right. [k] And all ſuch Statutes are in Advancement of Juſtice, and beneficial to the public Weal, and therefore ſhall be extended by Equity. And although it reſtrains the Liberty of Tenant in Tail, Sir, every Statute, which ſhall be extended by Equity, reſtrains ſome Body, and is penal to ſome Body. But yet inaſmuch as it is beneficial to the greater Number, it ſhall be taken by Equity, and ſo is this Statute, for it tends to the Suppreſſion of Deceit, and to the Advancement of Truth. And the Statute of *Weſtminſter* 2. *cap.* 3. gives a *Cui in vita* upon Recovery by Default, before which Statute ſuch Recovery was a Wrong to the Wife, and a Hardſhip as the Statute ſaith, and therefore a [l] *Cui ante divortium* is given by the Equity of that Statute. And the Statute of *Marlbridge cap.* 6. ſpeaks of them, *who uſe to infeoff their eldeſt Sons and Heirs being within Age*; [m] yet if his firſt Son be dead, and he infeoffs his ſecond Son, who is his Heir, it is within the Equity of the Statute; [n] or if he levy a Fine to him, which is Matter of Record, this ſhall be within the Equity of the Statute, and yet it ſpeaks of a Feoffment. And the Reaſon is, becauſe Covin is always abhorred in our Law, and Statutes made in Suppreſſion thereof are for the public Good, and therefore ſhall be extended by Equity. And ſo the Statute of 1. *Hen.* 7. *cap.* 1. which gives a Writ of *Formedon* in Remainder againſt the Pernor of Profits, was made in Suppreſſion of Covin, for the Feoffment made to Perſons unknown to defraud thoſe that had Right to the Land was a great Covin and Deceit in the Law; [o] and therefore a *Scire Facias* to execute a Remainder ſhall be maintainable againſt the Pernor of the Profits, as it is adjudged in 14. *H.* 7. and all this is for the Cauſe above given. So it is here, for *Bracton* ſaith, *de ſimilibus ad ſimilia eadem ratione procedendum eſt*, and therefore inaſmuch as this Statute was made in Suppreſſion of Covin, it ſhall be extended by Equity, eſpecially as the Intent of the Minds of the Makers of the Statute are to be ſuppoſed very ſevere againſt the Women therein mentioned, as I have ſaid before. And then the Statute of 27. *H.* 8. which executes the Poſſeſſion to the Uſe, makes the Poſſeſſion ſubject to the Condition, which was annexed to the Eſtate being in Uſe. As the Statute *de prerogativa regis cap.* 1. ordains that the Lord the King ſhall have the Wardſhip of all the Lands of ſuch as hold of him in chief by Knight's Service, of whomſoever they hold elſe by ſuch Service, *&c.* and the Statute of 4. *Hen.* 7. *cap.* 17. ordains, that if *Ceſtuy que uſe* die, no Will by him declared, and his Heir within Age, the Lord ſhall have a Writ of Ward as well for the Body as for the Land, as he ſhould have had if the Anceſtor had been in Poſſeſſion of the ſame Eſtate: [p] Now the Law was upon the Conjunction of theſe two Statutes together, that if the King's Tenant had died ſeized, having alſo a Uſe in Land holden of other Lords, the King ſhould have his Prerogative in them, for the ſaid Statute of 4. *Hen.* 7. makes the Land in Uſe ſubject to the King's Prerogative. And ſo here, the Statute of 27. *Hen.* 8. which unites the Poſſeſſion to the Uſe, makes the Poſſeſſion ſubject to Covin annexed to the Eſtate in Uſe. For which Reaſons it ſeems to me that the

Caſe

[a] See 7. Ed. 6. Bro. Formed. 46. B. N. C. § 436. Theol. Dig. lib. 9. cap. 7. § 23. 1. Co. 47. b. Wing. Max. reg. 54. pl. 27. reg. 148. pl. 33.

[b] Hob. 256.

[c] M. 21. H. 7. 32. pl. 20. Bro. Feoffm. 18. Leaſe 47. Co. Litt. 49. a. 302. b. 2. Rol. Abr. 64. pl. 6. Hob. 311.

[d] H. 13. H. 7. 14. pl. 8. Bro. Diſcontin. de poſſeſſ. 38. Co. Litt. 302. b. 6. Co. 15. a. Poſt. 140. Vin. Abr. tit. Grants G. a. 2. pl. 7. in Marg. Sed *Contra* Bac. Max. reg. 24.

[e] M. 21. H. 7. 32. pl. 20. Bro. Feoffm. 18. Co. Litt. 45. a. Cro. E. 701. Vin. Abr. tit. Grants G. a. 2. pl. 10.

[f] P. 19. H. 6. 62. Fitz. Grant. 10. Bro. 40. Patent. 16. Parliament 88. Bar. 25.

[g] P. 19. H. 6. 64. b. *per Fortejcue* C. Bendl. 187. Cro. C. 445.

[h] 1. Rol. R. 170.

[i] 7. Ed. 6. Bro. Formedon 46. B. N. C. § 436.

[k] Vin. Abr. tit. Statues E. 6. pl. 47. Co. Lit. 268. b. 5. Co. 60. a. 77. b.

[l] Ante 58. (c) and the Books there cited.

[m] See 1. Rol. R. 107. 2. Brownl. 189.

[n] P. 33. H. 6. 15. b. *Per Aſhton*. 2. Inſt. 110.

[o] 14. H. 7. 17. 31. Bro. Parliament 21. Pernor de profits 10. T. 15. H. 7, 8. pl. 2. Kelw. 101. a. b. 1. Co. 131, b. 2. Bulſt. 63. Poſt. 178.

[p] S. P. debated T. 12. H. 7. 19. pl. 1. Bro. Prerog. 63. Stamf. Prerog. 9. a. b. Contra B. N. C. § 15.

Caſe here is within the Words of the Statute of 11. *H.* 7. And if it be not, yet it is within the Equity of it, and ſo the Entry of the Plaintiffs is maintainable: but for the ſaid ſingle Fault in the Replication they ſhall not recover.

Nota Bene And ſo *Note*, that all the Juſtices held the Caſe here within the Words of the Statute of 11. *H.* 7. and if it was not within the Words, that yet it was within the Equity of the Statute. And they held alſo, that the Heir might enter * immediately, that is to ſay, in the Life of the Tenant in Tail. But no Judgment was given.

* 2. Rol. R. 506. Hetl. 155.

A Report of a Caſe argued in the Common Bench *before all the Juſtices of the ſame Bench, in* Michaelmas *Term, in the* fourth *Year of the Reign of King* Edward *the Sixth, between* Lewis Dive *late Sheriff of* Bedf. *Plaintiff and* John Maningham *Defendant, in an Action of* Debt *upon an Obligation brought by the ſaid Plaintiff againſt the Defendant. The Record was as follows:* Rot. 559.

Bedf. Declaration. *JOHN Maningham* late of *Baldock* in the County of *Hertford* Draper, otherwiſe called *John Maningham* of *Baldock* in the County of *Hertford* Draper, was ſummoned to anſwer *Lewis Dive* Eſquire, late called *Lewis Dive* Eſquire Sheriff of the County of *Bedford*, of a Plea that he render to him 40 *l.* which he owes him, and unjuſtly detains, *&c.* And whereupon the ſame *Lewis* by *Thomas Grendon* his Attorney ſays, that whereas the aforeſaid *John* the laſt Day of *May* in the *thirty-eighth* Year of the Reign of the Lord *Henry* the *eighth* late King of *England* the Father of the Lord the King now, at *Bedford* by his certain Writing obligatory acknowledged himſelf to be bound to the ſame *Lewis* in the aforeſaid 40 *l.* to be paid to the ſame *Lewis* on the Feaſt of *Pentecoſt* then next coming, nevertheleſs the aforeſaid *John*, although often requeſted, the aforeſaid 40 *l.* to the ſame *Lewis* hath not yet rendered, but the ſame to render to him hath hitherto refuſed, and yet doth refuſe. Wherefore he ſays, that he is damnified and hath Damage to the Value of 100 Shillings: and therefore he brings Suit, &c. And he produces here in Court the Writing aforeſaid which witneſſeth the Debt aforeſaid in Form aforeſaid, the Date whereof is the Day and Year aboveſaid, &c.

Plea. And the aforeſaid *John* by *John Poly* his Attorney comes and defends the Force and Injury when, &c. and prays *oyer* of the Writing aforeſaid, and it is read to him, &c. and alſo prays *oyer* of the Indorſement of the ſame Writing, and it is read to him in theſe Words; *The Condition of this Obligation is ſuch, that if one* Thomas Maningham *of* Luton *in the County of* Bedford *Yeoman ſave and keep harmleſs the within named Sheriff againſt our Sovereign Lord the King, and one* Thomas Palley *of* London *Fiſhmonger, and at all Time and Times be at the Commandment of the ſaid Sheriff as a true Priſoner, to appear before the King's Juſtices at* Weſtminſter, *or elſewhere within the King's Realm, that then this Obligation to be void, and of none Effect, or elſe to ſtand in his full Strength and Virtue.* Which being read and heard, the ſame *John Maningham* ſays, that the aforeſaid *Lewis* his Action aforeſaid thereof againſt him ought not to have, becauſe he ſays that at a Parliament of the ſaid Lord *Henry* late King of *England* the *Sixth* from the Conqueſt, holden at *Weſtminſter* the *twenty-fifth* Day of *February* in the *twenty-third* Year of his Reign, amongſt other Things it was enacted, that no Sheriffs, Under-ſheriffs, Sheriffs-clerks, Stewards or Bailiffs of Liberties, Servants or Bailiffs, nor Coroners ſhould take any Thing by Colour of their Office by themſeves, or by any Perſon to their Uſe, of any Perſon

for making a Return or Panel, and for every Copy of a Panel 4 *d.* And that the aforeſaid Sheriffs, and all the other Officers and Miniſters aforeſaid ſhould let out of Priſon all and all manner of Perſons by them or any of them arreſted, or being in their Cuſtody by virtue of any Writ, Bill, or Warrant in any Action perſonal, or by Cauſe of an Indictment of Treſpaſs, by reaſonable Surety of ſufficient Perſons, being ſufficient within the County, where ſuch Perſons be ſo let to Bail or Mainprize, to keep their Days and in ſuch Places as the aforeſaid Writs, Bills, or Warrants ſhould require: (ſuch Perſon or Perſons as ſhould be, or then were in their Cuſtody by Condemnation, Execution, *capias utlagatum* or *excommunicatum*, Suerty of the Peace, and all ſuch Perſons as ſhould be or then were committed by ſpecial Command of any Juſtices, and Vagabonds refuſing to ſerve according to the Form of the Statute of *Labourers*, only exccepted.) And that no Sheriff, nor any of his Officers or Miniſters aforeſaid ſhould take or Cauſe to be taken or made any obligation for any Cauſe before recited, or by Colour of their Office, but only to themſelves, of any Perſon, nor by any Perſon, as ſhould be in their Cuſtody by Courſe and Order of Law, but by the Name of their Office, and upon Condition that the aforeſaid Perſons appear at the Day contained in the ſaid Writs, Bills, or Warrants, and in ſuch Places as the aforeſaid Writs, Bills, or Warrants ſhould require. And if any of the aforeſaid Sheriffs, or the Officers or Miniſters aforeſaid ſhould take any Obligation in any other Form by Colour of their Offices, that the ſame Obligation ſhould be void, as by the ſame Act amongſt other Things more fully appears. And the ſame *John Maningham* ſays, that after the making of the aforeſaid Act of Parliament, and before the making of the Writing aforeſaid, to wit, the *eighteenth* Day of *May*, in the *thirty-eighth* Year of the Reign of the Lord *Henry* late King of *England*, the *Eighth* ſince the Conqueſt, one *Thomas Palley* of *London* Fiſhmonger ſued forth out of the Court of *Chancery* of the ſaid late King, then being at *Weſtminſter* in the County of *Middleſex*, a certain Writ of the ſaid late King of *Liberari facias* againſt the aforeſaid *Thomas Maningham*, directed to the then Sheriff of the aforeſaid County of *Bedford*, by which ſaid Writ the ſame Lord the King reciting that whereas *Thomas Maningham* of *Luton* in the County of *Bedford* Yeoman, before the Reverend *Edward Mountague*, Knight, Chief Juſtice of his Bench, deputed to take Recognizances of Debts, acknowledged himſelf to owe to *Thomas Pllacy* Citizen and Fiſhmonger of *London* two hundred Marks Sterling, which he ought to pay him on the Feaſt of *Eaſter* then next to come, and hath not yet paid the ſame, as it was ſaid, the King commanded him by his Writ to take the Body of the aforeſaid *Thomas Maningham* (if he were a Layman) and him ſafely keep in the Priſon of the ſaid late King, until he ſhould fully ſatisfy the Debt of the aforeſaid *Thomas Palley*, and carefully to extend and appraize, according to the true Value thereof, all the Lands and Chattels of the ſaid *Thomas Maningham* in his Bailiwick by the Oaths of good and lawful Men of the ſame Bailiwick, by whom the Truth of the Matter might be better known, and to cauſe them to be ſeized into the Hands of the ſaid late King, and to be delivered to the aforeſaid *Thomas Palley* until he ſhould be fully ſatisfied for his Debt aforeſaid, according to the Form of the Statute of *Weſtminſter* for the Recovery of ſuch Debts lately made and provided. And how the ſame Precept of the ſaid late King was executed, he ſhould certify by his Letters ſealed to the ſame late King in his Chancery at a certain Day then paſt whereſoever he ſhould then be: and that he ſhould have there the Writ aforeſaid. And the ſame late King commanded his Sheriffs of *London*, *Middleſex*, and *Hertford*, that they ſhould take the Body of the aforeſaid *Thomas Maningham* (if he were a Layman,) and him ſafely keep in his Priſon, and that they ſhould carefully extend and appraize all the Lands and Chattles of the ſaid *Thomas Maningham* in their Bailiwicks, and cauſe them to be ſeized into the Hands of the ſaid late King in Form aforeſaid; and the ſame Sheriff returned into the *Chancery* of the ſaid late King, that the ſaid *Thomas Maningham* in the Writ aforeſaid named, at the Day and Time of the Recognizance of the Debt in the ſame Writ ſpecified, and afterwards, was and now is ſeized in his Demeſn as of Freehold, of ſix Meſſuages, four Gardens, ſix Acres and a half of arable Land with the Appurtenances in *Luton* aforeſaid in the aforeſaid County of *Bedford*. And further, that the aforeſaid *Thomas Maningham* at the Time of the Recognizance aforeſaid, or at any Time afterwards had not any other or more Manors, Meſſuages, Lands, or Tenements, Goods or Chattles in his Bailiwick which might in any wiſe be extended and appraized, or ſeized into the Hands of the ſaid late King; which ſaid Lands and Tenements, as alſo all the Goods and Chattles aforeſaid he had cauſed to be ſeized into the Hands of the ſaid late King, as it was commanded him, and that the aforeſaid *Thomas Maningham* was not to be found in his Bailiwick, wherefore the ſame late King commanded the aforeſaid late Sheriff of *Bedford*, that he ſhould deliver to the ſame *Thomas Palley* the aforeſaid Meſſuages, Gardens, Lands, and Tenements, with the Appurtenances, and alſo the Goods and Chattles aforeſaid, if he ſhould be willing to receive them at the Extent and Appraizement aforeſaid, to have, that is to ſay, the ſaid Goods and Chattles in Part of Satisfaction of the Debt aforeſaid, and alſo to hold the Meſſuages, Gardens, Lands, and Tenements aforeſaid with the Appurtenances to him and his Aſſigns, as his [a] Freehold, until he ſhould be fully ſatisfied his Debt aforeſaid together with his Damages, Coſts, and Expences which he had ſuſtained in this Behalf: and nevertheleſs that he ſhould take the Body of the aforeſaid *Thomas Maningham* (if he were a Layman) and him ſafely keep in the Priſon of the ſaid late King, until he ſhould fully ſatisfy the ſaid *Thomas Palley* for his Debt aforeſaid together with his Damages, Coſts and Expences aboveſaid, in Form aforeſaid: And how this Precept of the ſaid late King was executed, he ſhould make known by his Letters ſealed to the ſame late King in his Chancery, on the Morrow of the *Aſcenſion* of our Lord then next coming, whereſoever he ſhould then be, and that he ſhould have then there that Writ. At which ſaid Morrow

[a] See B. N. C. § 226.

of the *Aſcenſion* of our Lord, before the ſame late Lord the King in his *Chancery*, the ſame *Chancery* then being at *Weſtminſter* in the County of *Middleſex*, the ſame late Sheriff returned, that by virtue of that Writ directed to him, he on the *thirtieth* Day of *May*, in the *thirty eighth* Year of the Reign of the ſaid late King, appraized and delivered to the aforeſaid *Thomas Palley* the Meſſuages, Gardens, Lands and Tenements above written with the Appurtenances, as alſo the Goods and Chattles aforeſaid, to have, to wit, the ſaid Goods and Chattles in Part of Satisfaction of the Debt aforeſaid, and alſo to hold the Meſſuages, Gardens, Lands, and Tenements aforeſaid with the Appurtenances to him and his Aſſigns, as his Freehold, until he ſhould be fully ſatisfied the Debt aforeſaid, together with his Damages, Coſts, and Expences, which he had reaſonably ſuſtained in this Behalf: and alſo that he had taken the Body of the aforeſaid *Thomas Maningham*, and had kept the ſame in the Priſon of the ſaid late King, in Form aforeſaid. And the ſame *John Maningham* further ſays, that the aforeſaid *Thomas Maningham* at *Luton* in the aforeſaid County of *Bedford* was arreſted by virtue of the aforeſaid Writ above ſignified, and for that Cauſe was impriſoned by the ſaid *Lewis Dive* (he the ſame *Lewis* then being Sheriff of the aforeſaid County of *Bedford*) at *Bedford* in the ſame County of *Bedford*, under the Cuſtody of the ſaid *Lewis* then Sheriff of the ſame County. And the ſame *Thomas* being ſo impriſoned, the ſame *John*, for the Delivery of him out of Priſon, by the aforeſaid Writing obligatory bound himſelf to the ſame *Lewis* then Sheriff of the ſame County, in the aforeſaid 40 *l.* And this he is ready to verify; wherefore for that the Writing aforeſaid was not made on ſuch Condition, as by the Statute aforeſaid it ought to be made, he prays Judgment if the aforeſaid *Lewis* by virtue of the Writing obligatory aforeſaid ought to maintain his Action aforeſaid thereof againſt him, *&c.*

Plaintiff demurs. And the aforeſaid *Lewis* ſays, that the Plea of the aforeſaid *John* is inſufficient in Law to preclude him the ſaid *Lewis* from having his Action aforeſaid againſt the aforeſaid *John*, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer that Plea in manner and form aforeſaid pleaded. And this he is ready to verify; wherefore for Want of a ſufficient Anſwer of the ſaid *John* in this Behalf, the ſame *Lewis* prays Judgment, and his Damages by reaſon of the detaining the ſaid Debt to be adjudged to him, *&c.*

Joinder. And the aforeſaid *John*, for that he hath above alledged ſufficient Matter in Law to preclude the aforeſaid *Lewis* from having his Action aforeſaid againſt him, which he is ready to verify, which ſaid Matter the aforeſaid *Lewis* does not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſes to admit, prays Judgment, and that the aforeſaid *Lewis* may be precluded from having his Action aforeſaid againſt him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the Morrow of the Holy *Trinity*, to hear their Judgment thereon, becauſe the Juſtices thereof not yet, *&c.* *The Judgment appears after the Arguments.*

The CASE. *Mich. Term* 4. *Edw.* 6. One being in Execution upon a Recognizance made according to the Statute of 23. *H.* 8. is bound to the Sheriff upon Condition that the Priſoner keep without Damage the Sheriff againſt the King and the Party, who ſued the Execution, and at all Times be at the Command of the Sheriff, as a true Priſoner, &c. this is void by the Statute of 23. *H.* 6. *cap.* 10.

The Caſe was rehearſed briefly in this Manner. *Lewis Dive* late Sheriff of *Bedford* has brought an Action of Debt for 40 *l.* againſt *John Maningham*, upon an Obligation by him made to the Plaintiff, which Obligation was indorſed upon Condition that if one *Thomas Maningham* ſhould keep without Damage the ſaid Sheriff againſt our Lord the King and one *Thomas Palley*, and at all Times ſhould be at the Command of the ſaid Sheriff (as a true Priſoner) to appear before the Juſtices of the King at *Weſtminſter* or elſewhere within the Realm, that then the Obligation ſhould be void. And the Defendant ſaith, amongſt other Things it was enacted, *&c.* And reciting three Branches of the Statute of 23. *H.* 6. *cap.* 10. (*viz.* the Clauſe concerning letting Priſoners to Bail, and the Clauſe concerning the Exception, and the Clauſe concerning the making of Obligations without Condition to be void, and thoſe alſo which are made to the Sheriff without naming him Sheriff, and all the reſt of this Branch) ſays further, that the ſaid *Thomas Palley* purchaſed out of the *Chancery* a Writ of *Liberari facias* out of a Recognizance made to him by the ſaid *Thomas Maningham*, which was directed to the Sheriff of *Bedford*, commanding him to do the Contents of the ſaid Writ, and to certify into the *Chancery* (at a Day then paſſed) how the Writ was ſerved; and he ſhews alſo that the King had ſent to the Sheriffs of *London*, *Middleſex* and *Hertford* other Writs in Form aforeſaid; and the ſame Sheriff returned the Writ into the *Chancery*, to wit, that he had extended the Lands, and that the ſaid *Thomas Maningham* was not to be found, *&c.* whereupon a *Liberate* was awarded to the Sheriff of *Bedford*, who returned the Delivery, and that he had taken the Body of the ſaid *Thomas Maningham*, and kept him in Priſon. And further the Defendant ſaith, that by Force thereof the ſaid *Thomas Maningham* was in Priſon under the Cuſtody of the Plaintiff, then Sheriff of the ſaid County, and that he the ſame Defendant made the Obligation to the ſaid Plaintiff for the Delivery of the ſaid *Thomas Maningham* out of Priſon: And this he is ready to verify; wherefore inaſmuch as the ſaid Deed was not made upon ſuch Condition as by the ſaid Statute it ought to be, he demands Judgment, if the Plaintiff by virtue of the ſaid Deed ought to maintain his Action,. And upon this Plea in Bar the Plaintiff has demurred in Judgment. And it was argued at the Bar for the Plaintiff, that the Bar was not good. For the Defendant has recited the Record commencing at the Writ of [a] *Liberari facias*, and this he ought not to do, for before the Delivery the Extent is always awarded and returned, and when the Thing appears certainly thereby, then a *Liberate* ſhall be awarded. For the Statute of 23. *H.* 8. *cap.* 6. of Recognizance of Debts refers the Order of the Execution to the Order of the Execution of the Statute Staple, which is referred to the Statute Merchant, which is referred in ſome points to the Statute of *Acton Burnel.* And by them it appears that an Extent ſhall be

For the Plaintiff. [a] *Note*, the Writ, which is called in the Record a *Liberari facias*, is an *extendi facias*, and theſe Words in the End of the Writ, viz. *et ea præfato Thomæ, &c. liberari facias*, are falſe, for it ſhould be *ut ea præfato Thomæ, &c. liberari facias*, as it appears by the *Regiſter*, and ſo the *et* put for *ut*, alters the Senſe, and this being not well underſtood here makes the Doubt and the Argument.

firſt had, and afterwards a Writ of *Liberate* ſhall be awarded, and Delivery ſhall not be made at the Beginning. * And when a Man pleads or recites a Record in any Temporal Court in our Law, he ought to plead or recite it fully, and in good order, and certainly, which is not done here, and alſo he ought to commence at the firſt Acknowledgment of the Debt, and this he has not done, and for this Cauſe the Plea in Bar is vicious. Further, it is alledged in the ſaid Record, that the ſaid Writ was directed to the Sheriff of *Bedford:* and it was commanded him to certify into the *Chancery* how the Writ was ſerved, at a Day then paſſed, *&c.* and every Writ appoints a Day for the Return which is to come, and not which is paſſed, and ſo inaſmuch as this Word *(then)* is a Word ſignifying the Time paſt, and the Return ought to be at a Time to come, this Reaſon alſo proves the Record badly recited, and ſo the Plea in Bar is inſufficient. Further, it is contained in the Bar, that the ſame Sheriff returned the Writ, and there are four Sheriffs mentioned before, *viz.* the Sheriff of *Bedford*, the Sheriff of *London*, the Sheriff *Middleſex*, and the Sheriff of *Hertford*, and then to ſay that the ſame Sheriff returned the Writ, is quite incertain, and the Sheriff laſt named is the Sheriff of *Hertford*, and always [a] when the Writ is returned, the Name and Surname of the Sheriff ought to be put to the Return: and ſo he ought to have done here. For there is a common Diverſity holden at Moots in Court and Chancery, that the Writ ſhall be directed to the Sheriff of ſuch a County generally, without naming his Name, but he ought to put his Name to the Return, and ſo here, wherefore inaſmuch as the Name of the Sheriff is not expreſſed, and alſo inaſmuch as it is incertain to what Sheriff the Return ſhall be referred, the Plea in Bar is for this Cauſe inſufficient. And as to the Matter, the Obligation is good and out of the Proviſion of the Statute for divers Cauſes, for firſt it is to be conſidered, that the Statute has three principal Branches touching this Point. The firſt is, a Commandment to the Sheriff to let to bail ſuch Perſons there expreſſed. The ſecond is, to reſtrain the others contained in the Exception. The third is, to make Obligations taken in other Manner than the Statute limits to be void. But it is to be conſidered, that the laſt Branch is referred only to the firſt, for the Words of the third Branch are, *that no Sheriff, nor any of his Officers or Miniſters aforeſaid take or cauſe to be taken or made any Obligation for any Cauſe aforeſaid*, &c. and theſe Words, *viz. for any Cauſe aforeſaid*, are referred to the firſt Branch only, *viz.* to ſuch Perſons as are mainpernable, and not to the ſecond Branch, for thoſe in the Exception, which are in in the ſecond Branch, are not mainpernable. And then the Intent of the Statute was not to make Obligations void for letting any at large, but ſuch only as were bailable. And here *Thomas Maningham* was in upon Execution, and was one of thoſe contained in the Exception, and the letting him go at large is an Eſcape, and ſo is out of the Intent of the Statute, and is meerly at the common Law, in which caſe the Obligation ſtands at common Law, and ſo is good. And alſo it is proved by other Words in the laſt Branch of the Statute, that the Statute does not extend to avoid the Obligation here. For the Statute ordains that Obligations ſhould not be taken *but upon Condition that the Priſoners appear at the Days contained in the ſaid Writs, Bills, or Warrants*, &c. and here the Priſoner had no Day to appear, for which Reaſon it appears to be out of the intent and Words of the Statute, and to be at common Law, and ſo the Obligation is good. And as to theſe Words which are contained in the Statute, *viz. vel colore officii ſui*, they are referred to the ſaid firſt Branch of the Statute, that is to ſay, concerning Obligations taken of thoſe who are in by Writ, Bill, or Warrant, and have a Day to appear, *&c.* But to refer it to thoſe, who are not bailable, could never be the Intention of the Statute, for the Sheriffs would always ſafely keep ſuch Perſons for their own Indemnity, that is, to avoid Eſcapes, and it was rarely ſeen that any, who were not bailable, were let at large, and Statutes are not made to remedy ſuch rare miſchiefs, but common Miſchiefs, and for theſe Cauſes the ſaid Words *colore Officii ſui* are only referred to thoſe who are bailable, and not others. And therefore our Caſe (where *Thomas Maningham* was not bailable) is out of the Intent of the Statute, and conſequently the Obligation for his Deliverance is ſo too. And alſo for another Cauſe the Caſe here is out of the Proviſion of the Statute, and that is, becauſe *Thomas Maningham* was impriſoned, and the Obligation is made by *John Maningham* now Defendant, and *John Maningham* was not impriſoned, and then the Statute does not extend to avoid any Obligation made but only by thoſe Perſons who are in their Cuſtody by Courſe of Law, and here inaſmuch as he that made the Obligation was at large and never impriſoned, this was out of the Words of the Statute, and the Statute being penal ſhall not be extended by Equity; for which Reaſons the Obligation is at the common Law, and not touched by the Statute, and ſo good: and therefore the Plaintiff ſhall recover.

* T. 12. H. 8. 6. a. *Per Newdigate.* Co. Litt. 303. a.

[a] Stat. 12. Ed. 2. cap. 5. H. 8. H. 6. 27. b. *Per Cott.* Bro. Return de Brief. 48. 41. Aſs. pl. 29. T. 9. Ed. 4. 19. a. *Per Genney.* Bro. *ſupra* 54. T. 11. H. 6. 44. b. *Per Godred et Paſton* Bro. *ſupra* 129. Scire facias 33. T. 26. H. 8. 3. pl. 10. Bro. Error. 2. Dalt. Sheriff cap. 41. Dal. 68. pl. 32 et 36. Mo. 65. 2. Rol. R. 210. 1. Bulſt. 73. Cro. C. 189.

On the other Hand it was argued at the Bar for the Defendant, that the Plaintiff ſhould be barred. And as to the firſt Exception, which has been taken, for that the Extent ought to be firſt awarded, and after that the *Liberate*, and now the Writ of *Liberari facias* is firſt awarded; as to that it was ſaid, that there is in the firſt Writ an *extendi facias* with a Seizure, and alſo with a *liberari facias*, in which Caſe as to the Extent the Writ is good, and the *liberari facias* is more than neceſſary in the ſame Writ, for *in rei veritate* the *liberate* is a ſeveral Writ in itſelf, but yet as to the Extent and Seizure into the King's Hands, the Writ is good, and as to the reſt it is Surpluſage. [b] As in 7. *H.* 4. in Treſpaſs upon the Caſe by the Lord of a Town, *eo quod tolloneum aſportavit, & illud ſolvere recuſavit*, Exception was taken to the Writ, becauſe he could not carry away the Toll, except it was paid before, but yet the Writ was adjudged good, for although the firſt Words are void, the others, *viz. ſolvere recuſavit* were ſufficient. So here the one Part of the Writ is good, though the other is not ſo, and that which is good is ſufficient, and for the other Part it ſhall be Surpluſage. But be the Writ good or bad, yet inaſmuch

E contra for the Defendant.

[b] P. 7 H. 4. 44. pl. 11. Bro. Action ſur le Caſe 37. Brief. 114. Nugation 9.

inaſmuch as it is an ancient Record, it ſhall ſtand in Force until it be annulled by Error: And then the Recital ought to be according to it; wherefore this Exception is ſufficiently anſwered. And as to the other Exception which has been taken, *viz.* that the Writ is recited to certify the King at a Day then paſſed, as to this it is to be known, that this recital is made now when it was pleaded, and then theſe Words, *(at a Day then paſt)* ſtand well together with the Recital, for the Day was paſſed at the Time of the Recital, although it was to come at the Time when the Writ was awarded, and ſo this Exception is fully anſwered. And as to the other Exception which has been taken, *viz.* that the ſame Sheriff returned the Writ, and he has not ſhewn what Sheriff in certain, nor has recited his Name or Surname; as to this, it ſhall be intended that the Sheriff of *Bedford* now Plaintiff did it, for the Proceſs was directed to him, and it appears by the Return that he returned the Extent of the Land in the County of *Bedford*, and no other Sheriff than the Sheriff of *Bedford* could do it, wherefore there is ſufficient Intendment hereof. And perhaps the firſt Record has not his Name certain, but has theſe very Words here and no other, and then we cannot vary from the Record, but we ought to recite it as it is. [a] And be it good or bad, it ſhall ſtand in Force until it be reverſed by Error, as is aforeſaid. Wherefore theſe Exceptions are of no Weight. And as to the Statute, there are there Branches in it, as hath been ſaid. And the laſt Branch, which ſaith, *that no Sheriff nor any of his Officers or Miniſters aforeſaid ſhall take or cauſe to be taken or made any Obligation for any Cauſe aforeſaid*, &c. hath Relation as well to the Exception as to the firſt Clauſe, for this Word *(aforeſaid)* has the Meaning of *(beforementioned)*, and the Exception is as well mentioned before as the firſt Clauſe is, and this Word *(aforeſaid)* being general, and having Relation to both the Clauſes extends to the Caſe here. And if it ſhould not, yet the other Clauſe in the laſt Branch, *viz. colore officii ſui* will extend to it well enough, for it cannot be denied but that *Thomas Maningham* here was in the Cuſtody of the Plaintiff as Sheriff, and he let him to Mainprize as Sheriff, and he took the Obligation as Sheriff, and by the Name of Sheriff, and if ſo, then it is *colore officii ſui*, and conſequently within the Words of the Statute. [b] And in Proof hereof in 37. *H.* 6. *Moile* Juſtice is of Opinion, that if the Sheriff lets one to mainprize, who is excepted by the Statute as not bailable, and takes a ſimple Obligation, it ſhall be void, *quod alii Juſticiarii ibi conceſſerunt*. [c] And, Sir, theſe Words, *colore officii*, are always taken *in malam partem*, and differ from the Words *virtute officii*, or, *ratione officii*, which are always taken *in bonam partem*, and where the Office is the juſt Cauſe of the Thing, and the Thing is purſuant to the Office. But *colore officii* implies that the Thing is under Pretence of Office, but not duly, and the Office is no more than a Cloak to Deceit, and the Thing is grounded upon Vice, and the Office is as a Shadow thereto. And that is the Caſe here, for the Obligation is not taken lawfully, for it is taken for the letting him go at large, who was not bailable, and he let him go at large as Sheriff, and ſo it is *colore officii*, and the Colour of the Office is moſt properly ſeen here. And then inaſmuch as this Word *(aforeſaid)* has Relation to the Exception, and alſo the Obligation is here made by Colour of his Office, there is nothing more to be conſidered, but whether the Obligation is made in other Form than the Statute limits. And this it is for two Cauſes. The one is, becauſe he has no Day to appear by the Condition. For the Statute appoints, that this ſhall be contained in the Condition, which it is not here; for he has no Day in Court appointed. The ſecond Cauſe is, for that there are other Things alſo contained in the Condition. For if it be contained in the Condition, that he ſhall appear at the Day, *&c.* and alſo that he ſhall do other [d] Things, then is it in other Form than the Statute limits, for the Statute limits the Condition to contain only the Day and Place of Appearance. And therefore inaſmuch as this Word *(aforeſaid)* and alſo theſe Words, *colore officii*, have Relation to the Exception in the Statute, and the obligation here is taken for one contained in the Exception, and is in other Form than the Statute limits, it follows *ex conſequente* that the Obligation ſhall be void. And, Sir, if the Obligation was not touched by the Statute, yet it ſhould be void by the Courſe of the common [e] Law, for (as it hath been confeſſed) the Priſoner here was not bailable, in which Caſe the letting him go at large by Mainprize is a *tort*, and a Thing contrary to Law, and then the Obligation is made to aid the Sheriff in the doing of a *tort*, in which Caſe by the Courſe of the Common Law the Obligation is void. [f] As if the Obligation was to ſave one harmleſs if he killed ſuch an one, or did ſuch a Treſpaſs, *&c.* the Obligation ſhould be void. So ſhall it be here, for the Obligation is to ſave the Sheriff harmleſs for doing a *tort* and a Thing contrary to Law, in which Caſe the Obligation is void by the Courſe of the Common Law. [g] And therefore there is this Caſe in one of our Books, that where the Plaintiff in Replevin had a *Withernam* out of the Common Bench, by Force whereof one of the Sheriff's Bailiffs took four Oxen of the Defendant's in Name of *Withernam*, and afterwards delivered them to the Defendant again, and the Defendant became bound to him to keep him without Damage concerning the ſaid four Oxen, and afterwards he being damnified brought an Action of Debt upon the Obligation, and it was held by the better Opinion that the Obligation was void; for the Writ of *Withernam* is [h] *capias in Withernam, &c. et ea detineas quouſque, &c.* ſo that the Sheriff ought to have kept the Cattle, and not to have delivered them to the Party, and then the Delivery of them to the Party was a *tort*, and the Obligation was made to aid him in that *tort*, and therefore void. So is it in our Caſe, for which Reaſons the Plaintiff ſhall be barred.

Afterwards *Molineux*, *Hales*, and *Brown* Juſtices argued to the ſame Purpoſe: But I was not preſent till the latter End of *Brown*'s Argument.

Mountague C. J. *Mountague* Chief Juſtice. It ſeems to me alſo that the Plaintiff ſhall be barred. Firſt as to the Exception

[a] Wing. Max. reg. 190. pl. 11.

[b] M. 37. H. 6. 1. b. Fitz. Obligation 4. Bro. 37. 10. Co. 100. b. Poſt 67.

[c] 2. Inſt. 206. Poſt 68.

[d] S. P. 10. Co. 100. b. Cro. E. 200. 10. Mod. 327. Poſt. 68.

[e] S. P. Dy. 324. pl. 33. O. Bendl. 138 *Bath. v. Salter.* 10. Co. 100. b. Hob. 14. 2. Bulſt. 213. 1. Lev. 209. 254. 1. Freem. 326. Wing. Max. reg. 146. pl. 22.

[f] M. 2. H. 4. 9. b. *Per Thirn.* Fitz. Obligat. 13. Bro. 20. Condition 34. Perk. § 725. Co. Litt. 206. b. 1. Rol. Abr. 418. Y. pl. 3. Cro. C. 353. Vide T. 19. H. 6. 76. a. Bro. Condition 55.

[g] M. 2. H. 4 9. O. Bendl. 138. 1. Rol. Abr. 418. Y. pl. 5. Hob. 14. Cro. C. 353, 354. 1. Lev. 29. Vin. Abr. tit. Condition Z. a. pl. 6.

[h] Fitz. Withernam 3. Bro. 3. Regiſt. 82. a.

ception before moved, *viz.* that the Act is a particular Act, and ought to be recited at large, and not as it is recited, *viz. inter alia enactatum fuit, &c.* Sir, as to this, I agree that he ought to recite the Act, [a] for the Act is particular in a Generality, that is, it is univerſal to all Sheriffs and Officers contained therein, and inaſmuch as it is not general to all the King's Subjects, but only to all the ſaid Officers, it is well called an Act particular in a Generality. [b] As if an Act of Parliament were made, that all Biſhops, or all Juſtices ſhould do ſuch an Act, or have ſuch a Benefit, this Act is called an Act particular in a Generality, and ought to be pleaded, for inaſmuch as it operates againſt ſome particular Perſons, that is to ſay, Officers, and not againſt all, for this Reaſon the Juſtices are not bound to take Notice of it. [c] And therefore in 13. *Ed.* 4. in the Lord *Say*'s Caſe, it was held that an Act of Parliament, by which all Corporations and Licences granted by King *Henry* 6. ſhould be void, ought to be pleaded, and the Court is not bound to take Notice of it, no more than of a particular Act touching a particular Perſon. And ſo in our Caſe the Act is particular in a Generality, or it may be called general in a Particularity, in which Caſe the Act ought to be pleaded. But if it was a general Act which concerns all the King's Subjects, it needs not be pleaded, but the Juſtices ought to take Notice of it; and ſo is the Diverſity. Then inaſmuch as the Act here ought to be pleaded, it is to be ſeen whether it be well pleaded or not, ſeeing the whole Act is not ſhewn, but only Part of it, which is recited in this Manner, *viz. Cum inter alia enactatum fuit, &c.* And, Sir, as to this, I take a Diverſity when a Man ſhall plead a Record for Parcel *inter alia*, and when not. [d] And therefore in 22. *Ed.* 4. in a *Scire facias* to have Execution of 200 Acres of Land, the Tenant pleaded that after the *Scire facias* ſued, one *J. B.* brought a *Formedon* of 100 Acres *inter alia*, and recovered, and had Execution, &c. Judgment of the Writ for that Parcel: And there the Opinion is, that the Plea is not good, for this is not the right Form of pleading ſuch a Recovery, for every Recovery had in our Law ought to be pleaded certainly to every Intent, and theſe Words *inter alia* are certain to no Intent; but there it is held that he ought to have pleaded that *J. B.* brought a *Formedon* of 200 Acres, whereof the 100 Acres now in Demand are parcel, and recovered, and had Execution; and there the Tenant by Licence of the Court amended his Plea; by which it appears, that to plead a Recovery *inter alia* &c. is not good. And the Reaſon thereof is becauſe every Recovery is entire, and there is one Original, and one Judgment upon it, and ſo the Recovery is one entire Matter, and therefore to ſay, that *inter alia* he recovered, &c. is not good, but he ought to plead certainly. [e] But, Sir, to ſay that *inter alia enactatum fuit*, is well pleaded, for the ſaid Act of Parliament made *Anno* 23. *H.* 6. is ſeveral, and has ſeveral Branches, one in Reſtraint of letting Counties to Farm, another for not returning Officers or Servants, &c. the third for the Fees, &c. the fourth for letting Men to Bail, &c. the fifth for reſtraining ſome Perſons; the ſixth for making Obligations void; ſo that theſe Branches, though they are contained in one Chapter, are ſeveral Acts of Parliament, and concern ſeveral Matters, and then where one Branch only ſerves a Man's Purpoſe, it is ſufficient for him [f] to recite that only: For the Recital of that only is a Recital of an entire and ſeveral Act of Parliament; but otherwiſe it is of a Recovery, for all that is contained in the Record is but one Recovery, and therefore all ought to be recited, and ſo is the Diverſity. And then here the Act being particular in a Generality, and which of Neceſſity ought to be recited, is well recited; and ſo this Exception is anſwered. Another Exception was taken, viz. that divers Sheriffs are named, and at laſt it is ſaid that the ſame Sheriff returned the Writ, &c. which is ſaid to be incertain; Sir, as to this, [g] it is certain enough that it ſhall be referred to the Sheriff of *Bedford*, for the Return contains an Extent of the Land in the County of *Bedford*, and none could do this but the Sheriff of *Bedford*, and the whole Sum of the Execution is referred to him, and ſo it cannot be otherwiſe intended but that the Sheriff of *Bedford* made the Return; wherefore the Law ſaith that this is certain enough. Another Exception has been taken, becauſe the Defendant has not begun at the Commencement of the Record, but begins firſt at the *Liberate*; Sir, admitting this, [h] yet it is well enough pleaded; and therefore I take a Difference when a Record ought to be intirely and certainly recited, and when not: As to which I hold, [i] that if a Record is pleaded in Bar, it ought to be entirely and certainly recited, becauſe the Record only is the Matter of the Subſtance and Effect of the Bar, which ought to be full and perfect; but here the Recital of the Record is only Conveyance to the Benefit of the Statute, and is not the Effect of the Bar, but an Inducement and Conveyance to it, and then it is not neceſſary for [k] ſuch Conveyance and Inducement to be as certainly pleaded as the Subſtance itſelf ought to be. [l] And therefore there is a Caſe in 34. *H.* 6. where Tenant by *Elegit* made Avowry in Replevin, becauſe he had Execution as Tenant by *Elegit*, and leaſed 20 Acres Parcel of the Land to the Plaintiff for three Years, rendring 50 *s. per annum*, &c. and for the Rent in Arrear he avowed, and there it was argued whether he ought to plead the whole Record in certain, by which he became Tenant by *Elegit*, and it is there held by the better Opinion that it is not neceſſary, but that it is ſufficient to plead, that heretofore he recovered Damages againſt the Party, and had an *Elegit*, and this Land was delivered to him, without pleading the whole Record entire, how he brought his firſt Action, and what Anſwer the Defendant made, or the like, but it is ſufficient to commence at the Execution, for the Leaſe made by the Avowant rendring Rent is the Effect of the Avowry and of the Execution by *Elegit*, and the Record, from whence it iſſues, is only a Conveyance to the Effect, and therefore it is not neceſſary to recite the entire Record, but that Part only, which proves the Execution, is ſufficient. [m] And in 19. *H.* 6. a Bill of Diſceit was ſued againſt two Attornies of the Common Bench for embezzeling and withdrawing a Writ of *habeas corpora in placito terræ* upon a *Formedon* between the Plaintiff and another, there Judgment was demanded of the Bill, becauſe it did not contain the Original, the Certainty of the Land, and

[a] Dy. 27. pl. 179. 119. pl. 3. 1. Leon. 307. Moor 468. 4 Co. 76. b. Hob. 13. 2. Saund. 154, 155. 1. Sid. 24. 336. 1. Freem. 101. Doc. Pla. 337. Heath's Max. 157.

[b] 2. And 250. Vin. Abr. tit. Statutes E. 6. pl. 65.

[c] P. 13. Ed. 4. 8. pl. 4. Fitz. Office de Court 8. Bro. 27. Parlement 60. Pleadings 103. Dy. 119. pl. 4. Doc. Pla. 336. 4. Co. 76. b. 1. Leon. 306, 307. 1. And 250, Vin. Abr. tit. Statutes C. pl. 12.

[d] P. 22. Ed. 4. 8. pl. 23. Bro. Pleadings 115. Hob. 24. 226. Heath's Max. 157. Poſt. 410. *per Harper* J. Vide Carth. 305. *Hool. v. Burgoign.*

[e] 1. Sid. 24. Hob. 226. Vide 3. Bulſt. 205.

[f] Dy. 103. pl. 7. 2. Vent. 215. Poſt. 105. 410. T. Jones 50. *Per Cur.* laid down as a Rule in the Recital of Statutes.

[g] Wing. Max. reg. 31. pl. 17.

[h] 2. And. 69, 100. Wing. Max. reg. 101. pl. 34. Heath's Max. 157.

[i] S. P. Co. Litt. 303. a. Doc. Pla. 305. 5. Mod. 8. 9.

[k] Co. Litt. 303. a. Doc Pla. 281. 283. Hardr. 2. Poph. 31. 6. 2. Bulſt. 214. Cro. E. 302. Cro. C. 138, 139. Heath's Max. 65. 3. Mod. 70. Poſt. 81.

[l] T. 34 H. 6. 48. Fitz. Avowry 256. Bro. Monſtrans de Faits 10. Heath's Max. 157.

[m] M. 19. H. 6. 29. pl. 51. Fitz. Diſceit 11. Bro. Bill 9. Heath's Max. 157.

the whole Record in certain, but there the Bill was awarded good, notwithſtanding it did not recite the Record certainly, becauſe the Record is only Conveyance to the Suit of Diſceit; but it is there held, that if the Record had been pleaded in Bar, the Certainty of the Land ought to be ſhewn, and the whole Record, for there the Record may be denied, inaſmuch as it is the Subſtance of the Bar; but in the other Caſe to ſay *nul tiel Record* is no Plea, becauſe it is but Conveyance, as is ſaid before. So in our Caſe the Record is ſhewn to no other Intent than to make *Thomas Maningham* a Priſoner, and that is not ſhewn but as a Conveyance to the Benefit of the Statute, *viz.* to make the Obligation void, and then altho' the Record is not fully nor entirely recited, yet it is well enough. Further, it ſeems to me that the Defendant has not well nor wiſely concluded his Plea, for he has concluded, *Unde ex quo ſcriptum prædictum non fuit factum ſub tali conditione quali per ſtatutum fieri deberet, petit judicium*; which ſpecial Concluſion has ſo ſtraitned the Defendant, that if the Obligation be void for any other Cauſe than for that which the Defendant has mentioned in the Concluſion, he ſhall not, by Courſe of Law, have Benefit of it. [a] And therefore in 34. *H.* 6. one deviſed a Reverſion of Tenant for Life to another in Fee, by the Name of *omnium terrarum et tenementorum quæ in manibus* of the Deviſor *adtunc fuerunt*, and the Heir of the Deviſee brought an Action of Waſt, reciting in his Count the ſpecial Grant *ut ſupra:* And the Defendant ſaid, *ex quo per narrationem prædictam apparet* that the Deviſor did not deviſe the Reverſion, but by the ſaid Words *ut ſupra*, and the Tenant for Life then held the Tenements, and nothing of the Reverſion paſſed by the general Words to the Deviſee, he demanded Judgment, *&c.* and upon this the Plaintiff alſo demurred: And there it is holden, that inaſmuch as the Defendant has demurred upon a ſpecial Point, and has rehearſed the Cauſe of his Demurrer, if there be any other Matter in the Declaration, whereof the Defendant might have had Advantage, he ſhall not now take any Advantage of it. So here in our Caſe, if there be any other Cauſe which will make the Obligation void, beſides the Condition of the Obligation, (as it ſeems to me there is, which I ſhall ſhew hereafter) yet the Defendant by his ſpecial Concluſion has loſt the Advantage of it; ſo that there appears little Policy in the Concluſion. [b] But when a Man concludes or demurs generally, he ſhall have Benefit of every Thing mentioned in the Record, or of every Point which the Law gives him. And ſo is the Diverſity, where the Concluſion or Demurrer is general, and where ſpecial. And here inaſmuch as the Concluſion is ſpecial, altho' the Obligation is void for other Cauſes than for the Condition (as in Truth it is) yet the Defendant ſhall not take Advantage thereof. But it is further to be ſeen, whether the Concluſion here, viz. Judgment *ſi actio*, be proper or not; and it ſeems to me that it is not, [c] but he ought to have concluded, *ſic non eſt factum*; for the Statute ſaith, *if an Obligation be taken in other Form than is contained in the Statute, it ſhall be void*, and from what Time ſhall it be void? I ſay, from the Beginning, and if it be void from the Beginning, then it never was his Deed, and if it never was his Deed, then he ought to have concluded, *non eſt factum.* [d] As if a Man will plead, in Avoidance of a Deed, that he was a Man not-letter'd, and that the Deed was read to him in other Form, or [e] that he delivered it with his own Hand as an Eſcrow to be delivered over, after the Performance of a Condition, as his Deed, and that before the Condition performed the Bailee delivered it over, there he ought to conclude, *non eſt factum*, becauſe the Matter proves that it never was his Deed. [f] But if it was once his Deed, and afterwards the Duty thereof became extinct, then he ought to demand Judgment *ſi actio.* [g] As if a Releaſe of the Duty he pleaded, he ought to demand Judgment *ſi actio*, for there it was once his Deed, and therefore he cannot ſay, *non eſt factum*, but Judgment *ſi actio*; becauſe the Duty is now extinct. So if an [h] Infant, or a Man by [i] Dures make an Obligation, they ſhall demand Judgment *ſi actio*, becauſe the Delivery of the Deed was not void. And ſo is the Diverſity where a Man ſhall ſay, *non eſt factum*, and where he ſhall demand Judgment *ſi actio.* But here, inaſmuch as upon the Matter it never was his Deed, he ought to have concluded *non eſt factum*, and not Judgment *ſi actio*, as he has done, for which Reaſon the Concluſion is bad. Further, inaſmuch as the Concluſion in this Point is bad, it is to be ſeen what ſhall be done, if it appears to us Judges that upon the Matter in Law the Deed is void; and it ſeems to me, that we by our Office ought to give Judgment againſt the Plaintiff, for altho' the Defendant may not take the Advantage, yet inaſmuch as it appears to us that the Plaintiff has no Cauſe of Action, [k] we ought to give Judgment againſt him. [l] And therefore in 7. *Ed.* 4. where an Action of Treſpaſs was brought againſt *Tilly* and *Wody* for taking five Boxes with Charters, *&c. Tilly* pleaded, Not guilty, and *Wody* made Title to himſelf by a Gift, and the Plaintiff traverſed the Gift, and upon theſe Matters they were at Iſſue, and *Tilly* was found guilty, and the Iſſue was found for *Wody* againſt the Plaintiff, and altho' the Iſſue was found againſt *Tilly*, yet by clear Opinion in a Manner the Plaintiff ſhould not have Judgment againſt him, for it was found between the Plaintiff and *Wody* that the Plaintiff had no Title, and then inaſmuch as it appears to the Judges by the Record that the Plaintiff had no Title, they *ex officio* ought to give Judgment againſt the Plaintiff. [m] And in 10. *Ed.* 4. there is a like Caſe, viz. in an Action of Treſpaſs by Leſſee for Years for Cattle taken, the Defendant ſaid that the Leſſor held of him by the Services, *&c.* and for ſo much in Arrear he took the Cattle, the Plaintiff replied *rien arere*, *&c.* and upon this they were at Iſſue, and it was found for the Plaintiff, and the Opinion of all the Juſtices there was, that notwithſtanding the Defendant had accepted the Writ good, yet the Plaintiff ſhould not have Judgment, but the Court ſhould abate the Writ, for it appears to the Court that the Defendant was Lord, againſt whom an Action of Treſpaſs lies not, for the Statute ſays, *non ideo puniatur Dominus*, *&c.* [n] And in an Appeal by a Woman of the Death of her Father, altho' the Defendant affirms the Writ, yet the Court *ex officio* ought to abate it, for it appears to the Court, that by the Statute [o] *no Woman may have an Appeal of Death of any but of her Huſband.* So that always if it

[a] M. 34. H. 6. 7. b. *per Priſot.* [b] Vin. Abr. tit. Demurrer T. pl. 2. [c] *Quære*, for the Current of the Books are againſt this Opinion, P. 7. Ed. 4. 5. pl. 15. 7. Ed. 6. Bro. non eſt factum 14. 3. Co. 59. b. 5. Co. 119. b. Hob. 72. 166. Jenk. 295. 1. Leon. 226. Hetl. 23. 10. Mod. 179. Doc. Pla. 262, 263. Gilb. L. of E. 166. [d] H. 15. Ed. 4. 18. pl. 7. *per Brian.* Bro. non eſt factum 10. P. 1. H. 7. 15. b. *per Keble.* Winch 19. Doc. Pla. 262. Kitch. 440, 441. Gilb. L. of E. 163. [e] P. 14. H. 8. 28. 2. *Per Brook.* Bro. General Iſſue 25. P. 7. Ed. 4, 5. b. *Per Choke.* Sav. 72. 6. Mod. 217. [f] Same Diverſity Dal. 33. pl. 21. *per Plowden.* ibid. 43. pl. 25. Moor 30. 43. Sav. 71. Kitch. 441. [g] P. 1. H. 7. 15. b. *per Keble.* [h] M. 35. H. 6. 28. 2. *Per Choke.* P. 1. H. 7. 15. b. *per Keble.* P. 14. H. 8. 28. 2. *per Pollard* Dal. 43. pl. 25. 5. Co. 119. a. 2. Inſt. 483. Perk. § 13. 1. Rol. R. 154. Comb. 468. Kitch 441. Doc. Pla. 259. [i] P. 1. H. 7. 15. b. *per Keble.* P. 14. H. 8. 28. a. *per Pollard.* 5. Co. 119 a. 2. Inſt. 483. Doc. Pla. 259. [k] S. P. Hob. 56. 1. And. 168. Cro. E. 121. pl. 12. Dy. 119. pl. 6. [l] H. 7. Ed. 4. 31. Fitz. Judgment 50. Dy. 119. pl. 6. Hob. 14. 54. 1. Rol. R. 356. 1. Lev. 63. [m] P. 10. Ed. 4. 7. pl. 18. Fitz. Office de Court 7. Bro. 29. Moor 105. Sav. 112. Cro. E. 425. Touch. of Preced. 273. Poſt. 84, 85. [n] 2. Leon. 162. Poſt. 85. [o] Mag. Cha. cap. 34.

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appears to the Court that the Plaintiff has no Title, he ſhall not have Judgment, although the Defendant admit his Title. So here, although the Defendant by his bad Concluſion has concluded himſelf of his Advantage, the Plaintiff ſhall be barred by the Court *ex officio*, if ſo be it appears that he has no Title. Then it is to be ſeen here, whether the Statute makes the Obligation void, or not. And it ſeems to me, that the Obligation here is void by the Letter of the Statute. The Statute, amongſt other Things, has three notable Branches, which have been rehearſed. The firſt is a Command and Authority to Sheriffs to let to bail ſuch Perſons as are bailable, and this is no new Proviſion, [a] for the Common Law has been always ſo before, for the Common Law, which is common Reaſon, did ever allow that ſuch Perſons as were taken by Writ, Bill, or Warrant in any Action perſonal, or Indictment for Treſpaſs, might be let at large upon Sureties, for it ſtands indifferent in a Manner whether they are guilty or not, and then if they are not guilty, and ſhould be reſtrained of their Liberty, it would be a great Inconvenience, which the Common Law will never ſuffer; and therefore as to this firſt Branch, it was made in Affirmance of the Common Law. The ſecond Branch, viz. the Exception, was alſo made in Affirmance of the Common Law, for ſuch Perſons as were in by Condemnation, Execution, *Capias utlagatum*, and ſuch other Cauſes contained in the Exception, were not bailable before, as any one may eaſily judge by the Inconvenience that would follow from it. But the Proviſion is only in the third Branch, *viz.* in Avoidance of Obligations taken in other Manner than is expreſſed in the Statute, and this Branch has Relation to avoid Obligations made for letting to mainprize as well thoſe who are contained in the ſecond Branch, as thoſe in the firſt. For theſe Words in the third Branch, viz. *for any Cauſe aforeſaid*, have Relation to all that is ſpoken before; [b] for *(aforeſaid)* contains all that is before mentioned, and is in *Latin prærecitata*, and this Word *prærecitata* has the ſame Meaning as *infra contenta*, *expreſſa*, or *præmiſſa*, which has Relation to all, that is, as well to Things excepted, as otherwiſe. [c] And therefore if one makes a Leaſe for Years of a Manor except a Cloſe, &c. rendring annually a Rent, &c. and the Leſſee is bound to perform all Grants, Covenants, and Agreements *contenta*, *expreſſa*, or *recitata* in the Indenture, if he diſturbs the Leſſor in the Occupation of the Cloſe excepted, he has forfeited the Obligation, for when he excepts the Cloſe, the other is content with it, and that the Leſſor ſhall occupy it, and then this is an Agreement, and the ſaid Words, viz. *contenta*, *expreſſa*, *et recitata* do each of them go as well to the Exception as to the reſt. [d] And in 45. *Ed.* 3. where a Vicar had leaſed his Church to three by Indenture, and divers Contracts were compriſed in the Deed, and at the End of the Deed there were theſe Words, *et ad omnia et ſingula in prædicto ſcripto contenta bene et fideliter facienda obligamus nos et quemlibet noſtrum in ſolido per præſentes*, there it is holden that this Word *contenta* reaches to every Covenant, and ſo does *prærecitata*; wherefore it ſeems to me clear enough that this Word *(aforeſaid)* and in *Latin prærecitata*, reaches well enough to the ſecond Branch, viz. the Exception. And, Sir, the Intent of the Statute was accordingly ſo, [e] for at the Common Law before this Statute, when a Man was condemned in any Sum, and in Execution for it, the Sheriffs or other Officers would let him at large upon Condition to ſave them harmleſs; as if he had been condemned in 100 *l.* the Sheriff or other Officer would take an Obligation of 300 *l.* and ſuffer him to go at large, and then the Party Plaintiff had no other Remedy but only to ſue the Sheriff or other Officer upon the Eſcape, and he ſhould recover no more than his firſt Debt or very ſmall Damages, and perhaps it would be one or two Years before the Plaintiff could recover it againſt the Sheriff or Goaler, and in the mean time the Priſoner is at large, and will encreaſe the Sum in which he was condemned more than the Sheriff or other Officer ſhould render in Damages. And ſometimes the Sheriff or other Officer would for ſuch Favour gain a Piece of Land, ſometimes he would compound with the Priſoner by this Means to get his Son and Heir married to his own Daughter, and he never was without great Reward for ſuch Favour. And ſo Sheriffs and other Officers by ſuch Crafts and Devices were enriched, and were ſure to be kept without Damage by ſuch Obligations for the Sum in which they ſhould be condemned for the Eſcape, and thus their Bribery had ſafe Conduct. For this Cauſe the Statute was made to avoid ſuch Obligations, ſo that if Sheriffs or other Officers will let Priſoners at large, they muſt do it at their Peril, for by this Statute their ſafe Conduct, that is to ſay, the Obligations to ſave them harmleſs, is cut off and deſtroyed. And therefore ſeeing the Miſchief was ſo great, it cannot be taken but that it was the Intent of the Makers of the Statute to cure it, and this was one of their principal Views in this Statute, and was a Thing that had the greateſt Need to be remedied. And, Sir, I don't ſee to what Intent this Exception was put or mentioned in the Statute, if it was not to make void Obligations taken for letting them go at large, who were not bailable. For to reſtrain them from Bail was in vain, for the Common Law had done that before, and then the Exception was not put in the Statute for ſuch frivolous Purpoſe, but upon great Conſideration, and that was, to make Obligations taken for letting them to bail who were not bailable, utterly void, by the Relation of this Word *(aforeſaid)* to the ſaid Clauſe. [f] And, Sir, in the ſaid Caſe of Debt in 37. *H.* 6. brought by a Sheriff upon a ſingle Obligation made by one, who was in his Cuſtody for Suſpicion of Felony, and which is there holden void, it is put *obiter* by *Moile*, that if the Sheriff had let one to mainprize, who is excepted in the ſaid Statute as not bailable, and had taken a ſimple Obligation, it ſhould be void, *quod alii Juſticiarii ibi conceſſerunt*: Which proves that they being nearer to the Statute than we are took it that an Obligation taken for one not bailable, and made in other Form than the Statute limits, ſhould be void, and that I believe. And ſo, as it ſeems to me, the Words of the Statute, and the Intent of the Statute, make the ſaid Word *(aforeſaid)* to have Relation to the ſecond Branch, and conſequently to make the Obligation (if it is taken in other Form than the Statute limits) to be utterly void. And further, if the Obligation is not void for this Cauſe, it ſeems to me that (if it is taken in other Form than the Statute

[a] *Contra* reſolved 10. Co. 100. a.

[b] Vide Hob. 276. Skin. 532.

[c] S. P. cited Accord. Cro. E. 657. 1. Leon. 117. But 1. Rol. R. 102. this Caſe denied to be Law by *Coke* C. J. and there ſaid to be adjudged P. 41. *Eliz. Ruſſel v. Gulwel*, that if a Man upon ſuch a Leaſe and Exception covenants not to cut down any Trees on any of the Premiſſes, that *præmiſſa* and *prædimiſſa* are all one, and therefore the Covenant does not extend to the Thing excepted.

[d] H. 45. Ed. 3. 4. pl. 9. Fitz. Bar 209.

[e] Dalt. Sh. Appendix cap. 2. § 4.

[f] M. 37. H. 6. 1. b. Fitz. Obligation 4. Bro. 37. 10. Co. 100. b. Ante 64.

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tute limits) theſe Words, *viz. colore officii*, will make it void, for it is to be conſidered that *Thomas Maningham* was in Execution, and no Man can be in Execution but under ſome Officer, and here he was in Execution under the Cuſtody of the Plaintiff, not as *Lewis Dive*, but as Sheriff, for the Writ to take *Thomas Maningham* was directed to him as Sheriff, and ſo as Officer he had the Cuſtody of him, then when he took the Obligation, he took it as Officer, but he took it unduly, for he was not bailable, but yet he took it as Sheriff, *ergo* he took it *colore officii ſui*; for this Word *colore officii ſui* is always taken [a] *in malam partem*, and ſignifies an Act badly done under the Countenance of an Office, and it bears a diſſembling Viſage of Duty, and is properly called *Extortion*. As if an Officer will take more for his Fees than he ought, this is done *colore officii ſui*, but yet it is not Part of his Office, and it is called Extortion, [b] which is no other than Robbery, but it is more odious than Robbery, for Robbery is apparent, and always hath the Countenance of Vice, but Extortion, being equally as great a Vice as Robbery, carries the Maſk of Virtue, and is more difficult to be tried or diſcerned, and conſequently more odious than Robbery. Wherefore here inaſmuch as the Obligation was made for the Deliverance of *Thomas Maningham*, who was in the Cuſtody of the Plaintiff, as Officer, it cannot be denied but that he took the Obligation for his Deliverance *colore officii*, altho' it was not *virtute officii ſui*. And as to what was ſaid at the Bar, that if a Sheriff or other Officer takes an Obligation of a Priſoner for his Meat and Drink, that this is *colore officii*, and yet out of the Statute, Sir, I utterly deny this, [c] for the Obligation is void. [d] For if one be in Execution he ought to live of his own, and neither the Plaintiff nor the [e] Sheriff is bound to give him Meat or Drink, no more than if one diſtrains Cattle, and puts them in a Pound, for there the [f] Owner of the Cattle ought to give them Meat, and not he that diſtrained them, no more is the Party or the Sheriff, who has one in Execution, bound to give Meat to the Priſoner, but he ought to live of his own Goods, altho' he be in for Felony, until he be attainted, and this by the Courſe of the Common Law. [g] For before Attainder the Goods are his, and in his Hands, and the Common Law in this Point is confirmed by a [h] Statute; and if he has no Goods, he ſhall live of the Charity of others, and if others will give him nothing, let him die in the Name of God, if he will, and impute the Cauſe of it to his own Fault, for his Preſumption and ill Behaviour brought him to that Impriſonment. Inaſmuch then as the Sheriffs or other Officers are not bound to find their Priſoners Meat, an Obligation taken for Meat is void, for it is *colore officii*, and the Sheriff cannot take an Obligation of his Priſoner but in a ſmall Number of Caſes. For his Ability in this Point is ſtraitned by this Statute, and ſo of all other Officers except the Warden of the *Fleet*, and of the King's Palace at *Weſtminſter*, [i] who are excepted by the Statute. [k] And therefore in 7. *Ed.* 4. one was in Cuſtody of the Sheriff by a *Capias* upon an Indictment of Treſpaſs, and the Sheriff let him to Mainprize, and he made an Obligation to another upon Condition to keep his Day, *&c.* and this he did for the Suerty of the Sheriff, and there it is held that the Obligation was void, becauſe the laſt Branch of the Statute prohibits any Sheriff from taking *an Obligation for any Cauſe aforeſaid, or by Colour of their Office, but only to themſelves*, and there inaſmuch as it was taken to another, it was void: And alſo there the Court held, that if the Obligation has not the Conditions expreſſed in the Statute, it is not the Deed of the Party: *Ex quo ſequitur*, that he ought to conclude *non eſt factum*, and hereto the Opinion there tends, which confirms my Opinion that the Concluſion ought to be as I have ſaid before. And ſo the Capacity of Sheriffs or other Officers is abridged and ſtraitned in this Point. And thus is my Mind perceived in theſe Matters; for I apprehend that this Word *(aforeſaid)* has Relation to the ſecond Branch, and to make the Obligation here void, and if it ſhould not, yet theſe Words *colore officii* will make it void, if ſo be the Obligation is taken in other Form than the Statute limits; to which Point I am now to argue. And, as it ſeems to me, it is taken in other Form than the Statute limits, for the Statute contains that it ſhall be *in the Name of their Offices, and upon Condition to appear*, and here it is not ſo, for he has no Day in Court, wherefore it is void; and the laſt Part of the Condition of the Obligation is, *if he ſhall be at the Command of the Sheriff as a true Priſoner*, and then the Sheriff might command him not to eſcape, and he might go to Bed and ſleep there ſafely, but it never was the Intent of the Statute to give him ſuch Eaſe, and ſuch Condition was never intended by the Statute; and if any will argue that the laſt Part of the Condition is according to the Statute, yet the firſt Part is not ſo, for the firſt Part is, if *Thomas Maningham keep without Damage the ſaid Sheriff againſt our Lord the King, and one Thomas Palley, &c.* and it does not ſay for [l] what he ſhould keep him without Damage, ſo that it is general, and ſhall be taken moſt ſtrongly againſt him, and that is, for all Things, as for Felonies, for Treaſons, for the Sheriff's Account in the Exchequer, and for all other Charges; nor does it ſay how long he ſhall keep him without Damage, and then it ſhall be taken for ever. And ſo it ſhall be conſtrued, for every Thing, and for ever, *et ſic per omnia ſecula ſeculorum.* And, Sir, I apprehend that if the Obligation had been conditioned according to the Statute, and had had another [m] Thing alſo in the ſame Condition, that the Obligation, by Reaſon of this Condition, would be utterly void. As a *Formedon* and Action of Waſt are given by Statute, there if a Man will add other Words in the Writ, the whole is void. [n] And if the King licenſe one to alien the third Part of his Land, and he aliens the whole, the Licenſe is totally void. And I was of Opinion in the firſt Statute of Deviſes, which gives Authority to deviſe two Parts, that if he had deviſed the whole, the whole ſhould be void. And ſo if another Thing is added to a Thing given by Statute, it ſhall make all void. So here, altho' the laſt Part of the Condition was according to the Statute, yet the firſt Part was not, and that ſhall make the whole Obligation void. And, Sir, the Obligation varies from the Form of the Statute in another Point, for in the firſt Branch it is commanded to

[a] 2. Inſt. 206. Ante 64.

[b] 10. Co. 101. b. Co. Litt. 368. b.

[c] 10. Co. 100. b. Dalt. Sh. 524. 12. Mod. 683. Vin. Abr. tit. Condition U. pl. 10.

[d] S. P. 1. Mod. 132.

[e] 2. Rol. Abr. 32. B. pl. 1. 12. Mod 683. *per Holt* C. J. and the Opinion in 9. Co. 87. b. to the contrary is there denied to be Law.

[f] Dr. & Stud. l. 1. cap. 5. l. 2. c. 27. P. 9. Ed. 4. 2. pl. 7. *per Choke*. Bro. Diſtreſs 25. 1. Bulſt. 53. B. N. C. § 214. Co. Litt. 47. b. 2. Inſt. 106. 1. Finch. 110. 2. Finch 236, 137. 1. Rol. Abr. 673. pl. 5. Kitch. 290.

[g] Bracton fo. 123, 136. b. Britton 4. b. T. 7. H. 4. fo. ult. pl. 8. Fitz. Corone. 83. Bro. Forfeiture 10. M. 43. Ed. 3. 24. pl. 1. *per Finchden*. Fitz. Treſpaſs 7. Bar. 136. Bro. Corone 9. Forfeiture 7. Officer 3. Reſeiſer 3. 44. Aſs. pl. 14. Bro. Forfeit. 44. St. Pl. Cor. 192. b. 13. Pulton 235. a. b. 3. Inſt. 228, 229. Dalt. Juſt. cap. 163. 1. Freem. 327. Kitch. 59.

[h] Stat. 1. R. 3. cap. 3.

[i] See Hetl. 146.

[k] P. 7. Ed. 4, 5. pl. 15. Fitz. Debt 80. Bro. non eſt factum 14. 10. Co. 100. b.

[l] S. P. Perk. § 726.

[m] See Ante 64. (d) and the Books there cited.

[n] 1. Finch. 22. 2. Finch. 31. Wing. Max. reg. 99. pl. 21.

to the Sheriff to let the Perſons therein mentioned to mainprize *upon reaſonable Suerty of ſufficient Perſons, having ſufficient within the Counties, where ſuch Perſons are ſo let to Bail or Mainprize*; ſo that the Statute is *of ſufficient Perſons, ut ſupra*, and is in the plural Number, in which Caſe there ought to be two * Suerties at leaſt, and here there is but one Suerty, *viz. John Maningham* only, and this is not according to the Words nor Intent of the Statute, for the more and the more able the Suerties are, the ſooner will they cauſe him to appear who is let to Mainprize, and ſo Juſtice will be more ſpeedily done; and therefore the plural Number of *Suerties* was well conſidered and put into the Statute, but here there is but one Suerty, *viz.* the Defendant only; And the letting them to Bail, who are mentioned in the ſecond Clauſe, ought to be upon like *Suerties*, and in the ſame Manner as is contained in the firſt Branch; and therefore ſeeing there is but one Suerty here, it is in other Manner than is contained in the Statute. And then if the Obligation is taken in other Form than is limited in the Statute, the Statute ſaith it ſhall be void. But the Defendant has loſt the advantage of the Obligation in its Variance from the Order of the Statute in this Point, by his ſpecial Concluſion and Reliance upon it that it was not made upon ſuch Condition as is limited in the Statute, as I have ſhewn before; yet becauſe the condition varies from the Statute he ſhall have Benefit by the Office of the judge, notwithſtanding his bad Concluſion to the Action, as I have ſaid before, and ſo for theſe Cauſes the Plaintiff ſhall be barred.

* See the contrary adjudged *Drury*'s Caſe cited 10. Co. 100. b. 101. a. Cro. Eliz. 624. *Per Popham.* ibid. 602. pl. 31. ibid. 808. pl. 11. ibid. 852. pl. 9. Cro. Jac. 286. Cro. Car. 446. Hardr. 28. 1. Mod. 228. 3. Mod. 178.

Note, (Reader) *that as to what was moved for the Plaintiff, that the Obligation here ſhould be out of the Danger of the Statute, becauſe it is not made by him who was impriſoned, but by the Defendant who was at large, this ſeems no Matter for two Cauſes. The firſt is, becauſe the firſt Branch requires, that the Suerty ſhall be of ſufficient Perſons, having ſufficient within the Counties where, &c. And ſo the Words and alſo the Intent of the Statute, by theſe Words, appears to extend to thoſe Suerties at large taken for them in Priſon, ſo that they have ſufficient within the County. The ſecond Cauſe is, for that the third Branch ordains, that no Sheriff ſhall take any Obligation for any Cauſe aforeſaid, or by Colour of their Office, but only to themſelves, of any Perſon, nor by any Perſon that is in their Cuſtody, &c. ſo that theſe Words, viz.* (of any Perſon) *are general, and extend to all Perſons, viz. at large, or not, &c. or at leaſt they extend to all that are at large, and theſe Words* (by any Perſon that is in their Cuſtody) *extend to all Priſoners only, and theſe Words*, (which are in their Cuſtody) *are only to be referred to the Perſons laſt named, and not to theſe Words* (of any Perſon) *firſt named; and then theſe Words will alſo make an Obligation taken of him at large to be void, as well as if it was taken of the Priſoner himſelf. And perhaps for theſe Cauſes it was held ſo clear, that it was not anſwered by the other Side, nor by the Lord* Mountague. *Nota bene* by the Reporter.

At which Day here comes as well the aforeſaid *Lewis*, as the aforeſaid *John Maningham* by their Attornies aforeſaid, and thereupon the Premiſes being ſeen and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here, that the Plea of the aforeſaid *John* above in Bar pleaded is good and ſufficient in Law to preclude the aforeſaid *Lewis* from having his Action aforeſaid againſt the aforeſaid *John Maningham*. Therefore it is conſidered, that the aforeſaid *Lewis* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim therein. And that the aforeſaid *John* go thereupon without Day, *&c.* Enquire the Names of the Pledges, *&c.* And alſo it is conſidered, that the aforeſaid *John* recover againſt the aforeſaid *Lewis* 24 Shillings adjudged to the ſame *John* by the Diſcretion of the Juſtices of the Lord the King here, according to the Form of the Statute therein made and provided, for the Coſts and Expences of the aforeſaid *John* by reaſon of the Premiſſes, *&c.* The reſt of the Record. Judgment.

A Report of a Judgment given in the Common Bench *by deliberate Advice of all the Juſtices of the ſame Bench, in* Hillary *Term in the 4th and 5th Years of the Reign of King* Edward *the* Sixth, *between* Lawrence Kidwelly *Plaintiff and* William Brand *Defendant, in an Action of* Treſpaſs *brought by the ſaid Plaintiff againſt the ſaid Defendant.*

IT appears amongſt the Records in the Term of *St. Hillary* in the 4th and 5th Years of the Reign of King *Edward* the *Sixth*, *Rot.* 355. that *Lawrence Kidwelly* brought an Action of Treſpaſs againſt *William Brand* for breaking his Cloſe at *Lomer*, in the County of *Southampton*, *&c.* and the Defendant pleaded, not guilty, *&c.* And it was found by Verdict before Juſtices of *Niſi prius*, that *John Salcot* Abbot of the late Monaſtery of *Hyde* near *Wincheſter* in the ſaid County of *Southampton* was ſeized of and in the Site of the Manor of *Lomer*, with a Grange ſituate upon the ſaid Site, and of and in 100 Acres of Land, 40 Acres of Paſture, and 40 Acres of Meadow with the Appurtenances in *Lomer* abovewritten, (whereof the Place where the Treſpaſs is ſuppoſed to be done is, and at the ſaid Time of the Treſpaſs ſuppoſed to be done was, Parcel) in his Demeſn as of Fee, in Right of the ſaid Monaſtery, and being ſo ſeized, the ſame Abbot and Convent by their Indenture made between the ſaid Abbot and Convent of the one Part, and *John Cropp*, *Thomaſin* his Wife, and *John* their Son of the other Part, (one Part whereof ſealed with the common Seal of the ſaid Abbot and Convent, bearing Date the 21ſt Day of *September*, in the 26th Year of the Reign of King *Henry* the *Eighth*, was ſhewn in Evidence) leaſed to the ſaid *John Cropp*, and *Thomaſin* his Wife, and *John* their Son, the ſaid Site and others the Premiſſes, to have and to hold to them and to their Aſſigns, from the Feaſt of *St. Michael* next enſuing the Date of the ſaid Indenture until the End of twelve Years then next following; Paying

Of a Demand or Tender of a Rent reſerved payable at a Place out of the Land, out of which it iſſues. S. C. Dyer 68. pl. 23.

Paying annually during the ſaid Term to the ſaid Abbot and Convent and their Succeſſors, for the ſaid Site and others the Premiſſes at *Hyde* aforeſaid, 4 *l.* 8 *s.* 10 *d.* at the Feaſts of the *Annunciation* of our Lady, and *St. Michael*, by equal Portions. And if it ſhould happen the ſaid Rent of 4 *l.* 8 *s.* 10 *d.* to be in Arrear and not paid in part or in whole by the Space of 40 Days after any of the ſaid Feaſts on which it ought to be paid, that then it ſhould be lawful for the ſaid Abbot and his Succeſſors into the ſaid Site and others the Premiſſes whereof, *&c.* to enter, and them to reſeize, hold, enjoy, and the ſaid *John Cropp*, *Thomaſin* his Wife, and *John* their Son from the ſame totally to expell. By Force whereof, the ſaid *John Cropp*, and *Thomaſin*, and *John* their Son entered into the Premiſſes, and were thereof poſſeſſed. And they found further, that the Reverſion of the Premiſſes came to the King by the Diſſolution of the Monaſtery, and that the King granted it over to *William* now Earl of *Wiltſhire*, and to his Wife, and to the right Heirs of the Earl, who granted it over to the Wife of the Plaintiff for her Life, *&c.* and they found Attornment accordingly. They found alſo, that the Leaſe came from the ſaid *John Cropp*, and his Wife, and their Son *John* to one *John Fernhold*, and from the ſaid *John Fernhold* to the Wife of the Defendant. And they found further, that becauſe 44 *s.* 5 *d.* of the ſaid Rent for one half Year ending at the Feaſt of the *Annunciation* of our Lady, in the *third* Year of the Reign of the King that now is, were in Arrear to the Plaintiff and his Wife after the Attornment made, and before the Time when, *&c.* and by the Space of 40 Days next after the ſaid Feaſt, the ſaid Plaintiff before the Time when, *&c.* that is to ſay, the *fourth* Day of *May*, in the *third* Year of the Reign of the King that now is (which *fourth* Day was the laſt of the ſaid forty Days next after the ſaid Feaſt of the *Annunciation* of our Lady) ſent one *Walter Thomas* his Servant to the ſaid Site and others the Premiſſes leaſed as is aforeſaid, whereof, *&c.* to demand the ſaid 44 *s.* 5 *d.* and therefore the ſaid *Walter* by the Command of the ſaid Plaintiff, the ſaid *fourth* Day of *May*, went to a certain Place called *Lomer's-Barns* Parcel of the Premiſſes leaſed in Manner and Form aforeſaid, and he was and tarried in the ſaid Place called *Lomer's-Barns from the riſing of the Sun on the ſame fourth Day until the ſetting of the ſun the ſame Day, to demand the aforeſaid* 44 *s.* 5 *d. of the aforeſaid Rent in Manner and Form aforeſaid being in Arrear, for the aforeſaid* Lawrence *his Maſter, and to the Uſe of the ſame* Lawrence, *and there was none then and there to render or pay the ſame* 44 *s.* 5 *d. And the Jurors aforeſaid alſo ſay, that the aforeſaid* Lawrence *was in his proper Perſon the aforeſaid fourth Day of* May, *in the third Year aforeſaid, at* Hyde *aforeſaid at the 10th Hour before Noon of the ſame fourth Day, to demand the aforeſaid* 44 *s.* 5 *d. of the aforeſaid Rent in Form aforeſaid being in Arrear. And then the aforeſaid* Lawrence *at* Hyde *aforeſaid requeſted one* Richard Bothell *that if the Rent aforeſaid in Form aforeſaid being in Arrear ſhould be brought to* Hyde *aforeſaid, that then the ſame* Richard *would receive the ſame Rent for the ſame* Lawrence, *which ſaid* Richard *was and tarried at* Hyde *aforeſaid from that tenth Hour of the aforeſaid fourth Day of* May *until the ſetting of the Sun the ſame Day, to demand the Rent aforeſaid for the aforeſaid* Lawrence, *and to his Uſe: and none came to pay the ſame Rent.* And upon this, for Default of Payment, the Plaintiff in Right of his Wife entered, whereupon the Defendant re-entered, and committed the Treſpaſs, as the Plaintiff hath declared. And upon this the Jurors pray the Diſcretion of the Juſtices, whether the Defendant be guilty or not. And the Juſtices had Copies of the Verdict delivered to them, and the Councel for the Parties would have argued the Caſe, if the Juſtices had held it ſo doubtful as to need an Argument. But the Juſtices well adviſed themſelves, and at laſt they all agreed without open Argument of Councel, and by good Advice they adjudged, that the Defendant was guilty upon the Matter, and they awarded that the Plaintiff ſhould recover 10 *l.* for his Damages aſſeſſed by the Court.

Ex quo, Lector, four Things are to be noted. The firſt is, that although the Rent was not demanded on the Day it was firſt due, that is, on the Day of the Feaſt of the *Annunciation* of our Lady, nor the Plaintiff ready the ſame Day on the Land, nor at *Hyde* to receive the ſame Rent, yet this is not material, nor ſhall it hurt his Entry, but he may well enter, for Default of Payment, the laſt inſtant of the laſt of the 40 Days. [a] So that the fortieth Day only is material for the Leſſor to demand the Rent, and the not being ready to receive the Rent the firſt Day on which it is due is not prejudicial to him in the Reverſion, nor is his Attendance on that Day any thing to the Purpoſe. The ſecond Thing to be noted in this Judgment is, that when the Rent was reſerved to be paid at *Hyde*, *and if it be in arrear by* 40 *Days that then*, &c. [b] in this Caſe the Rent ſhall be paid at *Hyde* the laſt of the 40 Days, as well as the firſt day on which it is firſt due. For although it is not ſaid by expreſs Words, that if the Rent be in arrear not paid at *Hyde* by the Space of 40 Days, *&c.* yet it ſhall have Relation to the Place which is firſt named; and ſo the Law ſaith that the Rent ſhall be paid at *Hyde* the laſt of the 40 Days, although it is not ſo expreſſed in plain Words. The third Thing to be noted in this Judgment is, that the Plaintiff might enter without any [c] Demand of the Rent, for *Walter Thomas*'s being upon the Land was not material, inaſmuch as he did not demand the Rent in deed, but was there *to demand the Rent aforeſaid*, and it does not appear in the Record that he *did demand the Rent aforeſaid*, for if his being there had been material, he ought to have demanded the Rent, although none was there ready to pay it, and then inaſmuch as he did not demand the Rent at all, his being there was in vain, and is all of one Effect as if he had been abſent; and ſo the Act of the ſaid *Walter Thomas* ſhall not give Benefit to the Plaintiff, nor ſhall aid him in his Entry, but the only Cauſe for which the Entry was good and congeable was becauſe the Defendant did not offer the Plaintiff the Rent at *Hyde*; for inaſmuch as the Rent is payable there, the Plaintiff is not bound to demand it. And therefore *Mountague* Chief Juſtice (as I heard, for I was abſent when this Matter was touched) put a Difference when he in the Reverſion ſhall demand the Rent, and when the Leſſee ought to offer it; as if a Man makes a Leaſe for Life or Years, rendering

[a] 4. M. 1. Bro. Tender 41. B.N. C. § 483. Co. Litt. 202. a. Poſt 172.

[b] 4. Leon. 249. Wing. Max. reg. 52. pl. 10.

[c] S. P. Dy. 68. pl. 24. 1. Rol. Abr. 461. pl. 16. 1. And. 25. Ow. 111. Sed *Contra* adjudged 4. Co. 73. a. Moor 598. pl. 821. Co. Litt. 202 a. T. Jones 33. 1. Rol. Abr. 449. pl. 2. 1. Bac. Abr. 417.

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ing Rent at ſuch a Feaſt, and if it be in arrear that he ſhall enter, there the Leſſor ought to come to the Land, and demand the Rent, or elſe he ſhall never enter; for the Rent is only payable upon the Land, and the Land is the Debtor, for in Aſſize for the Rent the Land ſhall be put in View, and he ſhall diſtrain in the Land for the Rent, ſo that the Land is the principal Debtor, * and the Perſon of the Leſſee is no Debtor, but in reſpect of the Land: † for if the Land is recovered upon *eign* Title, then the Perſon ſhall be diſcharged of the Rent from thenceforward; ſo that the Land is the original and moſt effectual Debtor; and therefore although the Leſſee be abſent, yet the Leſſor ought to demand the Rent of the Land, as principal Debtor, and as that which may render Diſtreſs, if the Rent is not ready upon it; and if he does not make a Demand, he ſhall never re-enter for Default of Payment, although the Leſſee be abſent. [a] But when the Rent is payable in another Place out of the Land, then the Leſſor is not driven by the Law to demand the Rent, for his principal Debtor is abſent, that is, the Land, and although the Leſſee is preſent, that is not material, for he is not the original Debtor, nor hath the Leſſor any Intereſt to Demand the Rent of him, but the Leſſee ought to offer it for his own Indemnity, as the obligor ought upon an Obligation, or as the Grantor of an Annuity ought to offer the Annuity at the Day, *&c.* to excuſe himſelf of Damages. So ought the Defendant here to offer the Rent for his own Indemnity to ſave himſelf from the Penalty of Forfeiture. [b] And it cannot properly be called a Rent in another Place out of the Land, but rather a Sum of Money, which the Leſſee, by this Agreement of Payment out of the Land, ought to offer to the Leſſor, ſo that he has altered the Nature of it as to this Purpoſe by his own Aſſent. And this is the Diverſity with regard to the Demand, where the Rent is payable upon the Land, and where out of the Land. And then here, inaſmuch as the Rent was payable at *Hyde*, the Plaintiff may enter without Demand.

* 3. Co. 22. a. b.
† 3. Co. 22. a. 10. Co. 128. a. Co. Litt. 292. b. 1. Rol. R. 198, 199. Vide Dyer 56. pl. 15.
[a] See ante 70 (c), and the Books there cited.
[b] *Contra* 4. Co. 73. a. Co. Litt. 202. a. 1. Rol. Abr. 459. pl. 2. T. Jones 33. Cro. E. 415. 1. Bac. Abr. 417. Hutt. 114.

It ſeems from hence, that if one grants a Rent-Seck in Fee out of Land in one County, payable annually ſuch a Day and Place in another County, and the Grantee is ſeized of the Rent, that if the Grantee comes to the Place appointed for the Payment, and there demands the Rent upon the Day accordingly, if the Rent be denied, this is no Diſſeizin of the Rent, as it ſhould be in Caſe of a Denial upon the Land, where the Rent is payable upon the Land. *Nota bene* by the Reporter.

The fourth Thing to be noted in the ſaid Judgment is, that although the Verdict does not find that *Hyde* was in the Hands of the Plaintiff or Defendant (for which Reaſon it ſhall be intended in the Hands of ſome Stranger, as *in rei veritate* it was, [c] yet the Defendant ought to come to it to pay the Rent, and the Plaintiff ought to come there to receive it. *Quære* if they ſhall be Treſpaſſers to the Stranger by coming there? And it ſeems to me that they ſhall not, for ſince the Abbot was Owner of *Hyde* at the Time of the Leaſe, and had reſerved the Rent to be paid there, the Leſſee ſhould not be a Treſpaſſer to the Abbot by coming there to pay it, for by the Reſervation of the Rent at *Hyde* it was charged with this Liberty, and the Reſervation to be paid there was an Aſſent that he ſhould come there, ſo that by his coming there he ſhould not be a Treſpaſſer. [d] As if *A.* is bound to *B.* in an Obligation of 20 *l.* for the Payment of 10 *l.* to him at ſuch a Day, there inaſmuch as no Place is expreſſed for the Payment, *A.* is bound to ſeek *B.* whereſoever he ſhall be. And if *B.* is in his own houſe, and *A.* comes to him there, and tenders the Money, he ſhall not be a Treſpaſſer by coming there; but if he had been in the Houſe of another Man, there he ſhould be a Treſpaſſer to that Perſon, if he had a Mind to take advantage of it, but he ſhould not be a Treſpaſſer to the Obligee by coming into his own Houſe, as is aforeſaid, for inaſmuch as by the taking of the Obligation he aſſented that *A.* ſhould pay him the 10 *l.* by Neceſſity of Reaſon he ought to be aſſenting that he ſhould come to him to offer him the 10 *l.* for the coming to his Perſon precedes the offer; and then inaſmuch as he was aſſenting that he ſhould pay him the 10 *l.* and therein it was contained that he was aſſenting that he ſhould come to him for that Purpoſe, it follows *ex conſequente* that he ſhall not puniſh him for doing that, to which he himſelf was privy and aſſenting, that is, for his coming there, and then if he ſhall not puniſh him as a Treſpaſſer for coming to the Place which was not appointed him by the Party in expreſs Words, *a multo fortiore* the Abbot ſhould not puniſh the Leſſee here for coming to *Hyde*, which was appointed by expreſs Words for the Tender of the Rent, for (as hath been ſaid) the Reſervation of the Rent to be paid there is an Aſſent that he ſhall come there, and by this Aſſent the Place is charged. And ſo the Leſſee had Title and intereſt in the Place as to his coming there, and the Place was charged to the Leſſee with this Liberty, and the Leſſee had Authority and Intereſt in the ſaid Place as to this Purpoſe, and this by the Act of thoſe, who had Authority to charge the ſaid Place at that Time, that is, the Abbot and Convent. And then if the Leſſee ſhould not be a Treſpaſſer to the Abbot by his coming to *Hyde* to pay the Rent there, no more ſhould he be to the King when *Hyde* was in the King's Hands, for the Statute of Suppreſſion ſaves the Intereſt of every Stranger; and then he who is the King's Patentee of *Hyde* ſhall hold it charged with the ſaid Authority and Intereſt. And therefore the Defendant might come there to pay the Rent without Offence or Treſpaſs, and by the ſame Reaſon it ſeems that he in the Reverſion, *viz.* the Plaintiff might come there alſo to receive the Rent without any Offence or Treſpaſs, for he has the like Authority, Privilege and Intereſt in *Hyde*, as the Leſſee hath.

[c] 1. Co. 137. b.
[d] Litt. § 340. Bro. Condition 200.

At which Day here comes as well the aforeſaid *Lawrence Kidwelly* as the aforeſaid *William Brand* by their Attornies aforeſaid. Whereupon the Premiſſes being ſeen, and by the Juſtices here more fully underſtood, it is conſidered by the ſame Juſtices that the aforeſaid *William Brand* by reaſon of the Treſpaſs aforeſaid to the ſame *Lawrence* in Form aforeſaid done is and ought to be adjudged by Law guilty of that Treſpaſs. Therefore it is conſidered, that the aforeſaid *Lawrence* recover againſt the aforeſaid *William Brand* his Damages aforeſaid to 10 *l.* by the Jury aforeſaid in Form aforeſaid aſſeſſed. And that the aforeſaid *William Brand* be taken, *&c.* The reſt of the Record. Judgment.

A Re-

A Report of a Judgment given in the Chancery, *by deliberate Advice, upon an Argument in* Eaſter *Term in the* fifth *Year of the Reign of King* Edward *the Sixth, in a Writ of* Audita Querela *brought by* Robert Roſs *of* Ingemanthorp *in the County of* York *Eſquire Plaintiff againſt Sir* Thomas Pope *Knight Defendant.*

Where Purchaſe of Part of Land chargeable with an Execution of a Recognizance diſcharges or ſuſpends the Execution in the whole.

IT appears amongſt the Rolls remaining in the Court of Chancery *de Termino Anno regni Regis nunc*, that the ſaid *Roſs* entered into a Recognizance of 500 Marks to the ſaid *Pope*, and one *Robert Curſon* Eſquire, according to the Form of the Statute of 23. H. 8. *cap.* 6. And afterwards the ſame *Roſs* and his Wife by Fine gave to the ſaid Conuſees the fifth Part of the Manors of *Burton*, *Conſtable*, and other Lands in the ſaid County of *York* in Fee. Afterwards the ſaid *Pope*, as Survivor, ſued Execution of the ſaid Recognizance in *London* againſt the ſaid *Roſs*, and his Body was taken, and the ſaid *Roſs*, ſuppoſing that the ſaid Fine of the Lands aforeſaid diſcharged the ſaid Recognizance, ſued the ſaid Writ of *Audita* * *Querela* comprehending the whole Matter, which Writ bore Date the *ſecond* Day of *November* laſt paſt, and was returned into † Chancery on the *Octave* of *St. Hillary* laſt paſſed, at which Day the ſaid Sir *Thomas Pope* appeared: And upon the ſaid Writ and Declaration he demurred in Judgment. And in this preſent *Eaſter* Term 4. *Edw.* 6. the Matter was moved and touched many Times. And now the Lord *Rich* Chancellor of *England* ſent for *Portman* one of the Juſtices of the King's Bench, and *Hales* one of the Juſtices of the Common Bench, to have their Advice, what the Common Law was in this Caſe. For he ought to adjudge in this Caſe according to the Courſe of the Common Law, inaſmuch as the Matter came before him by original Writ; but upon Matters depending before him by Bill he may adjudge according to Conſcience, but here according to the Common Law. And the ſaid Juſtices came into the Chancery, and ſat there with the Chancellor, where the Matter was ſpoke to, and the Opinion of the Chancellor, and of the ſaid Juſtices, and of the whole Court of Chancery was, that the *Audita Querela* did not lie, becauſe the Land, which the Conuſees took from the Conuſor and his Wife by the Fine, was not the Debtor, but the Body of the Conuſor remained Debtor, and the Land was liable only in reſpect that it was in the Hands of the Conuſor at the Time of the Recognizance or after. But the Land was not charged with the Debt, but chargeable at the Election of the Conuſees. [a] But the Perſon was charged, and in reſpect of the Perſon the Land was chargeable, and the Perſon was not chargeable in reſpect of the Land, for if ſo, the Recognizance would be diſcharged by the taking of the Land by the Conuſees: As if there be Lord and Tenant, now the Tenant is chargeable to do Fealty, and the other Services to the Lord in reſpect of the Land, but if he infeoffs the Lord of the Land, his Perſon ſhall be diſcharged, for his Perſon was chargeable in reſpect of the Land, and the Services were iſſuing out of the Land, and therefore ſhall be extinct by Unity of Poſſeſſion. But here the Conuſor was not Debtor in reſpect of the Land, for if he had aliened the Land to another, yet he ſhould remain Debtor, and his Body and Goods ſhould be taken, for he was not chargeable in reſpect of the Land, but the Land was chargeable in reſpect of him, and therefore before that the Land is charged with the Debt, his Perſon is only Debtor, and then the Execution is well ſued. But if Execution had been ſued of the Body and of the Land, and afterwards the Conuſor had [b] infeoffed the Conuſees of the Land, or had [c] ſurrendred Parcel of the Land, or the Fee-Simple of Parcel had [d] deſcended to them, in all theſe Caſes the Body ſhall be diſcharged, for by the Execution the Land was *de facto* charged, and ſo became Debtor, and by the Feoffment, Surrender or Deſcent it was diſcharged, becauſe the Diſcharge of Part of a Thing in Execution is a Diſcharge of the whole, be it by Act of the Party, or by Act of Law, for the Duty being perſonal and entire, the Execution for it is entire alſo. But here inaſmuch as the Fine of the Land was before Execution, it cannot be diſcharged of the Execution, for the Land was not then charged in Deed. [e] And therefore it was ſaid, that in 25. *Aſs.* where the Conuſor after the Recognizance infeoffed the Conuſee of the Land, who re-infeoffed the Conuſor, who infeoffed a Stranger, there it is adjudged that the Conuſee ſhall have Execution againſt the Stranger, for the Execution was not diſcharged by the Poſſeſſion of the Conuſee after the Recognizance made, *cauſâ qua ſupra*. [f] But if the Conuſor infeoff the Conuſee of Parcel of the Land, and a Stranger of an other Part, and Reſerve Part in his Hands, now the Conuſee ſhall not have Execution againſt the Stranger. For by the ſame Reaſon that one Feoffee [g] of the Conuſor (if his Land only is put in Execution) ſhall have an *Audita Querela* againſt all the other Feoffees, to make their Land alſo to be put in Execution, and to be contributory to the entire Charge, by the ſame Reaſon if the Conuſee himſelf is one of the Feoffees, his entire Execution ſhall be diſcharged for the Land againſt the other Feoffees of the Conuſor, for he ſhall not be contributory for a perſonal Thing due to himſelf, nor may the Duty be apportioned or divided, but all ſhall be extinct againſt the Feoffees, but yet againſt the [h] Conuſor the Conuſee ſhall have Execution of that Parcel which remains in his Hands. For although each Feoffee ſhall have an *Audita Querela* againſt the Conuſor to make him contributory to their Charge, if the Execution is ſued againſt him only, [i] yet he ſhall not have an *Audita Querela* againſt any of them to make their Land contributory to the Charge, if the Land left in his Hands is only put in Execution for the Entirety, for the Burthen is his own, and he only is Debtor, as is ſhewn before. And then if the Conuſor ſhall not have Remedy for Contribution againſt the other Feoffees, by the ſame Reaſon he ſhall not diſcharge the Execution by the Purchaſe of the Conuſee, for the Execution of the Conuſee ſhall be diſcharged in conſideration that he ſhould be contributory if he was Feoffee and not Conuſee, and then inaſmuch as he ſhall not be contributory if he was Feoffee and not Conuſee, he ſhall not be diſcharged being Conuſee, *quia ceſſante cauſâ ceſſabit effectus*. And for theſe Cauſes the Acceptance of the Land ſhall not diſcharge the Execution here. Wherefore Judgment was afterwards given that the Plaintiff ſhould take nothing by his Writ.

* *Note* here the bringing of an *Audita Querela*, and ſee 2. Rol. Abr. 482. pl. 11. there miſprinted (9).

† See *Scriven. v. Wright* 2. Bulſt. 10.

[a] 10. Co. 50. b. Cro. Eliz. 552. Hob. 45.

[b] 36. H. 8. Bro. Stat. Merch. 42. 2. Rol. Abr. 477. pl. 7. Heath's Max. 281.

[c] M. 15. Ed. 4. 5, 6. Bro. Stat. Merch. 15. 2. Rol. Abr. 477. Y. pl. 1. 2. Leon. 96.

[d] 2. Rol. Abr. 477. pl. 6. Co. Litt. 150. a. 2. Vent. 327. Comb. 79.

[e] 25. Aſs. pl. 7. Fitz. Execution 39. Bro. Stat. Merch. 25. O. Bendl. 103.

[f] 36. H. 8. Bro. Stat. Merch. 42. B. N. C. § 293. Dy. 193. pl. 30. 2. Rol. Abr. 470. pl. 8. F. N. B. 104. n. 1. And. 266.

[g] 23. H. 8. Bro. Aud. Quer. 39. M. 9. H. 4. 4. b. *Per Gaſcoign.* Bro. ibid. 13. P. 23. Ed. 3. Fitz. Execution 127. F. N. B. 103. b. and Hales's Notes thereon. B. N. C. § 71. *Verey v. Carew.* Moor 535. 3. Lev. 419.

[h] 2. Rol. Abr. 411. pl. 10. Vin. Abr. tit. Statutes Merch. M. pl. 10.

[i] P. 36. H. 8. Bro. Aud. Quer. 2 *in fine*. B. N. C. § 71.

A Re-

A Report of a Writ of Aſſize, *and of the Exceptions taken to it, and of certain Arguments made at* Serjeant's-Inn *in* Chancery-Lane *in* Trinity *Term, in the* ſixth *Year of the Reign of King* Edward *the* Sixth, *before* Henry Bradſhaw *then Lord Chief Baron of the Exchequer, and late the King's Attorney, and Sir* Edmund Marvin *Knight, one of the Juſtices of the King's Bench, Juſtices of Aſſize in the County of* Lincoln, *which Writ of* Aſſize *was brought by* Thomas Wimbiſh *and* Elizabeth *his Wife Plaintiffs, againſt the Lord* Willoughby *and others Defendants.*

EDWARD the *Sixth* by the Grace of God of *England*, *France*, and *Ireland* King, Defender of the Faith, and on Earth ſupreme Head of the Church of *England* and *Ireland*, To his Coroners in the County of *Lincoln* Greeting. *Thomas Wimbiſh* Eſquire and *Elizabeth* his Wife have complained to us, that *William Willoughby* Knight, Lord *Willoughby* of *Parham*, *Edward Dimock* Knight, *Elizabeth Tailbois* Widow, and *William Tailbois* Clerk, unjuſtly and without Judgment have diſſeized them of their Freehold in *Golthough*, within 30 Years now laſt paſt: And therefore we command you, that if the aforeſaid *Thomas* and *Elizabeth* his Wife ſhall make you ſecure to proſecute their Claim, that then you cauſe the ſaid Tenement to be reſeized of the Chattles, which within it were taken, and the ſaid Tenement with the Chattles to be in Peace until a certain Day, which our beloved and faithful *Edmund Marvin* Knight, and *Henry Bradſhaw* our Attorney-General ſhall make known to you; and in the mean time do you cauſe 12 free and legal Men of that Neighbourhood to view the ſaid Tenement, and the Names of them to be impanneled; and ſummon you them by good Summoners, that they be then before the aforeſaid *Edmund* and *Henry*, and thoſe whom they ſhall aſſociate to them, at a certain Place which the ſame *Edmund* and *Henry* ſhall make known to you, ready thereof to make Recognition, and put by Sureties and ſafe Pledges the aforeſaid *William* Lord *Willoughby*, *Edward*, *Elizabeth Tailbois*, and *William*, or their Bailiff, if they cannot be found, that they be then there to hear the Recognition; and have there the Summoners, the Names of the Pledges, and this Writ. Witneſs ourſelf at *Weſtminſter*, the *eighth* Day of *February* in the *ſixth* Year of our Reign. Becauſe *Richard Thymilby* Knight now Sheriff of the County aforeſaid hath taken to Wife one *Catherine* (yet alive) the Daughter of one *Robert Tirwhit* Knight, and *Maud* his Wife, Siſter of one *George Tailbois* Knight, Father of *Gilbert Tailbois* Lord *Tailbois*, Father of the aforeſaid *Elizabeth* the Wife of the aforeſaid *Thomas*: And becauſe *Richard Curſon*, one of the Coroners of the County aforeſaid, is Servant of the aforeſaid *William* Lord *Willoughby*, let Execution of that Writ be done by the reſt of the Coroners of the County aforeſaid; ſo that neither the aforeſaid Sheriff, nor the aforeſaid *Richard Curſon* Coroner do in any wiſe concern themſelves in the Execution of that Writ. Baron.

The Writ of Aſſize. Raſt. Entr. 83. a.

For 40 s. *paid in the Hamper.*

Pledges of proſecuting { John Doe. Richard Roe.

The within named *William Willoughby* Knight, Lord *Willoughby* of *Parham*, *Edward Dimock* Knight, *Elizabeth Tailbois* Widow, and *William Tailbois* Clerk are attached by one Ox of the Price of 5 *s.* The reſt of the Execution of that Writ appears in a certain Scedule hereunto annexed.

Coroners of the Lord the King in the County within named { Richard Naler. John Capp. Thomas Dunn. John Wilſon, and John Maire.

Summoners of the Jurors aforeſaid { John Hart. Richard Smart.

Manucaptors of the Summoners of the Jurors aforeſaid, and of each of them, - - - { William Dent. John Sent. Philip Mann. Nicholas Fann.

And the aforeſaid *William Willoughby*, *Edward Dimock*, *Elizabeth*, and *William Tailbois* Clerk, by *Edmund Stareſmore* their Attorney come, and the ſame *Elizabeth Tailbois* Widow prays * *Oyer* of the Writ of Aſſize aforeſaid, and alſo of the Return of the ſame Writ; ſhe alſo prays *Oyer* of the Letters Patent of the ſame Aſſize, and they are read to her in theſe Words, *Edward the Sixth*, *&c.* Which being read and heard, the ſame *Elizabeth Tailbois* Widow, by proteſting that the aforeſaid *Richard Thymilby* Knight now Sheriff did not take to Wife the aforeſaid *Catherine* Daughter of the aforeſaid *Robert Tirwhit* and *Maud* his Wife, Siſter of the aforeſaid *George Tailbois*, Father of the aforeſaid *Gilbert*, Father of the aforeſaid *Elizabeth* the Wife of the aforeſaid *Thomas*, by proteſting alſo that the aforeſaid *Richard Curſon* is not, nor on the aforeſaid Day of obtaining the Writ of Aſſize aforeſaid was the Servant of the aforeſaid *William Willoughby*, as the aforeſaid *Thomas* and *Elizabeth* his Wife by the Writ aforeſaid above ſuppoſe, for Plea the ſame *Elizabeth* ſaith, † that the aforeſaid Writ of Aſſize in Manner and Form aforeſaid obtained, and alſo the Return thereof, are inſufficient in Law to compell her the ſaid *Elizabeth Tailbois* Widow to anſwer to the Writ aforeſaid, and that ſhe hath no Neceſſity, nor is by the Law of the Land bound to anſwer the ſaid Writ in Manner and Form aforeſaid obtained: And this ſhe is ready to verify; wherefore ſhe prays Judgment, and that the Writ aforeſaid may be quaſhed, *&c.*

* Note the Form of Demurrer upon Matter apparent in the Writ and in its Return. See Theol. Dig. lib. 15. cap. 9. § 1. Vin. Abr. tit. Demurrer A. pl. 1.

† It ſeems by this Precedent, that there may be a Demurrer in Abatement of the Writ for any Inſufficiency appearing within it, and this Authority is countenanced by Theol. Dig. lib. 15. cap. 9. § 1. Dy. 341. pl. 51. Lutwy. 1644. But of late Time this Doctrine has been impugned, for *Per Holt C. J.* 6. Mod. 195. there can be no ſuch Thing as a Demurrer in Abatement: And in the Caſe of *Docmannee v. Davenant*, the Defendant demurred in Abatement, and Plaintiff joined in Bar, and Judgment final was given for the Plaintiff, for the Court ſaid they knew not what a Demurrer in Abatement was, for if the Cauſe be apparent to the Court, they would abate the Writ themſelves, if not, it ought to be pleaded, and they ſaid they would turn all ſuch Demurrers into Bars, tho' *Eyre* quoted this Precedent here as an Authority for a Demurrer in Abatement. 6. Mod. 198. S. C. Salk. 220. 8. P. G. Hiſt. of C. B. 208.

Memorandum, Walpole *and* Morgan *Apprentices had argued before I came.*

The CASE. Where a Writ original or judicial ſhall be directed to the Coroners for Default in the Sheriff, and how. S. C. 2. Rol. Abr. 668. pl. 4. Theol. Dig. lib. 7. cap. 1. § 6.

Cook and *Saunders* Serjeants took divers Exceptions in Abatement of the Writ. Firſt they argued, that the Writ directed to the Coroners was not well directed. For all original Writs are awarded out of the Chancery by the Chancellor, who is thereunto deputed by the King, and the Power, which the Chancellor hath concerning the Writs of the Common Law, is certainly defined and expreſſed by the Common Law, and if he exceeds his Authority, or does not purſue it in ſuch Order as the Law hath appointed him, then the Party by Exception ſhall abate ſuch Writ. And here the Chancellor ought to have awarded the Writ to the Sheriff, who is the Officer [a] to all the Courts to execute the Writs of the Common Law, and whom the Law preſumes to be indifferent between Party and Party. And if he is not ſo, but makes the Jury in Aſſize favourably to either of the Parties, the other may abate it by Exception, and then the Plaintiff ſhall have a new Writ awarded by the Juſtices of Aſſize to the Coroners, where the Default in the Sheriff is firſt known to the Court, and of Record. But the Chancellor has no Authority to take Conuſance of this before Exception of the Party, nor may he change the Officer to execute the Writ, for if he might change the Officer, by the ſame Reaſon he might change the Order and Form of the Writ, and by the ſame Reaſon alſo he might take away the Juriſdiction of the Courts, and make a Thing, which is pleadable in one Court, to be pleaded in another Court, which he cannot do. And therefore in a Writ of Right if the Land is holden of a Manor, it ought to be directed to the Lord of the Manor, for the Land ought to be demanded there, and the Lord of the Manor ought to have the Fines, Iſſues, Amercements, and other Profits ariſing by Reaſon of the Plea. And therefore if the Lord of the Manor has a-mind that the Land ſhall be impleaded in the King's Court, then after this is certified to the King in Chancery, the Demandant ſhall have a Writ of Right returnable in the Common Bench, which ſhall have this Clauſe at the End of it, [b] *Quia B. capitalis Dominus feodi illius nobis inde remiſit curiam ſuam.* And there is in the *Regiſter* the Form of the Lord's Certificate, that he is content to remit his Court. And this is grounded upon good Reaſon, that the Lord's Aſſent ſhall be certified, before that the Chancellor by any Writ ſhall take away his Court, and his Profits. And ſo in a *Recordare* or an *Accedas ad curiam* to remove a Replevin out of the baſe Court of any Lord, there is the Cauſe of Removal expreſſed in the Writ, and alſo there is this Clauſe in the Writ, [c] *Fiat executio iſtius brevis, ſi cauſa ſit verâ, aliter non*; which Clauſe is conſonant to Reaſon, that when the Party complains to the Chancellor that the Lord of the Court favours the other Party, or that he cannot have Juſtice done him in the baſe Court, yet inaſmuch as the Lord ſhall loſe his Court and his Profits ariſing from this Plea, neither the Chancellor nor the King ſhall believe the Complaint, for perhaps the Surmiſe is falſe, and therefore the Sheriff is by the ſaid Clauſe made Judge of the Matter. Which Caſes argue that the Chancellor ought not to take preciſe Conuſance of Surmiſes, nor ought he to take away the Juriſdiction of any Court, nor the Profit of any Perſon, by giving Credit to ſuch Suggeſtions. With Regard to the principal Caſe then, no more than the Chancellor may, by ſuch Surmiſes, take away the Juriſdiction of Courts of other Lords, or their Profits in them, no more may he take away the Juriſdiction of the Sheriff, and his Fees and Profits, which ariſe to him from the Execution of ſuch original Writs. But judicial Writs may be directed to the Coroners, as the *Venire Facias* where the Parties are at Iſſue, [d] but there upon the Surmiſe of the Plaintiff that the Sheriff is his Couſin, and upon Prayer that the *Venire facias* may be directed to the Coroners, to avoid the Delay which may happen by the Challenge to the Array, the Defendant ſhall be examined whether it be true or not, and if he confeſs it, then the *Venire facias* ſhall be awarded to the Coroners, for then it appears to the Court, by the Confeſſion of the Defendant, that the Sheriff is not indifferent: But if the Defendant will not confeſs it, but deny it, then the Proceſs ſhall be awarded to the Sheriff, becauſe his Authority and Profits ſhall not be taken away without certain Cauſe appearing to the Court. [e] But if the Defendant will alledge that the Sheriff is his Couſin, and pray the *Venire facias* to the Coroners, there the Plaintiff ſhall not be examined at the Prayer of the Defendant, becauſe Delays are for the Defendant's Advantage; and ſo is the Diverſity. Wherefore in judicial Writs at the Requeſt of the Plaintiff it ſhall be done *ut ſupra:* But in original Writs there is nothing but the Surmiſe of the Plaintiff only without any Examination or Confeſſion of the Defendant, for the Defendant has no Day in Court before the Return of the Writ, to which Surmiſe of the Plaintiff the Chancellor ought not to give Credit: For if he ought to give Credit to the Surmiſe of the Plaintiff, that the Sheriff is his Couſin, by the ſame Reaſon he ought to give Credit to him, if he ſays that the Coroners alſo are his Couſins; and then if the Chancellor will name any other to execute the Writ, by the ſame Reaſon the Chancellor ought to give Credit to the Plaintiff that ſuch other Perſon alſo is his Couſin, if he will ſurmiſe the ſame; and by this Means every one would be Couſin to the Plaintiff, or would have ſome other Fault in him, if the Plaintiff had a mind to ſurmiſe it, and he would be ſure to ſurmiſe Default in all other Perſons, but in his own Confederates or Friends: And thus would he have the Writ directed to what Perſon he pleaſed, which is the ſame in Effect as if the Writ was directed to himſelf, nay much worſe, for if it was directed to himſelf, the Defendant might quaſh the Array for the Preſumption of his Partiality in his own Cauſe, but it would be hard to try the Favour or Partiality of ſuch Perſon as the Plaintiff would appoint, for he would appoint ſuch a one as would be partial and favourable in Fact, and yet his Partiality would be hard and difficult to be tried, and ſo the Miſchief would be very great. For if the Plaintiff would ſurmiſe that the Sheriff is his Couſin, and ſo pray the Writ of Aſſize to the Coroners, where *in rei veritate* the Sheriff is not his Couſin, upon which the Coroners make the Panel, the Defendant may not challenge the Array for this Cauſe, for he ſhall not falſify the Surmiſe upon the Challenge to the Array by ſaying that the

[a] P. 22. H. 6. 51. pl. 17. Bro. Proceſs 70. 1. Finch. 167. 2. Finch. 237.

[b] F. N. B. 2. f. Poſt. 208.

[c] F. N. B. 4. a. Poſt. 208.

[d] P. 22. Ed. 4. 3. pl. 11. Fitz. Suggeſtion 6. Bro. Challenge 187. P. 21. Ed. 4. 31. a *per Brian.* T. 9. Ed. 4. 6. pl. 2. Fitz. Suggeſtion 5. Bro. Challenge 82. Venire facias 21. P. 20. Ed. 4. 2. pl. 9. Bro. Challenge 178. 14. H. 6. 2. pl. 13. Bro. Challenge 89. P. 22. H. 6. 51. pl. 17. Bro. Proceſs 70. Co. Litt. 157. b. Hutt. 24. Poſt. 76.

[e] H. 3. H. 7. 5. pl. 21. Fitz. Suggeſtion 8. Bro. Challenge 153. *Sed vide* P. 22. H. 6. 51. pl. 17. which ſpeaks of the other Party being examined as well upon the Surmiſe of the Defendant as of the Plaintiff, but *quære*, and ſee Bro. Proceſs. 70. S. C. abridged differently, and accords with the Opinion here.

the

the Sheriff is not Couſin to the Plaintiff. For if the Law ſhould be that he might challenge the Array for this Cauſe, this would be a falſifying of the Surmiſe, which ſhall never be anſwered nor falſified by Law, and alſo this ſeems Matter of Abatement of the Writ, which he hath affirmed before to be good, and therefore the moſt proper Time to find Fault with the Direction is in taking Exception to it in Abatement of the Writ, and if upon Exception to it in Abatement of the Writ, the Writ ſhould not abate, then would it be a great Miſchief, as it is ſaid before, and no Way to avoid it; for which Reaſons it ſeems that the Writ ought to abate. And if the Law was that the Writ might be directed to the Coroners, it would ſometime have been put in uſe, for it is a Matter which comes often in Practice, but neither in the *Regiſter*, nor in the *Book of Aſſizes*, nor in any other Book of the Law, can there be found ſuch a Writ as is here; wherefore the Writ ought to abate. Another Exception they took, viz. altho' upon the Matter the Writ might be directed to the Coroners, yet the Writ, as it is here, is not good, for it is not well directed. For it is directed *Coronatoribus ſuis in comitatu Lincoln*; and it is not *de comitatu Lincoln:* In which Caſe if there were ten Coroners, two might ſerve the Writ, and fulfil the Words, for two of the Coroners are Coroners *in* the County, but Coroners *of* the County are all the Coroners, ſo that Part of the Coroners may and ſhall be intended Coroners *in* the County, and not *of* the County. Wherefore inaſmuch as the Writ carries with it an Intendment to be directed to Part of them, as much as to all, the Direction is not good. And alſo if there was a Coroner within the Franchiſe of the City of *Lincoln* by the King's Letters Patent, he is Coroner *in* the County of *Lincoln*, and not *of* the County of *Lincoln*. And if a Man be bound in an Obligation to pay 20 *s.* ſuch a Day at the City of *Lincoln*, to every one that ſhall be Coroner *in* the County of *Lincoln*, the Obligor is bound to pay 20 *s* to the Coroner of the Franchiſe of *Lincoln*, and to the Coroners of *Cambridge* and *Yorkſhire*, if they are there at the Day limited, or elſe he ſhall forfeit the Obligation; for the Words (*Coroners in the County*) cannot be intended *Coroners of the County*, and he who is Coroner of the County of *York*, if he be in the County of *Lincoln*, yet is he then Coroner of the County of *York*, and conſequently Coroner *in* the County of *Lincoln*, for his coming into the County of *Lincoln* does not take away nor deveſt him of his Office of Coroner of the County of *York*, altho' he cannot exerciſe nor execute it in the County of *Lincoln*. And if a Gentleman of the County of *York* comes into the County of *Lincoln*, he is a Gentleman *in* the County of *Lincoln*, for Names of Offices or Dignity don't leave a Man by his going from one Place to another, nor are they removed by the Removal of the Perſon. So here, the Writ which is directed *Coronatoribus in comitatu Lincoln* has no certain Intendment to be directed to the Coroners *of* the County of *Lincoln*, no more than if the Writ was directed to the Sheriff or Biſhop *in Lincoln*, it could not be intended to be directed to the Sheriff or Biſhop *of Lincoln*, nor is it the uſual Direction. For which Cauſe alſo the Writ ought to abate. Another Exception they took, which was, that the Writ, at the Beginning, is directed *Coronatoribus*, and afterwards at the End of the Writ *Richard Curſon* one of the Coroners is excepted, *ita ſe non intromittat* in the Execution of the Writ, in which Caſe there is a Repugnancy in the Writ. For it is directed *Coronatoribus*, which ſhall be intended all the Coroners, and then by the Exception of one it is not directed to all, for which Reaſon it is repugnant; and alſo it might happen that there were but two Coroners in the whole County, in which Caſe this Exception, when the Truth of the Matter appears, is contrary to the Premiſſes: For the Writ was directed to the Coroners, which is to two at leaſt, and upon the Matter it is but directed to one, and ſo the Writ ought to abate for the Repugnancy. And altho' the Truth be that there are ſix Coroners in the County of *Lincoln* in our Caſe, yet this does not alter the Matter, for the Law ſees before-hand what may be, and will prevent it, and therefore the Chance that there may be ſix Coroners will not excuſe the Negligence of the Party, if ſo be he might have purchaſed a better Writ, as in Truth he might; for inaſmuch as he takes Conuſance of one of the Coroners, he might have taken Conuſance of all, and have had the Writ directed to all the other Coroners, naming their ſeveral Names, and have ſhewn the Cauſe in the Writ why *Curſon* was omitted, and if it had been ſo, then no Repugnancy could poſſibly have been objected. And becauſe he might have had the Writ directed better, ſo that there could not poſſibly be any Defect in it, and the Writ is not directed ſo, it ought for this Cauſe alſo to abate. Another Exception they took was, that the Cauſe why the Writ was directed to the Coroners, and not to the Sheriff, is put in the End of the Writ, *viz.* the Conſanguinity between the Wife of the Sheriff, and the Wife of the Plaintiff, and the Degrees are ſhewn, and *Maud* is expreſſed to be Siſter to *George Tailbois*, but inaſmuch as the whole Blood is not ſhewn, it may be that ſhe is Siſter of the half Blood, and ſo it ſhall be intended. For every Thing that is ſhewn ſhall be taken moſt ſtrongly againſt the Perſon that ſhews it. And if a Challenge had been taken, it ſhould not have been a principal Challenge without ſhewing the whole Blood, for without that the Land could not deſcend from the one to the other, and for the ſame Reaſon the Cauſe here is not ſufficient. And for theſe four Cauſes they prayed that the Writ might abate.

E contra.

On the contrary it was argued by *Daliſon* and *Gawdy* Serjeants elect, that the Writ was good enough. And as to the firſt Exception, *viz.* that the Writ might not be directed to the Coroners upon the Surmiſe; they ſaid, it ought to be conſidered that Aſſizes are the moſt * expeditious Suits in the Law, as the Statute of *Weſtminſter* 2. *cap.* 25. recites, which ſays, *Foraſmuch as there is no Writ in the Chancery whereby Plaintiffs can have ſo ſpeedy Remedy as by a Writ of Novel Diſſeizin, &c.* And then inaſmuch as this is ſo ſpeedy a Suit, the Law ſhews great Favour to it, as well as to all Things that have Speed and Expedition in them, and abhors all Delays that tend to retard Aſſizes. In our Caſe therefore if the Law ſhould be that the Writ of Aſſize ought to be directed to the Sheriff, where he is Couſin to the Plaintiff, and that upon the Array being challenged by the Defendant for this Cauſe and quaſhed, a new Writ ſhould be awarded to the Coroners, none can

* Poſt. 89. 8. Co. 50. a. Wing. Max. reg. 1-5. pl. 5. 176. pl. 12.

can deny but that this would be a great Delay to the Aſſize, and a vain and frivolous Circuit, which the Law, that favours Speed, and abhors Delays, will never encourage, but will ſuffer the Writ to be directed to the Coroners at firſt, and herein no Inconvenience or Miſchief can reaſonably be objected, for if the Surmiſe be falſe, the Party comes to no Damage hereby, and yet he may not traverſe it, * for Surmiſes ſhall never be traverſed: [a] As if a Writ comes to receive a Woman in the Reverſion upon Default of Tenant for Life, by Attorney, becauſe ſhe is *groſſment enſeint*, this Surmiſe is not traverſable, although it be falſe; ſo here, for it comes after the *Teſte* of the Writ, and ſo is not Part of the Subſtance of the Writ, and therefore without Queſtion, whether the Surmiſe be falſe or true, it ſhall never be anſwered by Way of Challenge to the Array, or otherwiſe: *Quod fuit conceſſum* by all thoſe that I heard argue in the Caſe. And although the Defendant may not traverſe the Surmiſe, it is not prejudicial to him if the Writ be directed to thoſe who are indifferent, and if it is not, then the Defendant may challenge the Array for that Cauſe. And as to what has been ſaid, that there may be Partiality, and yet difficult to be tried, Sir, how can he ſay the Perſon is partial or favourable, if he does not know it? and if he does know it, he can try it. And our Law ſays that nothing is true but what may be tried, for Truth never wants Trial. So the Defendant receives no Damage hereby; but if the Plaintiff ſhould not have the Writ directed to the Coroners upon his own Surmiſe, it would be hurtful to him, becauſe otherwiſe the Array would be quaſhed, and he driven to a new Writ to make a new Panel. Therefore as this Writ is, there is no Prejudice to either Party, but Delays are greatly avoided by it, which is a Thing the Law much aims at, and eſpecially in Aſſizes: And ſo the Plaintiff has Benefit hereby, and the Defendant has no Damage. But if it was in a *Præcipe quod reddat*, let the Demandant make what Surmiſe he will, yet the Writ ſhall not be directed to the Coroners until the *Venire facias:* and when the *Venire facias* ſhall be awarded to make the Panel, then upon ſuch Surmiſe the Defendant [b] ſhall be examined, and if he cannot deny it, the *Venire facias* ſhall be awarded to the Coroners, and the Defendant ſhall not afterwards traveſe the Surmiſe, but ſhall be bound by his firſt Confeſſion and Admittance. But in our Caſe the Panel is made the firſt Day, ſo that the ſame Reaſon which ſays in the *Præcipe quod reddat* that the Demandant ought to make the Surmiſe when the Writ iſſues to make the Panel, *viz.* the *Venire facias*, the ſame Reaſon alſo ſays in our Caſe, that the Plaintiff ought to make the Surmiſe when the Writ iſſues to make the Panel, which is, at the Time of the Writ purchaſed, for the Writ of Aſſize is to make a Jury the firſt Day, viz. at the Day of the Return. And ſo Reaſon itſelf allows this Surmiſe, as it is made in our Caſe, and the Direction of the Writ accordingly to be good. And as to what has been ſaid, that the Allowance of the Surmiſe, and the Direction of the Writ is the Act of the Chancellor, it is not ſo, for it is the Act of the King, and the Writ is made in his Name, and his Seal is put to it, which makes it his own Act. [c] For if the King's Seal is put to any Patent or Writing made in the Name of the King without Warrant, this is Matter of Record preſently, and ſhall bind the King. So here this Writ made in the Name of the King, and ſealed with his Seal, and the Allowance of the Surmiſe therein, is the Deed of the King, and not of the Chancellor. And as to what has been ſaid, that in the Writ of Right, *quando capitalis Dominus remiſit curiam*, the Aſſent of the Lord is firſt known, and ſo in the *Recordare* the Clauſe is, *ſi cauſa ſit vera, aliter non*, Sir, this is founded upon good Reaſon, but is not like our Caſe. For there it is Part of the Lord's Inheritance to have the Plea holden in his Court, and to have the Profits and Caſualties ariſing thereupon, which it is not reaſonable to take from him without Cauſe. But in our Caſe the Sheriff is no more than the King's Miniſter appointed by him, and he has not any Profit, but only an Allowance for his Labour, viz. the uſual Fees for the Execution of Writs, and if any other ſerves the Writs, the Sheriff loſes nothing, for he has no Labour nor Trouble. And if the King changes his Officer, there is no Wrong done to the Officer, and ſo this cannot be reſembled to the other Caſes: And therefore the Writ is maintainable notwithſtanding the ſaid Exception. Then as to the other Exception, *viz.* that the Writ is directed *Coronatoribus* in *comitatu Lincoln*, Sir, this is to be intended [d] *Coronatoribus de comitatu Lincoln.* For it is to be conſidered that the Writ was directed to the Intent to be executed, and that duly, which could not be but by the Coroners of the County, and therefore the Intent, which the King had in the Direction of the Writ, ſhall be taken and conſtrued the beſt Way. [e] As in a *Præcipe quod reddat* directed to the Sheriff of *Middleſex*, the Writ is, *præcipe quod reddat* 20 Acres in D. and it is not expreſſed in what County D. is, yet the Writ is good, for inaſmuch as the Writ was directed with an Intent to be executed, it ſhall be conſtrued that D. is in the ſame County of which he is Sheriff. So here this Word (*in* the County) ſhall be intended that they are Coroners of the County; for if it be well conſidered that the King directed the Writ, and ſpoke the Words in it, and if it be alſo conſidered that the Words of the King ſhall be conſtrued moſt ſtrongly to fulfil his Intent, it cannot be otherwiſe taken, but that the Writ is directed to the Coroners *of* the County, and not to other Coroners, *viz.* ſuch as are *in* the County, and not *of* the County; for that would have been too hard and ſtrained an Expoſition even if any other than the King had ſpoken the Words. And, Sir, this Word *(in)* and the Word *(of)* have many Times all one Conſtruction in Law. [f] And therefore in 41. *Aſs.* it is taken all one to grant a Rent *in manerio de D.* and *de manerio de D.* And ſo here Coroners *in* the County, and Coroners *of* the County may be taken to one Intent, in conſtruing this Word *(in)* to be *(of)*. And the Order in the *Regiſter* is, that the Writs, which are directed to the Sheriff, ſhall be to the Sheriff *of* the County, and all Writs directed to Coroners are directed to the Coroners *in* the County. As an Attachment againſt the Sheriff for not returning a Replevin is directed *Coronatoribus in comitatu, &c.* [g] And a Writ to certify Outlawry ſhall be directed *Coronatoribus in comitatu*, as you may ſee in the *Book of Entries*. And ſo all other like Writs, as *diem clauſit extremum*, [h] which is *Eſcheatori in comitatu*.

* Vin. Abr. tit. Traverſe P. pl. 8.

[a] F. N. B. 25. d.

[b] See Ante 74. (d) and the Books there cited.

[c] Vin. Abr. tit. Record B. pl. 17.

[d] S. P. Acc. 4. Co. 41. b. 1. And. 206. Godb. 64, 65. Wing. Max. reg. 81. pl. 88. reg. 262. pl. 12.

[e] M. 39. H. 6. 14. b. *per Priſot.* Bro. Lieu 41.

[f] 41. Aſs. pl. 3. Bro. Affize 358. Charge 33. T. 41. Ed. 3. 15. pl. 8. Fitz. Charge 6. Bro. 3. Grants 135. 1. And. 237. Godb. 65.

[g] Raſt. Entr. 332. a. b.

[h] F. N. B. 252. a. &c.

And

And he that finds any fault with this Direction argues againſt the *Regiſter*, which is the Foundation of the Law in theſe Points, and alſo againſt the Uſage of the Law, which has been heretofore. For which Reaſons the Writ is good, notwithſtanding the ſaid Exception. And as to the third Exception, *viz.* that the Writ is directed *Coronatoribus*, and afterwards *Curſon* is excepted, Sir, this is as well and better than if it had been directed to the five Coroners, omitting *Curſon*, for upon the Matter it is not directed to any more than the five Coroners, and the Exception of *Curſon* out of the general Number is good. * And therefore a Feoffment to *A. B.* his Heirs and Aſſigns, with *proviſo* that he ſhall not alien to any Perſon, is void; but that he ſhall not alien to *J. S.* is good, for upon the Matter he has given the Land to him and all his Aſſigns, except *J. S.* And ſo here, Sir, the matter is directed to all the Coroners but *Curſon*. And to direct any Writ to the Coroners, naming their ſeveral Names, is not the Courſe, nor has it been ever ſeen, ſo that there is not any Contrariety in this Matter; wherefore it ſhall be good. And as to the laſt Exception, † it ſhall be intended that *Maud* was Siſter to *George* of the whole Blood, and if it be not ſo, the Defendant ought to ſhew it, but without it be ſhewn to the contrary ſhe ſhall be preſumed to be Siſter of the whole Blood, and in theſe laſt Exceptions there is little Weight. Wherefore it ſeemed to them that the Writ ſhould be good, notwithſtanding any of the four Exceptions.

* M. 21. Ed. 4. 47. a. *Per Philpot.* H. 8. H. 7. 10. b. *Per Fairfax* et *Huſſey.* Bro. Condition 135. P. 13. H. 7. 23. a. *Per Read et Brian.* H. 21. H 6. 33. b. *Per Yelv.* Bro. Condit. 57. H. 21. H. 7. 8. a. *Per Vavaſor.* Bro. Condit. 82. Dr. & Stud. lib. 1. c. 24. 29. lib. 2. cap. 35. Litt. §360, 361. 4. Co. 3. b. 5. Co. 56. a. 6. Co. 41. b. 2. Rol. R. 203. 1. Sid. 127. Hob. 13. Comb. 121. 1. Mod. 141. 4. Mod. 295. 1. Bac. Abr. 410. Vin. Abr. tit. Condition A. a. pl. 7.

† Kitch. 452. Wing. Max. reg. 190. pl. 12.

Wherefore it is conſidered by the Court, that the aforeſaid *Elizabeth* anſwer to the Writ aforeſaid, ſaving always to herſelf all and all Manner of Advantages appearing in the Writ aforeſaid. The Judgment.

A Report of a Caſe argued in the Common Bench *before and by all the Juſtices of the ſame Bench, in* Hillary *Term, in the* ſixth *and* ſeventh *Years of the Reign of King* Edward *the* Sixth, *in an Action of* Debt *brought by* William Partridge *Plaintiff, who ſued for himſelf and the King, againſt* John Strange *and* John Croker *Defendants. And the Record is entered in* Trinity *Term* 6. Edw. 6. Rot. 522. *and was read as follows.*

Glouceſt. Declaration.

JOHN *STRANGE* late of the City of *Oxford* in the County of *Oxford* Gentleman, and *John Croker* of *Hucknorton* in the County of *Oxford* Eſquire, were ſummoned to anſwer as well * the Lord the King as *William Partridge* of a Plea, that they render to them 80 *l.* which they owe the ſame Lord the King and the aforeſaid *William*, and unjuſtly detain by reaſon of a certain Attempt contrary to the Form of a Statute made in the Parliament of the Lord *Henry* the *Eighth* late King of *England*, Father of the Lord the King now, holden at *Weſtminſter* in the *thirty-ſecond* Year of his Reign, againſt thoſe, who ſhall bargain, buy, or ſell, or by any Ways or Means obtain, get, or have any pretenced Rights or Titles, or take promiſe, grant, or covenant to have any Right or Title, of any Perſon or Perſons, in or to any Manors, Lands, Tenements, or Hereditaments, (except ſuch Perſon or Perſons, as ſhall ſo bargain, ſell, give, grant, covenant, or promiſe the ſame, their Anceſtors, or they by whom he or they claim the ſame, have been in Poſſeſſion of the ſame, or of the Reverſion or Remainder thereof, or taken the Rents or Profits thereof, by the Space of one whole Year next before the ſaid Bargain, Covenant, Grant, or Promiſe made) upon pain that he, who ſhall make any ſuch Bargain, Sale, Promiſe, Covenant, or Grant, ſhall forfeit the whole Value of the Lands, Tenements, or Hereditaments, ſo bargained, ſold, promiſed, covenanted, or granted, contrary to the Form of the Statute aforeſaid amongſt other Things made and provided, *&c.* And whereupon the ſame *William*, who proſecutes as well for the Lord the King as for himſelf, by *John Stocks* his Attorney ſays, that whereas by the aforeſaid Act made in the aforeſaid Parliament of the aforeſaid late King holden at *Weſtminſter* aforeſaid the *twenty-eighth* Day of *April*, in the aforeſaid *thirty ſecond* Year of his Reign, amongſt other Things it was enacted by Authority of the ſame Parliament, that no Perſon or Perſons, of what Eſtate, Degree, or Condition ſoever he or they be, ſhould from thenceforth bargain, buy, or ſell, or by any ways or means, obtain, get, or have any pretenced Rights or Titles, or take Promiſe, Grant, or Covenant, to have any Right or Title, of any Perſon or Perſons, in or to any Manors, Lands, Tenements, or Hereditaments, (except ſuch Perſon or Perſons, who ſhould ſo bargain, ſell, give, grant, covenant, or promiſe the ſame, their Anceſtors, or they by whom he or they claim the ſame, had been in poſſeſſion of the ſame, or of the Reverſion or Remainder thereof, or taken the Rents or Profits thereof, by the Space of one whole Year next before the ſaid Bargain, Covenant, Grant or Promiſe made) upon pain that

* Vide W. Jones, 262. 2. Hawk. P. C. 266.

he, who ſhould make any ſuch Bargain, Sale, Promiſe, Covenant or Grant, ſhould forfeit the whole Value of the Lands, Tenements, or Hereditaments ſo bargained, ſold, promiſed, covenanted, or granted, contrary to the Form of the ſame Act. And the Buyer or Taker thereof, knowing the ſame, ſhould forfeit alſo the Value of the ſaid Lands, Tenements, or Hereditaments, ſo by him bought or taken, as is aboveſaid; whereof one half of the ſaid Forfeitures ſhould be to the Lord the King, and the other half to the Party that would ſue for the ſame in any of the King's Courts of Record, by Action of Debt, Bill, Plaint, or Information, in which Action, Bill, Plaint, or Information no Eſſoign, Protection, Wager of Law, nor Injunction ſhould be allowed, as in the ſame Act amongſt other Things is more fully contained. Nevertheleſs the aforeſaid *John* and *John* the Statute aforeſaid not weighing, after the making of the ſaid Statute, to wit, the *ſixth* Day of *July*, in the *fourth* Year of the Reign of the ſaid Lord the King, at *Minty* in the aforeſaid County of *Glouceſter* bargained, granted, and to Farm let for a Term of Years to one *Robert Mill* and *Gabriel Pledall* one Meſſuage called *Genetts*, and eleven Acres of Land to the ſame Meſſuage belonging, and ſeven Acres and three Fardels of Land in the Field of *Minty* aforeſaid with the Appurtenances in *Minty* aforeſaid in the aforeſaid County of *Glouceſter*, of the Value of 80 *l.* of which ſaid Tenements the ſame *John* and *John*, or any of their Anceſtors, or they by whom the ſame *John* and *John* claim the ſame Tenements, were not in poſſeſſion of the ſame, nor of the Reverſion or Remainder thereof, nor took the Rents or Profits thereof by the Space of one whole Year next before the aforeſaid Bargain, Grant, and Demiſe to Farm thereof made, by which Means an Action hath accrued to the ſame *William Partridge* to demand and have of the aforeſaid *John* and *John*, for the aforeſaid Lord the King and himſelf, the aforeſaid 80 *l.* for the Value of the Tenements aforeſaid contrary to the Form of the Statute aforeſaid bargained, granted, and to Farm let. Nevertheleſs the ſame *John* and *John* although often requeſted the aforeſaid 80 *l.* to the ſaid Lord the King and the ſame *William* have not yet rendered, but the ſame to them to render have hitherto refuſed, and yet refuſe: wherefore the ſame *William* ſays that he is damnified, and hath Damage to the Value of 20 *l.* And therefore he brings Suit, *&c.*

Defendants demur.

And the aforeſaid *John* and *John* by *Roland Durant* their Attorney come and defend the Force and Injury when, *&c.* And ſay that the Matter in the Declaration aforeſaid above ſpecified is inſufficient in Law for the aforeſaid *William* to have and maintain his Action aforeſaid againſt them the ſaid *John* and *John*, and that they have no Neceſſity, nor are by the Law of the Land bound to anſwer the ſaid Matter in manner and form aforeſaid declared: and this they are ready to verify; wherefore for Want of ſufficient Matter in the Declaration aforeſaid ſpecified, the ſame *John* and *John* pray Judgment, and that the aforeſaid *William* may be precluded from having his Action aforeſaid againſt them, *&c.*

Joinder.

And the aforeſaid *William*, for that he hath above declared ſufficient Matter in Law to maintain his Action aforeſaid, which he is ready to verify, which ſaid Matter the aforeſaid *John* and *John* do not deny, nor to the ſame in any wiſe anſwer, but the ſaid Averment wholly refuſe to admit, prays Judgment and his Debt aforeſaid together with his Damages by reaſon of the detaining the ſaid Debt to be adjudged to him. *&c.* And becauſe the Juſtices here will adviſe of and upon the Matter in the Declaration aforeſaid ſpecified before they give Judgment thereon, Day is given to the Parties aforeſaid here until the *Octave* of *St. Michael*, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.*

Continuance.

Memorandum, *All the Serjeants at the Bar*, viz. *the new and ancient Serjeants had argued in the ſame Caſe in the Term of* St. Michael *laſt paſt*, *except* Morgan, Whidon, *and* Saunders, *who now argued*; *and the other arguments I did not hear.*

The CASE. *Hillary Term* 6 & 7. *Edw.* 6. An Action upon the Statute of 32. *H.* 8. *cap.* 9. of pretended Titles, for that the Defendants leaſed Land of which neither they nor their anceſtors were poſſeſſed, nor took the Profits by the Space of a Year next before: and adjudged, that a Leaſe for Years is within the Statute, as well as to recite the Statute, but yet if he does and miſrecites it, as in the Day of the making of it, the Count ſhall abate, and the miſrecital of it ſhall not be aided by the Demurrer of the adverſe Party; that the Statute, being penal, ſhall not be taken by Equity; that though the Statute ſpeaks of pretenced Rights or Titles in the plural Number, yet a pretenced Right or Title in the ſingular Number is within the Statute; that the Plaintiff ought to aver it to be a pretenced Right or Title; and if the Plaintiff declares that the Defendant *bargained, granted, and demiſed to Farm*, the e three Words ſhall be taken in Aggravation of the Offence, and ſhall not make the Count double, by 2 Juſtices againſt 2. S. C. Dyer 74. pl. 19. Vin. Abr. tit. Maintenance T. pl. 22.

Morgan Serjeant recited the Caſe in this manner. You (my Lords) have well underſtood by the Record, how that *William Partridge* has ſued here before you, for himſelf and the King, an Action of Debt againſt *John Strange* and *John Croker*, and demands 80 *l.* which they owe to the King and himſelf by reaſon of an attempt againſt the Form of a Statute in the Parliament of the late King *Henry* the Eighth at *Weſtminſter* in the 32. Year of his reign publiſhed and provided. And he counts, that whereas by the ſaid Act made in the ſaid Parliament of the ſaid late King holden at *Weſtminſter* the ſaid 28th Day of April, in the ſaid 32d Year of his Reign, amongſt other Things it was enacted, That no Perſon or Perſons, of what Eſtate, Degree, or Condition ſoever he or they be, ſhould from thenceforth bargain, buy, ſell, or by any Ways or Means obtain, get, or have any pretenced Rights or Titles, or take Promiſe, Grant, or Covenant to have any Right or Title, of any Perſon or Perſons in or to any Manors, Lands, Tenements, or Hereditaments, (except ſuch Perſon or Perſons, as ſhould ſo bargain, ſell, give, grant, covenant, or promiſe the ſame, their Anceſtors, or they by whom he or they claim the ſame, had

been

been in poſſeſſion of the ſame, or of the Reverſion or Remainder thereof, or had taken the Rents or Profits thereof by the Space of one whole Year next before the ſaid Bargain, Covenant, Grant, or Promiſe made,) upon pain that he who ſhall make any ſuch Bargain, Sale, Promiſe, Covenant or Grant, ſhall forfeit the whole Value of the Lands, Tenements, or Hereditaments ſo bargained, ſold, promiſed, covenanted, or granted contrary to the Form of the ſame Act: And that the Buyer or Taker thereof, knowing the ſame, ſhall forfeit alſo the Value of the ſaid Lands, Tenements, or Hereditaments ſo by him bought or taken, as is aforeſaid, one Moiety of the ſaid Forfeitures to be to our Lord the King, and the other Moiety to the Party that will ſue for the ſame in any of the King's Courts of Record, by Action of Debt, Bill, Plaint, or Information, in which no Eſſoign, Protection, Wager of Law, or Injunction ſhall be allowed, as in the ſaid Act amongſt other Things is contained. Notwithſtanding this, the ſaid Defendants, ſuch a Day, after the ſaid Act, had bargained, granted, and demiſed to farm for a Term of Years, to *Robert Mill* and *Gabriel Pledall*, one Meſſuage called *Genetts*, and eleven Acres of Land to the ſame Meſſuage belonging, and ſeven Acres, and three Fardels of Land in *Minty* in the ſaid County of *Glouceſter*, of the Value of 80 *l.* of which Lands and Tenements neither the Defendants themſelves, nor any of their Anceſtors, nor they by whom the Defendants themſelves claim the ſame Tenements, were in poſſeſſion, nor of the Reverſion or Remainder thereof, nor took the Rents or Profits of the ſame by the Space of one whole Year next before the ſaid Bargain, Grant, and Demiſe thereof made, by which Means an Action hath accrued, *&c.* and upon this Count the Defendants have demurred in Judgment. And it ſeems to me that the Count is inſufficient, for it is both too abundant, and defective, and alſo wants Form. [a] For the Statute is recited to be made the 28th Day of *April* in the 32d Year of the Reign of King *Henry* the Eighth, where *in rei veritate* the Statute commenced the 28th Day of *April* in the 31ſt Year of the Reign of King *Henry* the Eighth, and was continued by Prorogation until the 32d Year of the Reign of the ſaid late King, and then the Act was made, ſo that there was no Parliament holden the 28th Day of *April* in the 32d Year of that Reign, as the Plaintiff has rehearſed. Then he has grounded his Action upon a Statute, where it appears to the Court there is no ſuch Statute, in which Caſe for his Miſtake the Count ſhall abate it. [b] As if a Man vouch a Record, and the other denies it, and at the Day he brings in ſuch Record, but it varies in the Year or Term, he has failed of his Record, for there is no ſuch Record, the Time being Part of the Matter. So here there is no ſuch Statute made ſuch a Day as he has rehearſed. But it ſeems to me that it ſhall be accounted an Act from the laſt day of the Parliament, [c] for three Things are neceſſary to conſtitute it an Act, to wit, the Aſſent of the Lords, of the Commons, and of the King, and one or two of them without the third don't make it an Act. For although the Lords and Commons agree to a Thing, yet it is no Act until the King hath alſo aſſented, and his Aſſent always comes after their Aſſent, and for the moſt part it is given the laſt Day of the Parliament, and then from that Day forwards it is an Act, and not before that Day, for before the King's Aſſent it is like an Iſſue *in ventre ſa mere*, which is not a perfect Iſſue until it is born, ſo the Statute is not full nor perfect until the King's Aſſent is given to it, and from the Time of the King's Aſſent it is accounted in Law an Act, and from no Time before; which all the Serjeants who argued after him, and all the Juſtices denied. [d] For they ſaid, that the Aſſent of the King, and of the Lords, and Commons alſo ſhall have Relation to the firſt Day of the Parliament, and from the firſt Day forwards it ſhall be accounted in Law a perfect Act, and from the firſt Day forwards all ſhall be puniſhed for an Offence done againſt it after the firſt Day, except a certain Time is appointed, when the Act ſhall firſt take Effect. [e] But *Hales* Juſtice ſaid, if the Parliament has divers Prorogations, and in the ſecond or third Seſſion an Act is made, this ſhall not have Relation to the Day of the Beginning of the Parliament, that is, to the firſt Day of the firſt Seſſion, but only to the firſt Day of the ſame Seſſion in which it is made. As the Parliament of 27. *H.* 8. was holden upon Prorogation, and the common [f] Pleading of a Uſe is, *viz.* that the Feoffees were ſeized to the Uſe of *J. S.* until the *fourth* Day of *February*, in the 27th Year of King *Henry* 8. at which Day he was ſeized of the Demeſn, *&c.* And Mr. *Morgan* argued further and ſaid, that for the Miſtake of the Day of the Act the Count ſhould abate. But it has been objected, that the Statute is general, in which Caſe it is not neceſſary to be rehearſed, but the Judges ought to take notice of it without it's being recited, and then the Recital of it is Surpluſage, and the Miſrecital of what is Surpluſage ſhall not hurt the Party; Sir, I agree that it is not * neceſſary to recite the Statute, no more than it is neceſſary to recite the Statute of *Champerty*, or *Maintenance*, in which Caſes it is ſufficient to ſay *contrary to the Statute in ſuch Caſe provided*, without further Recital: But yet I ſay, [g] that if he recites a Statute to be made preciſely ſuch a Day, where there is no Statute made that Day, he has failed: for he does not refer the Statute to the Knowledge of the Judges, as he would have done, if he had ſaid, *contrary to the Form of the Statute in ſuch Caſe provided*, in which Caſe, if he had ſaid ſo, the Law would refer the Matter to ſuch Statute as was moſt apt for it) but he has recited an Act, and does not intend or mean any other, and if there is none ſuch as he has recited, then he has grounded his Action upon that which is not: And ſo the Recital of the Day, which is ſuperfluous and Surpluſage, makes the Matter faulty, if it is miſrecited. [h] As if one brings an Action of Debt by the Name of *J. S.* Parſon of *D.* the Defendant ſaith, *nul tiel Ville* as *D.* this ſhall be a good Plea in Abatement of the Writ, and yet the naming him Parſon was Surpluſage. Therefore this Surpluſage ſhall marr the Matter.

[a] Dy. 74. pl. 20. O. Bendl. 185. 1. Freem. 19. T. Raym. 191. Wing. Max. reg. 166. pl. 13. Vin. Abr. tit. Statutes E. 3. pl. 14. Vide infra (E). Poſt 84. agreed *Per Cur.* Sed vide 1. And. 76. S. P. held contrary, and this Opinion denied to be Law.

For the Defendants.

[b] S. P. cited and affirmed to be good Law 2. Mod. 242. *Per Atkins* J.

[c] M. 4. H. 7. 18. pl. 11. Fitz. Parliament. 3. Bro. 42. Dy. 60. pl. 19. Moor 824. 2. Bulſt. 187. Hob. 111. 8. Co. 20. b. 2. Inſt. 334 4. Inſt. 25. 1. Finch 58. 1. Mod. 146.

[d] P. 33. H. 6. 18. a. *Per Fauxes.* Bro. Expoſition del Terms 33. 33. H. 8. Bro. Parliament 86. Relation 35. B. N. C. § 228. Dy. 95. pl. 37. 1. And. 295. Hob 111. 222. Cro. C. 424. W. Jones 372. 4. Inſt. 25. Ld. Raym. 371.

[e] B. N. C. § 228. O. Bendl. 186. 2. Bulſt. 235.

[f] O. Bendl. 186. See the Pleadings Ante 39. *Wimbiſh v. Tailbois.* * 2. H. H. P. C. 192. 2. Hawk. P. C. 245.

[g] S. P. H. 33. H. 8. Bro. Parliament 87. B. N. C. § 229. Sty. 403. Cro. E. 603. Cro. C. 135. Hob. 310. 2 Leon. 186. 2. Bulſt. 51. 53. 174. 1. Sid. 245. Cart. 150. Godb. 121. 248. 1. Finch 47. 2. Finch 65. Doc. Pla. 340. 1. Haw. P. C. 264 2. Hawk. P. C. 246. 2. H. H. P. C. 172. T. Jones 49, 50. Strange 230. Vin. Abr. tit. Statut. E. 5. pl. 3. Vide ſupra (a). Poſt 84. *Per Cur. Contra* Touch. of Preced. 198, 199.

[h] 1. Finch 47. 2. Finch. 65.

ter. So here the Recital of the Day of the Parliament, which is miſrecited, ſhall vitiate the Matter. Further it ſeems to me, [a] that the Plaintiff ought to have recited the Number and Certainty of the Years, for it is to be conſidered that the Statute, without the Leaſe, is not the Cauſe of the Action, but the Leaſe and the Statute together. And then if the Leaſe is one of the chief Cauſes of the Action, the Certainty of it ought to be ſhewn. And as to what is ſaid, that the Plaintiff is a Stranger to the Leaſe, and therefore ſhall not be compelled to ſhew it, inaſmuch as he is not privy to it, nor can have knowledge of it, Sir, if he can take notice of Part, he may may take notice of the whole, and how in Reaſon can he take advantage of a Thing, if he does not know the Thing? Certainly he cannot, and if he knows the Thing, it is reaſonable that he ſhould ſhew it certainly. And this is not like the Caſes where a Man ſhall claim by a Deed to which he is a Stranger, without ſhewing it. For although he ſhall not be compelled to ſhew the Deed, becauſe it belongs to another, yet he ought to take certain notice of the Contents of it. So here he ought to take notice of the Certainty of the Leaſe, that is, of the Time of the Commencement and End of it, and the Number of the Years, and ſince this is not ſhewn, the Count is bad. Then as to the Matter, it ſeems to me, [b] that this Leaſe is out of the Danger of the Statute. For it is to be noted, that the Statute here is penal, becauſe it gives a greater Puniſhment for the Offence than the Law gave before. And then if the Leaſe is not within the Words of the Statute, it is out of the Danger of the Statute. And it ſeems to me to be out of the Words and Intent of the Statute alſo, for the Statute has three Branches; the firſt is, that *none ſhall bargain, buy, or ſell pretenced Rights or Titles of any Perſon or Perſons*; the ſecond is, concerning the *obtaining or taking ſuch Rights or Titles of any Perſon or Perſons*; the third is, concerning the *taking of a Promiſe of any Right or Title of any Perſon or Perſons*; but in what is it? Sir, it is, *in or to any Manors, Lands, Tenements, or Hereditaments*, ſo that theſe Words, *Manors, Lands, Tenements, or Hereditaments*, are referred to each of the three Sentences. Then the Statute is, that none ſhall bargain, or buy any pretenced Rights or Titles, in any Manors, Lands, Tenements, or Hereditaments. And what is the Senſe thereof? Sir, I ſay that the Meaning of it is, that he ſhall not bargain or buy *all* the Right or Title of any Perſon. For if he has bargained or bought no more than an Eſtate for Years, then he has not his Right or Title, but part of it only; for the Leſſor himſelf has the Right of the Freehold or Inheritance after the Leaſe for Years made. And, Sir, it ſhall be intended that the Leſſors here had a greater Eſtate than for Years, and it cannot be intended that they had a leſſer Eſtate than a Fee. For it can never be taken that the Leſſors had a particular Eſtate, becauſe the Commencement of it is not ſhewn. And then if *the whole* is not granted, *ergo* his Right or Title is not granted. And therefore the Statute of 1. *H.* 5. *cap.* 3. reciting, that *whereas ſome Perſons have forged falſe Deeds to change the Lands of the good Men of the Country, and to deſtroy and trouble the Poſſeſſions and Titles of the Liege Subjects of our Lord the King*, &c. provides and ordains that the Party grieved thereby ſhall have his Suit in ſuch Caſe: And there I apprehend the Law to be, [c] that if a Man forge and publiſh a falſe Deed of a Leaſe for Years, a Writ of Forger of falſe Deeds does not lie thereupon; for when the Statute ſaith, *to change the Lands, and to trouble the Poſſeſſion and Title*, this cannot be intended of an Eſtate for Years, ſo that a Leaſe for Years is not included in it; no more is it in our Caſe. And ſo the Statute of *Weſtminſter.* 1. *cap.* 25. ordains, that *no officer of the King, by themſelves nor by other, ſhall maintain Pleas, Suits, or Matters hanging in the King's Courts for Lands, Tenements, or other Things*, &c. [d] which Words, *(other Things)* include Leaſes for Years, but if there had been only the Words *(Lands and Tenements)* Leaſes for Years had not been included in them, which the Makers of the Statute well perceived, and therefore they put in the ſaid Words *(other Things.)* And ſo the Statute of *Weſtminſter* 2. *cap.* 49. ordains, that *none ſhall receive Lands or Tenements in Fee, by Gift, nor by Purchaſe, nor to Farm, nor to Champerty, nor otherwiſe*, &c. And there it is to be noted, that if the Statute had ſaid, *none ſhall receive Lands or Tenements* only, then a Receit of a Leaſe for Years had not been prohibited by thoſe Words, and therefore was it put in *(in Fee, nor to Farm)* for if a Term had been prohibited by the firſt Words, then the Words *(to Farm)* would have been put in the Statute in vain, which is never to be intended. Which Statutes argue in our Caſe that the Prohibition of our Statute againſt bargaining and buying &c. of Manors, Lands, Tenements, or Hereditaments, does not extend to a Term. And for another Cauſe we ought to conſtrue the Statute not to extend to a Term, for the Penalty is to forfeit the whole Value of the Lands, Tenements, or Hereditaments. And inaſmuch as it is ſo, it cannot be taken to be the Intention of the Legiſlature, that he ſhould forfeit the whole Value of the Inheritance for a Leaſe for Years, but that he ſhall forfeit the whole Value where the whole Eſtate is ſold or bought. For to ſay that he ſhall forfeit as much for taking of a Leaſe, as he ſhall forfeit for taking the whole Inheritance, is an Inequality of puniſhment, and inconſiſtent with the Diſcretion of thoſe who were aſſembled in that Parliament. Wherefore it ſeems to me, that upon the whole Matter this Caſe is out of the Danger of the Statute. Further it ſeems to me, that if a Leaſe for Years be within the Danger of the Statute, yet it ought [e] to be averred that it was a pretenced Right or Title, for every Eſtate, which is within the Words of the Statute, is not within the Danger of it. And therefore if a Man dies ſeized in Fee of certain Land, and a Stranger abates, to whom the Heir releaſes, and afterwards the Heir, notwithſtanding his Releaſe, claiming the Land by Deſcent makes a Leaſe for Years to a Stranger, now this Leaſe (admitting that a Leaſe for Years is within the

[a] Poſt 85. this exception overruled by all the Juſtices except *Cook*.

[b] Poſt 87. *Contra* by all the Juſtices.

[c] 9 Vin. Abr. tit. Forgery A. pl. 1. in Marg. Sed vide M. 9. Ed. 4. 37. b. *Per Moile.* Bro. Forger. 15.

[d] 2. Inſt. 209.

[e] Poſt 88. *Per Hales* J. 89. *Per Mountague* C. J. Sed 87. *Contra Per Cook* J.

the

is within the Penalty of the Statute) is within the Words of the Statute, becauſe his Anceſtor, by whom he claims, was in Poſſeſſion for a whole Year, and ſo out of the Penalty of the Statute by the very Words. But if it was averred to be a pretenced Right, then this Averment would help the Matter, and bring it within the Penalty of the Statute, as *in rei veritate* it is, and ſo the Averment and not the Words makes the whole Matter. So it ſeems here that it ought to be averred a pretenced Right or Title, wherefore in this Point the Declaration is defective. And thus it is too abundant, as well as defective, as is ſhewn before, and the *Medium* is the Perfection which is here wanting; for which Reaſon the Declaration is not good, and ſo the Plaintiff ought to be barred.

Whidon to the contrary. And as to the firſt Point, it is to be conſidered, that the Statute here is general, as is the Statute of 27. *H.* 8. concerning the Conveyance of the Poſſeſſion to Uſes, and needs not be recited, for without Recital the Party ſhall take Advantage of it; as if the Tenant vouch out of the Line, the Demandant ſhall demur without reciting the Statute of *Weſtminſter* 1. *cap.* 39. made thereupon. So it is a good Counterplea to ſay, that he who vouched was the firſt that abated, without reciting the ſaid Statute of *Weſtminſter* 1. And Executors of Executors ſhall have an Action of Account without reciting the Statute of 25. *Ed.* 3. *cap.* 5. made thereupon. For theſe Statutes are general, and the Judges are bound to take Notice of them. [a] And ſo the Book is in 5. *H.* 7. that an Information upon the Statute of *Liveries* is good, without reciting the Statute *cauſâ qua ſupra*. So this Statute in our Caſe needs not be recited, nor was it requiſite to ſhew the Day of the making of it. [b] And then the Miſrecital of that which is Surpluſage ſhall not vitiate the Matter. As if one as Executor brings an Action of Debt upon a Contract made to him, he ſhall not ſhew the Teſtament, for the naming himſelf Executor is Surpluſage. [c] So in Detinue againſt two as Executors, they ſhall not plead that another is Co-Executor with them, for they are not charged as Executors, but the Detinue is the Cauſe of the Action, and the naming them Executors is Surpluſage. [d] So if one by Deed by the Name of A. B. Heir to J. S. makes a Feoffment, at another Time he ſhall ſay that he is not his Heir, and ſhall not be eſtopped, for the naming himſelf Heir was not material. So the Recital of the Day of the Statute here is not material, and therefore the Miſrecital ſhall not hurt the Plaintiff. Then as to another Exception, which was laſt moved, *viz.* that he ought to have averred the Title or Right to be pretenced, Sir, this is [e] not neceſſary. [f] For the Statute declares and intends the Title to be pretenced, if neither he, nor his Anceſtors, nor they by whom they claim, have been in Poſſeſſion thereof, or of the Reverſion or Remainder thereof, nor taken the Rents and Profits thereof for one whole Year next before the Bargain, *&c.* And therefore a Man ſhall not aver that which is apparent by the Statute. [g] As where it is prohibited that none ſhall alien in Mortmain, if the Lord ſhews that he entered into the Land within the Year, becauſe his Tenant alien'd in Fee to Dean and Chapter, he ſhall not aver that this is Mortmain, becauſe upon the Matter it appears to be ſo. [h] So here, inaſmuch as in the Count it is declared that neither the Defendants, nor any of their Anceſtors, nor they, by whom the Defendants claimed, were in Poſſeſſion, Reverſion, or Remainder thereof, nor took the Profits by the Space of one whole Year before the Leaſe, it appears to be pretenced, and that in the true Meaning of the Word, as the Statute has conſtrued and taken it: and then an Averment of that which is apparent is not neceſſary, and ſo the Count is good notwithſtanding this Exception. And as to the other Exception, *viz.* that the Certainty of the Term ought to be ſhewn, Sir, this is not neceſſary, for the Term is only a Conveyance to the Sum which he demands, and thoſe Things which are only [i] Conveyance need not be ſo certainly recited as that which is Matter of Subſtance. [k] And therefore in a *Decies tantum* all the Record ſhall not be ſhewn in certain, but that Part of it only which conveys the Plaintiff to his Action. But if a Writ judicial iſſues out of a Record, he ought to recite the Record certainly; for the Record is the Effect and Subſtance, and not only Conveyance, as it is in our Caſe. Wherefore inaſmuch as the Leaſe here is but Conveyance and Inducement to the Debt, he ſhall not be compelled to ſhew the Certainty of it. Alſo he ſhall not ſhew the Certainty of it, becauſe he is a Stranger to it; and it may well be reſembled to the Caſe of ſhewing of Deeds. [l] And therefore in 35. *H.* 6. a Man brought an Action of Treſpaſs for Goods taken, the Defendant juſtified for that at the Time of the Treſpaſs ſuppoſed he was Mayor of the Town of C. and that the King had granted to the Defendant then being Mayor, and to the Commonalty, and to their Succeſſors, all the Goods of Perſons outlawed within the ſame Town, and ſhewed that the Plaintiff was outlawed, and ſo juſtified; and by the better Opinion the Plea is good without ſhewing the Letters Patents, becauſe now they belong to his Succeſſor, and not to him, and he is a Stranger to them now, altho' he was once privy. [m] So a Woman ſhall have a Writ of Dower of a Rent Charge granted to her Huſband, without ſhewing the Deed *cauſâ qua ſupra*. And ſo if a Man brings an Action of Debt againſt his Leſſee for Years for the Rent reſerved, he ſhall ſay that the Eſtate, which his Leſſor had, was upon Condition, and that ſuch an one entered for the Condition broken before the Time when the Rent is ſuppoſed to be in Arrear, Judgment *ſi actio*, and the Plea is good without ſhewing what the Condition was, or the Certainty of it, becauſe he was not privy to the Condition. So in our Caſe he is not privy to the Leaſe, and therefore he ſhall not ſhew the Certainty of it; and therefore the Count is good, notwithſtanding this Exception. Then as to the Matter, it ſeems that it is [n] within the Statute, for the Plaintiff has counted that the Defendants bargained, granted, and demiſed to Farm the Meſſuage, *&c.* And a Man may bargain Land as well for Years, as in Fee Simple, and ſome Men will be as ready to maintain to have a Leaſe for Years, as to have a Leaſe for Life, or a Fee Simple. And the Effect of the Statute would be in a great Meaſure taken away, if Leaſes for

E contra for the Plaintiff.

[a] H. 5. H. 7. 17. b. Fitz. Action ſur l'eſtatute 7. Bro. Surmiſe 27. Theol. Dig. lib. 10. cap. 28. §12. Doc. Pla. 335.

[b] 6. Mod. 41. 8. Mod. 377. *Turner v. Meſs.* Ante 30. 32. Poſt. 503.

[c] M. 21. H. 6. 1. a. *per Newton.*

[d] P. 33. H. 6. 19. b. *per Danby.*

[e] Poſt. 87. *per Cook* J. Sed *contra* 88. *per Hales* J. 89. *per Mountague* C. J.

[f] Wing. Max. reg. 152. pl. 23. Gouldſb. 101.

[g] Vin. Abr. tit. Averment B. pl. 23.

[h] Poſt. 87. *per Cock* J. Vin. Abr. tit. Averment B. pl. 22.

[i] Ante 65. (k) and the Books there cited.

[k] M. 34. H. 6. 4. b. *per Priſot.* Hardr. 2. Wing. Max. reg. 101. pl. 35.

[l] M. 35. H. 6. 8. Fitz. Monſtrans de faits 96. Bro. 11. P. 13. H. 7. 19. a. *per Fincux.* Heath's Max. 139. Wing. Max. reg. 151. pl. 23. Poſt 148. Vin. Abr. tit. Faits M. a. 28. pl. 1.

[m] Ante 46. (g) and the Books there cited.

[n] Dy. 74. pl. 20. 374. pl. 17. 4. Co. 26. a. Co. Litt. 369. a. 2. Rol. R. 169. Pulton 60. a. 1. Hawk. P. C. 264. Wing Max. reg. 59. pl. 43. Vin. Abr. tit. Maintenance fo. 155. Poſt. 83. *Per Saunders* 87. *Per Cur.*

Years are not prohibited as well as greater Eſtates. And inaſmuch as it is ſhewn that the Defendants were not in Poſſeſſion for a whole Year before, *&c.* it is fully ſhewn to be within the Words of the Statute. And if it was not within the Words, yet ſhould it be within the Equity of the Statute, for it is in equal Miſchief. [a] And the Statute ſhall be taken by Equity, inaſmuch as it is made in Suppreſſion of Vice, and great Miſchiefs, notwithſtanding it be penal againſt the Offenders. [b] As the Statute of *Marlbridge cap.* 6. ſaith, *If a Man enfeoffs his Son and Heir by Colluſion, &c.* yet if he enfeoffs his Brother or Siſter being his Heir Apparent, it is within the Equity of the Statute. And ſo an Action of Debt will lie againſt the Warden of the *Fleet* by Statute, but Damages ſhall be recovered againſt him by Equity, *&c.* And he put many other like Caſes upon the Equity of Statutes; for which Reaſons it ſeemed to him that the Action was maintainable.

[a] Poſt. 86. *contra* by all the Juſtices.

[b] 2. Inſt. 110. 6. Co. 76. a. 1. Rol. R. 107. 2. Brownl. 189. *per Coke* C. J. See Ante 59.

On the ſame Side.

Saunders, It appears to me in the ſame Light. This Demurrer is in Conſideration of two Things, viz. the Statute, and the Record in Court. And if the Statute is well weighed and conſidered, it will clear up ſeveral of the Doubts moved in the Record. And as to the Statute, it was made to remedy divers great Miſchiefs and Inconveniences, *viz.* Maintenance, Embracery, Champerty, and Subornation of Witneſſes, which are Enemies to the due Adminiſtration of Laws, and the Deſtruction of the Trial of the Truth of Iſſues, in which conſiſts the main Point, *viz.* the Adminiſtration of the Law. And it was alſo made for the Preſervation of Tranquility, Peace, and Concord; and as the wiſe *Solomon* ſaid of Wiſdom, ſo may it be ſaid of Concord, viz. *Omnia bona pariter cum illa:* and where Concord is exiled, there ſhe leaves in her Room Diſcord, Injuſtice, Trouble, Vexation, and all Iniquity in general, which are the Root and Foundation of Perjury and Oppreſſion; to avoid which this Statute was made, as appears by the Preamble of it. [c] And then I ſay, altho' the Statute gives a Penalty, yet ſeeing it is very beneficial to the public Weal, Things which are out of the Letter ſhall be taken within the Equity of it: And if the Words of it are obſcure, they ſhall, for the ſame Reaſon, be expounded moſt ſtrongly for the public Good. [d] For Words, which are no other than the Verberation of the Air, do not conſtitute the Statute, but are only the Image of it, and the Life of the Statute reſts in the Minds of the Expoſitors of the Words, that is, the Makers of the Statutes. And if they are diſperſed, ſo that their Minds cannot be known, then thoſe who may approach neareſt to their Minds ſhall conſtrue the Words, and theſe are the [e] Sages of the Law, whoſe Talents are exerciſed in the Study of ſuch Matters. And to prove this, the Statute of *Weſtminſter* 3. *cap.* 2. is, that if the Tenant alien part of his Land, he ſhall hold of the chief Lord for the ſame Part, *ſecundum quantitatem terræ* ſo ſold, and there the Sages of the Law have not expounded the Words *(ſecundum quantitatem terræ)* according to the Letter, but have interpreted them [f] *ſecundum valorem terræ:* for that was the Intent of the Makers of the Statute. [g] And ſo the Statute of *Weſtminſter* 2. *cap.* 1. concerning Lands entailed, ſaith, "And if a Fine be hereafter levied upon ſuch Lands *ipſo jure* "*ſit nullus*;" there the Sages of the Law did not take the Words according to their common Meaning, but they have taken the Words *(ipſo jure)* in this Light, that as to binding the Right, the Fine ſhall be null and void, but as to the Poſſeſſion, it works a Diſcontinuance; for this was the Intent of the Statute, and yet the Words are *ipſo jure ſit nullus*, which ſeems in common Underſtanding to mean, that in Law it ſhall be void. And ſo the Statute of *Glouceſter cap.* 3. is, *that the Heir of the Mother ſhall not be barred to demand the Inheritance of his Mother aliened by the Father whereof no Fine is levied in the King's Court*, yet if the Father only levy the Fine, he ſhall be received to demand the Land againſt the Fine, and ſo the Expoſitors of the Law have taken it; and they have expounded the Intent of the Statute to be, [h] whereof no *lawful* Fine is levied, to wit, by the Father and Mother. So that the Efficacy of Statutes conſiſts not only in the Words, but in the Intent thereof, which Intent ought always to be greatly conſidered, and made agreeable with the Words; and upon like Reaſon a penal Statute ſhall be extended by Equity, if the Intent of the Makers of it may be ſo perceived. And therefore the Statute called the *Statute Merchant*, binds all the Lands of the Conuſor to the Execution, and provides, that they ſhall be delivered to the Conuſee upon reaſonable Extent, and ſpeaks not a Word of the delivering them to the Extendors, if they extend them too high, [i] yet they ſhall be delivered to the Extendors in that Caſe by Equity of the Statute of *Acton Burnel* made before, which ſaith, "That the Goods appraized too high ſhall be delivered to the Appraizers themſelves at the Rate "they ſet upon them," which Statute is penal. [k] And if the Plaintiff is nonſuited in ſecond Deliverance, the Defendant ſhall recover Damages, as well as if he had barred the Plaintiff in Deed, becauſe Return irrepleviſable ſhall be awarded, and ſo by this Means the Plaintiff is barred, and this by the Equity of the Statute of 7. *H:* 8. *cap.* 4. and yet the Statute is penal, but becauſe the Expoſitors of the Statute took the Intent of the Makers of it to be ſuch, viz. to give Damages in Caſes of like Nature, that is the Reaſon thereof. And ſo the Intent of the Makers of Statutes directs the Words, and Equity of them; which Conſideration being applied to the Statute in our Caſe, and the Minds of the Makers of it being well perceived as well by the Preamble, as by the Body of the Act, will ſet aſide three Objections which have been made againſt the Plaintiff. The firſt is, that the Count is not good, becauſe it is not averred that it was a pretenced Right or Title, Sir, to this I ſay, that whatever Right it be which the Defendants bargained, whether pretenced or not, it is within the Danger of the Statute. For the two firſt Branches go to pretenced Rights or Titles; but the third is, viz. *or take Promiſe, Grant, or Covenant to have any Right or Title*, which Words *(any Right or Title)* are general, and include every Right, whether pretenced or not. But then it may be objected, that theſe Words extend only to him who takes a Promiſe, Grant, or

[c] Hardr. 208.

[d] Hardr. 208. Poſt. 46. *per Plowden.*

[e] That the Expoſition of Statutes belongs to the Judges, 33. H. 8. Bro. Trials 143. B. N. C. § 228. in a Note. 1. Mod. 146. Comb. 16. *per Pollexf. arguendo.*

[f] Hardr. 210. See Ante 10. (e) and the Books there cited.

[g] See Ante 57 (o) and the Books there cited.

[h] See Ante 57. (p) and the Books there cited.

[i] T. 21. Ed. 3. 21. Fitz. Extent. 14. Bro. Stat. Merch. 14. M. 15. H. 7. 15. b. *per Curiam.* 2. Brownl. 307. W. Jones 188. Hardr. 211. Wing. Max. reg. 57. pl. 57. reg. 58. pl. 3. Vin. Abr. tit. Statutes Merch. E. 11. fo. 537. Poſt. 127. 205.

[k] P. 17. H. 8. Bro. Return de Avers 37. Second Deliver. 15. B. N. C. § 4. P. 19. H. 8. 8. pl. 11. Bro. Damages 1. Vin. Abr. tit. Nonſuit P. pl. 2.

or Covenant, and not to him who makes the Promiſe, Grant or Covenant, as our Caſe is, Sir, as to this I ſay, that the Words after prove that it extends as well to them who part with the Eſtate, as to them who take the Eſtate. For the Words after are, *except ſuch Perſon as ſhall ſo bargain, ſell, give, grant, covenant, or promiſe the ſame, &c.* Which Words refer to him who parts with the Right or Title; and ſo are the Words afterwards, *upon Pain that he who ſhall make any ſuch Bargain, Sale, Promiſe, Covenant, or Grant, ſhall forfeit, &c.* which Words alſo refer to him who parts with the Thing; and ſo altho' the Words in the third Branch go to him who takes any Right or Title, they alſo reach to him who makes Promiſe or Grant to part with any Right or Title; wherefore this Word *(any)* is general, ſo that whether it be pretenced or not, it is within the Compaſs of the Words, as well as to the Bargainor, as the Buyer, *ergo* it ought not to be averred that it was a pretenced Right or Title. The ſecond Objection is, in that the Statute ſaith, *pretenced Rights or Titles*, ſo that the Statute is in the plural Number, and then one Right or Title is not within the Words, becauſe it is in the ſingular Number, and the Statute is in the plural; Sir, to this I anſwer, that if there were no more Words in the Statute than theſe in the plural Number, yet theſe do contain every ſingular Number, and eſpecially here, inaſmuch as the Words are *(any pretended Rights or Titles)* ſo that this Word *(any)* includes the ſingular [a] Number without Doubt. Alſo the third Branch is (*any Right or Title*), and therefore is in the ſingular Number, and our Caſe is within this Branch, as I have proved before. So that this Objection is ſufficiently anſwered. Then as to the other Objection, that he ought to have the *whole* Right, and that a Leaſe for Years is not within the Compaſs of the Statute, Sir, [b] this it not ſo. For (as hath been ſaid before) the Words of the third Branch are *(any Right or Title)*, which Word *(any)* contains *every* Right or Title, ſo that be the Right or Title in Fee, in Tail, for Life, or for Years, it is included in this Word *(any)*; for a Title for Years is a Title, and is included in the Word *(any.)* Therefore whether it be taken that the Defendants had a Fee, and made the Leaſe for Years, or that they had the Leaſe for Years and granted it over, it is all one: for a Leaſe for Years is within the Words (*any Right or Title*) and he that has a Leaſe for Years has a Right and Title for Years. And to prove that he has a Right, Eſtate, and Title, firſt *Bracton* ſaith, that he, who has a Leaſe for Years, *habet jus utendi et fruendi in alieno libero tenemento*; and ſo by his Opinion he has a *Right* in the Land. And to prove an *Eſtate* in the Termor, Sir, [c] a Remainder, by the Rule of Law, cannot be but where there is an Eſtate precedent; and if a Leaſe for Years be made, the Remainder in Fee, the Remainder is good, for the Leaſe for Years is an Eſtate in the Eye of the Law. And to prove that he has a *Title*, in 7. *H.* 7. *Brian* is of Opinion, that the Termor might [d] falſify a feint Recovery againſt his Leſſor by the Common Law, before the Statute of *Glouceſter*, in an *Ejectione Firmæ*, becauſe he was not Party, and had a Title. And ſo it ſeems the Leſſee for Years has a Title in the Land. From whence it appears to me, that the Leſſee for Years has a Right, Eſtate, and Title in the Land. [e] And in 9. *H.* 6. in the Caſe of *Maintenance* brought by *Thomas Rothwel*, it is ſaid, if I grant to one B. that if my Tenant for Term of Life dies during my Life, the ſaid B. ſhall have the Land for the Term of 10 Years, and afterwards my Tenant is impleaded, there B. may lawfully maintain, and yet he hath nothing, and it is doubtful whether he ſhall have his Term or not, nevertheleſs becauſe he hath Colour of Title he may well maintain. And then if the Leſſee for Years hath ſuch an Intereſt that by the Common Law he might maintain, there was great Need of a Remedy in the Caſe. And, Sir, this Statute has provided for it, wherein all other Statutes before were defective. For all other Statutes, which were made concerning Maintenance or Champerty, were made to avoid Maintenance pending the Suit only. And this Statute is made to avoid meddling in other's Affairs before any Suit or afterwards. And it was as neceſſary to provide a Remedy againſt him that had an Eſtate for Years, or a Promiſe thereof, as againſt one that had a greater Eſtate. [f] For he that has an Eſtate, or a Promiſe to have an Eſtate for 100 Years, will maintain, as well as he who has an Eſtate, or a Promiſe to have an Eſtate for Life, or in Tail, or in Fee, altho' the Eſtate of the former is not ſo great. And therefore if the Statute be deliberately weighed and conſidered, a Leaſe for Years will be taken within the Purview of it. And ſo it ſeems the Statute maintains the Count, and avoids the ſaid three Objections. Then as to the Count's being too abundant in reciting the Day, where it is not neceſſary, and miſreciting it, Sir, there is a Statute, [g] that no Count ſhall abate for want of Form, if it has Subſtance. And here there is Subſtance in the Count, *viz.* the Deed as it was made. And as to the Statute, you Judges have a private Knowledge, and a judicial Knowledge, and of your private Knowledge you cannot judge, but may uſe your Diſcretion. [h] As it appears in 7. *H.* 4. where the King demanded of *Gaſcoign* Juſtice, if he ſaw one in his Preſence kill J. S. and another that was innocent was indicted for it before him, and found guilty of the ſame Death, what he would do in ſuch Caſe? and he anſwered, that he would reſpite Judgment, becauſe he knew the Party was innocent, and make further Relation to his Majeſty to grant his Pardon, and the King was well pleaſed that the Law was ſo; but there he could not acquit him, and give Judgment of his own private Knowledge. But where you have a judicial Knowledge, there you may, and you may give Judgment according to it. [i] As if one is arraigned upon an Indictment for an Offence which is pardoned by Parliament, there you ought not to proceed in it, nor give Judgment, if he is found guilty, becauſe it appears to you by your judicial Knowledge that you ought not to arraign him. For the Judges ought to take Notice of Statutes, which appear to them judicially, altho' they are not pleaded, and then the Miſrecital of that, whereof the Judges ought to take Notice without Recital, is not material, and it is not like to

[a] Poſt. 86. *per Hales* J. Co. Litt. 369. a. Wing. Max. reg. 59. pl. 12. 41.

[b] See Ante 81. (n) and the Books there cited.

[c] 8. Co. 75. a. 1. Leon. 201. Vin. Abr. tit. Remainder W. pl. 6. Ante 35.

[d] That a Termor might falſify at the Common Law. P. 7. H. 7. 11. b. Fitz. Fauxer recov. 25. Bro. 25. H. 1. H. 7. 9. b. *per Brian.* H. 19. Ed. 3. Fitz. Aſſize 83. Reſceit 112. H. 21. Ed. 3. 1. a. That he might not, T. 30. H. 6. Fitz. Fauxet recov. 9. 43. Aſs. pl. 41. M. 9. Ed. 4. 38. a. *per Danby.* M. 14. H. 8. 4. pl. 4. T. 26. H. 8. 2. pl. 3. Kelw. 92. b. *per Road* C. J. F. N. B. 118. c. Co. Litt 46. a. 6. Co. 57. a. 9. Co. 135. 2. Inſt. 322. Vide Cro. E. 284. 718.

[e] H. 9. H 6. 64. a. b. *per Strange.* Bro. Maintenance 3. Wing. Max. reg. 113. pl. 10.

[f] Pulton. 60. a.

[g] Stat. 35. Ed 3. cap. 15, Dy. 299. pl. 32. 8. Co. 161. a. 2. Bulſt. 214. Doc. Pla. 84. Poſt. 190.

[h] P. 7. H. 4. 41. a. *per Tirwhit et Gaſcoign.* 1. Leon. 161.

[i] T. 26. H. 8 7. pl. 34. *per Fitzh.* Bro. Charter de pardon 1. Notice 1. Parliament 1. H. 11. H. 4. 41. pl. 8. Fitz. Corone 83. Bro. 30. Indictment 2. Dy. 28. pl. 188. 3. Inſt. 234. 2. Hawk. P. C. 307. § 61. H. P. C. 252.

to the Caſes of *Procedendo* and Protection where the Day is miſrecited, becauſe that is a private Record. [a] And ſo is the Caſe in 22. *Ed.* 4. where it was granted by Parliament, that *Aſhby* ſhould have a Writ with Proclamation out of the Chancery againſt one *Griffith*, to anſwer to divers Treſpaſſes which were contained in the Act of Parliament; and the Writ was abated by Award, becauſe it did not make Mention of the Treſpaſſes in certain, and ſo it varied from the Act; but that was a private Act, and therefore the Non-recital of the Treſpaſſes made the Writ bad, and ſo would a Miſrecital; but our Act is general, whereof the Judges are bound to take Notice without the ſhewing of the Party, and the Miſrecital of it is not material. And as to the Certainty of the Term, he ſhall not ſhew it, becauſe he is a Stranger to it. [b] As the Defendant ſhall plead Jointenancy on the Part of the Plaintiff, without ſhewing of whoſe Gift, and ſo the Tenant ſhall ſay, *que eſtate* J. S. hath in the Seigniory, without ſhewing how, becauſe he is a Stranger to it. So is the Plaintiff here a Stranger to the Term, for which Reaſons it ſeems to me that the Plaintiff ſhall recover.

[a] H. 22. Ed. 4. 47. pl. 14. Bro. Parlement 66. 74.

[b] See Ante 55. (a) and the Books there cited.

The Reſolution of the Court.

Afterwards the Juſtices argued two other Days in the ſame Term, and in ſome Things they agreed, which, to avoid Prolixity and Tediouſneſs to the Reader, I apprehend it is better to recite briefly all together, than to declare their ſeveral Arguments at Random. [c] Firſt, all the Juſtices, except *Mountague* Chief Juſtice, agreed that it was not neceſſary for the Plaintiff to recite the Statute, becauſe it is a general Statute, and extends to every one of the King's Subjects, and the Juſtices are bound to take Notice of it, without the Recital of the Party, and if he had ſhewn the Deed, and had concluded, *contrary to the Form of the Statute in ſuch Caſe provided*, it had been very well. And without reciting ſo much it had been good, as they held. But *Mountague* was of Opinion that he ought to recite the Statute certainly, for the Statute is the Ground of his Suit, and he ought always to recite the Subſtance of his Action. But all the four Juſtices agreed [d] that the Count ſhould abate for the Miſrecital of the Statute. [e] For Declarations ought to have two Things, the firſt is, certainty, in order that the Defendant may know what he is to anſwer to. [f] And therefore in 3. *Ed.* 4. a Man retained in Huſbandry brought an Action of Debt againſt a Prioreſs for his Salary, and declared that he was retained with her Predeceſſor, and did not ſhew what Perſon retained him, and by the better Opinion the Count ſhall abate for the Incertainty, for it might be that one, who had no Warrant, retained him to be with her Predeceſſor. [g] In ſome Caſes the Count and the Writ alſo are general without Certainty, as Aſſizes, but there the Certainty ought to be ſhewn by the Replication; and in ſome Caſes the Writ, and the Count, and the Replication alſo are incertain, but there the Certainty ſhall appear by the Verdict, as in a *Quare Impedit*, the Value of the Church does not appear in the Count, nor in the Replication, but it ſhall appear by the Verdict, for they ſhall aſſeſs double Damages, or Damages for half a Year, according to the Value of the Church, as the Caſe requires. So in a Writ of Ward, the Jury ſhall find whether the Heir be married or not, and they ſhall aſſeſs Damages for it, and yet no ſuch Matter appears either in the Count or in the Replication. So in Detinue, the Value of the Goods ſhall appear by the Verdict, and in many other Caſes. Wherefore Certainty ought always to appear to the Court: And if it is requiſite to be ſhewn in the Count, then it ought not to be omitted in it. The other Thing, which the Law requires in Counts, is [h] Truth, which ought to be joined to Certainty: and if it appears to the Court that Falſhood is uttered in the Room of Truth, the Party, who ſhews the ſame, has confounded and annoyed himſelf. [i] And therefore if a Man brings an Action Debt for two Payments at two Days, whereof one is not yet come by his own ſhewing, he has thereby abated his own Writ, becauſe he has ſhewn Falſhood. And ſo in our Caſe he has grounded his Action upon a Statute by him recited, where it appears to us judicially that there is no ſuch Statute made at that Time, and therefore he has abated his Count by his own ſhewing. [k] So in 20. *H.* 6. a Writ of Champerty was brought, which was not warranted by any Statute, and there *Newton* ſaid, that if the Party could not ſhew them ſome Statute by which it was warranted, that they would award that the Writ ſhould abate. And as to what has been ſaid, that it is not neceſſary to recite the Statute, and therefore the Miſrecital of it is not material, it ſeemed to them, that altho' it is not neceſſary, yet if he recites it, and there is no ſuch Statute, he has failed in Subſtance: for the Court will not aid him, nor take that which he intends otherwiſe than it is ſhewn. [l] And this Abundance in reciting more than is neceſſary ſhall hurt the Party oftentimes. [m] And therefore in 20. *H.* 6. a Man brought a Writ of Forger of falſe Deeds, and the Writ was *diverſa facta et munimenta*, *&c.* and he counted but of one Deed only, and by the Aſſent of all the Juſtices it was awarded that the Writ ſhould abate, becauſe the Writ was of *divers* Deeds, and he counted but of *one* Deed, and yet it might be ſaid, that the Writ, in that it contained divers Deeds, had Surpluſage, for it was not neceſſary to have contained more than *quoddam factum* in the ſingular Number, but yet ſuch Abundance there ſhall abate the Writ. And if one makes Title in Aſſize in his Plaint where it is not neceſſary, if it is unformal the whole ſhall abate, and yet there is Abundance, and more than he is compelled to do. So is it in the principal Caſe. And they put many other good Caſes on this Head, and for theſe Reaſons they were agreed *ut ſupra*. And whereas it was ſaid that the Defendants by the Demurrer have confeſſed ſuch an Act of Parliament as the Plaintiff has declared, they held that admitting the Demurrer to be a Confeſſion thereof, yet it ſhould not bind the Court, which is a third Perſon, as appears by the Caſe in [n] 10. *Ed.* 4. where in Treſpaſs for taking Cattle brought by the Leſſee for

[c] Theol. Dig. lib. 10. cap. 28. § 14.

[d] See Ante 79. (a) and (g) and the Books there cited.

[e] Bracton lib. 2. fo. 140. M. 3. H. 7. 11. b. 12. a. Bro. Count 58. Co. Litt. 303. a. 5. Co. 120. b. 2. Bulſt. 77. Cro. J. 588. Hardr. 2. 135. 2. Sid. 175. Jenk. 305. pl. 79. Hetl. 60. Doc. Pla. 83. 1. Finch 174. Heath's Max. 3. Vin. Abr. tit. Certainty in Pleadings *per totum*. Poſt. 121. 193. 202. 412.

[f] M. 3. Ed. 4. 21. pl. 16. Bro. Contract 36. Labourers 39. Hardr. 135. 2. Bulſt. 75, 77, 78. 3. Bulſt. 39. 303. Wing. Max reg. 162. pl. 71. Poſt. 202.

[g] Vin. Abr. tit. Replication K. pl. 7.

[h] Co. Litt. 303. a. Doc. Pla. 83. Jenk. 305. pl. 79.

[i] T. 9. H. 7. 3. b. *per Fineux*. M. 6. Ed. 4. 7. pl. 16. 11. Co. 45. a. 2. Bulſt. 75. 1. Rol. R. 34. Cro. J. 104. Kelw. 31. b. 1. Finch. 35. Vide 1. Saund. 385. Hob. 164. 178, 199.

[k] P. 20. H. 6. 30, 31. pl. 30. Fitz. Brief 86. Bro. Champerty 1.

[l] See Kelw. 8. a. *per Mordant*.

[m] T. 20. H. 6. 42. pl. 21. Fitz. Count 32. M. 35. H. 6. 37. b. Fitz. Forger 14. Bro. Amendment 15. Count 22. Faits 5. H. 7. Ed. 4. 31. 10. Co. 103. a. Doc. Pla. 95. 1. Finch 47. 2. Finch 65. Wing. Max. reg. 166. pl. 14. L. P. Kelw. 35. pl. 1. *Contra* H. 8. H. 6. 33. pl. 35. Fitz. Count 15. Bro. Forger 9. General Brief 6. See Theol. Dig. lib. 9. cap. 5. § 36. Vin. Abr. tit. Abatement. E. a. pl. 16.

[n] See Ante 66. (m)

Years, the Defendant ſaid that the Leſſor held of him by ſo much Rent, which was in arrear, for which he took the Cattle, and the Plaintiff replied *rien arere*, and there notwithſtanding the Defendant had admitted the Writ good, yet the Opinion of all the Juſtices was that the Court ought to abate the Writ, becauſe it appears that the Defendant was Lord, againſt whom the writ did not lie. [a] And ſo if the Defendant will admit an Appeal to be good, which is brought by a Woman of the Death of her Father, yet the Court ought to abate it, as it is there alſo holden, becauſe the [b] Statute ſays, *none ſhall be taken or impriſoned upon the Appeal of a Woman for the Death of any other than of her Huſband.* And ſo the Court, (which is the third Perſon) ſhall abate the Count, notwithſtanding the Admittance of the Party (if it was an Admittance of the Defendants here, as *in rei veritate* it is not.) [c] For a Demurrer is a Confeſſion of all Matters of Fact, but not of Matters of Law, for by the Demurrer they put themſelves upon the Judgment of the Court, and don't confeſs the Law to be againſt them. And here perhaps the Miſrecital of the Statute was the Cauſe of Demurrer, wherefore the Exception is good notwithſtanding. And as to what was ſaid at the Bar, that the King is Party here, and a Miſrecital ſhall not bind him, they held that the King has divers Prerogatives; and that he may [d] wave Iſſue and demur in Law, *et e contra*, and other Prerogatives he has, [e] but yet by Miſrecital, Miſuſer, or Miſconceiver of Action he ſhall be bound, and upon ſuch Matters his Writ ſhall abate, as well as in the Caſe of a common Perſon. And if the Law be ſo where the King is ſole Party, *a multo fortiore* ſhall it be ſo where [f] another is Party with him. And therefore notwithſtanding any of the ſaid Reaſons given againſt the Exception, they held that the Count ſhould abate.

Further, as to the Incertainty of the Leaſe, *Cook Juſtice* was of opinion, that the Plaintiff ought to ſhew the Certainy of it, becauſe without the Leaſe he has no Cauſe of Action. And although he is not privy to it, yet inaſmuch as it is the Effect of the Action, he ought to take notice of it at his Peril, as in Champerty he ought to ſhew the Certainty of the firſt Plea. *And ſo in a *Decies tantum* he ought to ſhew the Certainty of the Sum received. And in Treſpaſs, if the Defendant pleads that it is his Freehold, and the Plaintiff intitles himſelf by a Leaſe for Years made by him, if the Defendant will ſhew that the Plaintiff made a Feoffment, and that he entered for a Forfeiture, he ought to ſhew the Name of the Feoffee, and the Certainty of the Feoffment, though he is a Stranger to it. So here the Plaintiff ought to ſhew the Certainty of the Term. But all the other Juſtices were of opinion [g] againſt him: But the Caſes put by him are good Law. For in the Caſe of Champerty, he is privy to the Record; and in the Caſe of *Decies tantum*, he ought to ſhew the Certainty of the Money, becauſe he ſhall recover *ten times* as much, which he cannot do without ſhewing how much it is: And in the Caſe of the Forfeiture, the Leſſor in the Reverſion is privy to it. And ſo in all Caſes the privy ought to ſhew the Certainty. [h] And if the Heir will plead in Bar in a Writ of Dower, *Detinue of Evidences*, he ought to ſhew the Certainty of the Evidences, for he is privy to them, which he affirms to belong to him, [i] but if he ſaith, a Bag ſealed with Charters, this is good without ſhewing the Certainty of them, as it is held in 18. *H.* 8. by all the Court, except *Engleſield*, for the Bag ſealed is certain enough. And ſo in all other Caſes Privies ought to ſhew Certainty. But here the Plaintiff is a Stranger, and therefore he cannot be ſuppoſed to have Knowledge of it. And therefore an Indictment of Murder [k] *de quodam ignoto*, or of ſtealing [l] the Goods *cujuſdam ignoti*, is good, where the Perſon killed or robbed is unknown. So here the Leaſe might be made privately, ſo that the Plaintiff, being a Stranger, could not by Intendment have knowledge thereof. Alſo the ſhewing of the Commencement and the End of the Years is to no other Purpoſe but only to ſhew the Length or Shortneſs of the Time, which is not material here. For if it be for an hour, or for 100 Years, it is all one. As if Leſſee for Life is charged that he ſhall not alien in Fee, if he alien in Tail only it ſhall be a Forfeiture: So here whether it be for a ſhort Time, or for a long Time, it is all one. But if he ſhould recover according to the Value of the Leaſe, then the Commencement and the End of it ought to be ſhewn: As in a *Decies tantum*, the Certainty of the Money ought to be ſhewn, for he ſhall recover *ten times* the Value and Quantity of it. But here it is not neceſſary to ſhew more than the Quality of the Leaſe; and that was their Opinion as to this Point.

Further, whereas it was moved at the Bar, that it appears in the Declaration that the Bargain and Leaſe for Years was made of one Meſſuage called *Genett*'s, and eleven Acres of Land to the ſame Meſſuage appertaining, and that as to theſe eleven Acres of Land the Count is not good, nor may the Plaintiff recover the Value of them, becauſe Land may not be appurtenant to a Meſſuage, as to this Exception, all the Juſtices except *Cook* (who did not ſpeak to this Point, but omitted it in his Argument) agreed in Opinion [m], that Land may not be appurtenant to a Meſſuage, and this was a Ground in the Law, as the Lord *Mountague* ſaid. But yet they all held that the Declaration, as to this Point, was good enough. For the Quantity of the Land is expreſſed, *viz.* eleven Acres; and ſo theſe Words *(appertaining to the ſaid Meſſuage)* are void, becauſe Land may not be appurtenant to a Meſſuage, and therefore it is the ſame as if theſe Words *(appertaining to the ſaid Meſſuage)* had been omitted, and then the Declaration is, one Meſſuage, and eleven Acres of Land, in which Caſe it is good. And ſo the three Juſtices held the Declaration good, as to this Point. And the Lord *Mountague* ſaid, [n] that the ſaid Words *(appertaining to the ſaid Meſſuage)* are Matter to be given in Evidence to prove what eleven Acres the Plaintiff means. [o] As if I have two Manors of *D.* and I levy a Fine of the Manor of *D.* Circumſtances may be given in Evidence to prove what Manor I intend, as appears in 12. *H.* 7. And the Phraſe made uſe of in ſpeaking is of great help to find

[a] Ante 66. (n).
[b] Mag. Cha. cap. 34.
[c] See ante 13. (f), and the Books there cited.
[d] P. 13. Ed. 4. 8. a. Fitz. Prerog. 8. Bro. 69.
[e] P. 14. Ed. 4, 5. b. M. 28. H. 6. 2. pl. 8. Bro. Prerog. 3. 5 Co. 104. a. Lit. R. 115. Hardr. 83. 455. Vaugh. 65. Pollexf. Arg. in Quo. W. 74. 1. Finch 184. Heath's Max. 173. Poſt 236. 322.
[f] Pollexf. Arg. in Quo W. 74. Vide B. N. C. § 128, 129. Heath's Max. 173.
[g] 1. Hawk. P. C. 261. S. P. Accord. with the Opinions of the Juſtices here, 2. Leon. 39. 121. Godb. 85. 1. Hawk. P. C. 264. Dy. 74. pl. 20. Doc. Pla. 334.
[h] M. 2. H. 7. 6. pl. 19. Fitz. Dower 17. Bro. 67. Dy. 230. pl. 53. 9. Co. 18. a. 110. a. Co. Litt. 285. b. Perk. § 356. Godb. 370. 2. Leon. 38. Latch 195. 4. Mod. 137. Doc. Pla. 150. 2. Bac. Abr. 113.
[i] M. 18. H. 8. 1. pl. 3. Bro. Dower. 1. H. 41. Ed. 3. 2. a. *Per Thorp.* Vin. Abr. tit. Dower L. pl. 9.
[k] M. 1. Ed. 3. 25. pl. 26. Fitz. Corone 159. 22. Aſſ. pl. 94. Fitz. Corone 183. Bro. Appeal 61. Corone 91. 1. Aſs. pl. 7. Bro. Corone 65. M. 9. H. 6. 45. b. *Per Martin.* Pulton 175. b. Dy. 99. pl. 61. 285. pl. 38. Kelw. 25. b. 2. Leon. 121. 2. H. H. P. C. 181. 2. Hawk. P. C. 232. S. P. C. 95. g. 3. Bac. Abr. 104. Poſt 129.
[l] P. 9. Ed. 4. 1. b. *Per Cateſby.* Bro. Indictment 6. P. 21. H. 6. Fitz. Indictment 12. 18. Aſs. pl. 15. Bro. Indictment 11. S. P. C. 95. g. 2. H. H. P. C. 181. 2. Hawk. P. C. 232. 3. Bac. Abr. 104. Pulton 175. b. Dalt. Juſt. cap. 184. Dy. 99. pl. 61. 285 pl. 38. Kelw. 25. b. 4. Mod. 101. Poſt 129.
[m] 23. H. 8. Bro. Feoffments 53. B. N. C. § 160. Theol. Dig. lib. 8. cap. 1. § 7. 1. And. 77. Godb. 352. 2. Show. 438. 1. Finch. 97. Poſt 170. 11. Comyns 408.

[n] Wing. Max. reg. 8. pl. 7. vide 2. Leon. 186. [o] M. 12. H. 7. 7. a. b. Bro. Fines Levies 28. 88. Noſme 63. 2. Rol. Abr. 676. pl. See L. P. 5. Co. 68. b. Lutwy. 737. Comb. 155. 6. Mod. 235. Vin. Abr. tit. Fine O 6. pl. 2. tit. Grants H. 4. pl. 2.

out the Meaning of Perſons. [a] As if I give you a Cup of Wine, you ſhall not have the Cup, but if I give you a Hogſhead of Wine, you ſhall have the Hogſhead, for the Intent appears from the Manner of the Expreſſion. So the ſaid Words (*appertaining*, &c.) declare what eleven Acres were meant. And *Hales* ſaid, [b] that a Garden may contain eleven Acres in Quantity, and by this ſpecial Way it may be Parcel of a Meſſuage.

Further it was moved by *Cook*, [c] that the Declaration ſhould be double becauſe it is contained in it, that the Defendants had *bargained*, *granted*, *and demiſed to Farm*, ſo that there are three Words to which they ought to anſwer, where *in rei veritate* one had been ſufficient; [d] as in Debt upon an Obligation for the Non-performance of divers Covenants ſhewn to be broken, is double, for one Covenant broken makes a Forfeiture of the whole Obligation. So here the Plea is double, *quod Mountague conceſſit*. [e] For if the Heir in Detinue will declare that his Father (now dead) delivered the Deed to be re-delivered to him and his Heirs, and that he is his Heir, and ſhews alſo that he has the Land by Deſcent, it ſhall be double; ſo is it here. But *Brown* and *Hales* were of a contrary Opinion as to this Point. For they ſaid, that by the three Words the Offence is declared to be the greater. [f] And in falſe Impriſonment a Man may ſhew 20 Cauſes in Juſtification of the Impriſonment, and it ſhall not be double, for the Number of Things increaſes the offence. And the Statute of 8. *H.* 6. is, *if any Man ouſt another with Force, or enter peaceably and hold with Force, that then, &c.* [g] And in 3. *Ed.* 4. a Man brought a Writ of forcible Entry upon both the Points, and Exception was taken to it, becauſe the Statute is in the disjunctive, ſo that he ought to have brought his Action upon one Point only, but there the Writ was awarded good, becauſe if the Makers of the Statute had a mind that a Man ſhould be puniſhed, who offended in one Point, *a multo fortiore* their Intent was to puniſh thoſe who offended in both Points. So here if the Intent of the Makers of the Statute was, that he, who offended in one Word ſhould forfeit the Value of the Land, *a multo fortiore* he who offends in three of the Words ſhall forfeit the Value of the Land, and then the ſhewing of it is not double, eſpecially where they all tend to one Effect and Meaning. And ſo as to this Point, two of the Juſtices were againſt the other two.

Further, whereas the Record ſaith that the Parliament was holden the ſaid 28th Day of *April*, *Hales* Juſtice was of opinion that the Count was bad, becauſe no 28th Day of *April* is mentioned before, and then when he ſaith, the *ſaid* 28th Day of *April*, it has Relation to a Thing, where there is none ſuch. But the Lord *Mountague* was againſt him in this Point, for when he ſaith, the *ſaid* 28th Day of *&c.* where *in rei veritate* no ſuch Day was mentioned before, the Word (*ſaid*) is Nugation and Abundance: And inaſmuch as it appears by the Record, that it can not be referred to any Thing, becauſe no ſuch Thing is mentioned before, it follows that it is no more than a void and vain Recital and Abundance, which leaves the Matter in the ſame Caſe as if he had ſaid *the 28th Day of April, in the Year*, &c. omitting the Word (*ſaid.*)

Then as to the Statute, all the Juſtices agreed, [h] that it ſhould not be taken by Equity, for it is a penal Statute; and although it is made in Avoidance of Perjury and Oppreſſion, yet it ſhall not be extended by Equity; no more than Statutes that give Attaints, [i] which, though they were provided to avoid Perjury, yet ſhall not they be extended by Equity, as it is adjudged in divers Books. And by the Statute of 25. *Ed.* 3. it is declared, that if a Servant kills his Maſter it is Treaſon. [k] And in 19. *H.* 6. one was arraigned upon an Indictment for killing the Wife of his Maſter, and he confeſſed it, and there it came in queſtion whether he ſhould be drawn, or hanged only, whereupon it is to be ſeen whether it be Treaſon or not, and there it is adjudged, by the Advice of all the Juſtices of the one Bench and of the other, that he ſhould be drawn and hanged, becauſe it was Treaſon; and there it is not taken within the Equity of the Statute, which ſpeaks only of killing his Maſter, but it is rather within the Words of the Statute, for Maſter and Miſtreſs are the ſame Thing in Effect. So that there the taking it to be Treaſon is a Declaration of the Words of the Statute, rather than an equitable Conſtruction of it. And this Caſe was put by *Cook* Juſtice. Therefore Statutes, which are made to puniſh great Offences worthy of Puniſhment, and which increaſe the Severity of the Puniſhment inflicted by the common Law, are penal, and ſhall not be extended by Equity, though the Words of them may be conſtrued beneficially according to the [l] Intent of the Makers thereof; but Things, which don't come within the Words, ſhall not be taken by Equity. And this was the Opinion of all the Juſtices in this Point.

Further, as to what was moved, that the Statute ſpeaks of pretenced Rights and Titles in the plural Number; *Hales* (for the other Juſtices did not ſpeak to this Point) was of opinion, that a [m] pretenced Right and Title in the ſingular Number is within the Penalty of the Statute: for the plural Number contains in itſelf the ſingular Number and more. [n] And therefore the Statute of 1. *H.* 5. *cap.* 3. recites, *that whereas ſome People do of late uſe to forge divers falſe Deeds and Muniments*, &c. therefore it ordains, that the Party thereby grieved ſhall have his Suit in that Caſe, *&c.* here the Statute ſpeaks of falſe Deeds in the plural Number, yet if a Man forge one falſe Deed, he ſhall be puniſhed by the Statute, as it is held in many Books. So the Statute of 5. *R.* 2. *cap.* 7. ordains, "that none ſhall make entry into any Lands and Tenements, except "in caſe where Entry is given by Law," yet if a Man enters into one Tenement, he ſhall be puniſhed, notwithſtanding the Statute is in the plural Number, as in divers Books it is holden. So that the plural Number contains in it the ſingular Number. And if *one* Right or Title ſhould not be contained here, the Effect of the Statute would be ſet aſide, and alſo *every* Right or Title is

[a] M. 27. H. 8. 27. b. *Per Fitzh.* Wing. Max. reg. 8. pl. 7. reg. 203. pl. 13.
[b] Theol. Dig. lib. 8. cap. 1. §9.
[c] See Dy. 74. pl. 20.
[d] H. 11. Ed. 4. 10. a. *Per Fairfax.* Fitz. Double Plea. 54. Bro. 101. M. 5. H. 7. 7. pl. 14. *in fine.* M. 3. H. 6. 8. pl. 7. T. 9. H. 6. 18. pl. 11. Doc. Pla. 144, 145. Cro. C. 176. *Per Cur.* Paſch. 32. Geo. 2. B. R. *Cornwallis v. Seagrave.* S. P. *arguendo*, and agreed *Per Ld. Manſfield* C. J. and a Difference there taken (at Common Law) between an Action of Covenant, and Debt for the Non-performance of Covenants. But in this laſt Caſe the Common Law is now altered by the *Stat.* 8 & 9. *Will.* 3. *cap.* 11. whereby the Plaintiff ſhall not be confined to aſſign any one particular Breach, but may aſſign as many as he will, and it ſhall not be double, as it was there alſo ſaid at the Bar.
[e] H. 9. H. 6. 58. pl. 4. Fitz. Detinue 7. Bro. 7. Bailment 2. M. 19 H. 6. 41. pl. 84. Fitz. Count 29. Bro. Charters de terres 31.
[f] M. 7. Ed. 4. 20. a. *Per Markham.* Bro. Faux Impriſonm. 22. Fitz. Double Plea 52. Bro. 150. Doc. Pla. 145. 2. H. H. P. C. 81. 2. Hawk. P. C. 77. Bridgm. 62. 1. Finch 182. 2. Finch 394.
[g] M. 3. Ed. 4. 19 & 24. Fitz. Entry 33. Bro. Forcible Entry 15
[h] S. P. 2. Brownl. 112.
[i] H. 14. H. 7. 13. b. 14. a. Bro. Attaint. 42. 2. Brownl. 112.
[k] M. 19. H. 6. 47. pl. 102 Fitz. Corone 7. Bro. Treaſon 8. Vide S. P. C. 10. m. 1. H. H. P. C. 380. 1. Hawk. P. C. 88. 11. Co. 34. b. 3. Inſt. 20. 2. Brownl. 110. 111. 116.
[l] S. P. That penal Statutes ſhall be taken liberally according to the Intent 11. Co. 34. a. b. Cro. C. 71. Ante 10. See Vin. Abr. tit. Statutes E. 6. pl. 95. *in notis.*
[m] S. P. Co. Litt. 369. a.
[n] Wing. Max. reg. 59. pl. 42.

is contained in the laſt Branch by this Word *(any)*. And therefore for this Reaſon, a Right or Title in the ſingular Number is within the Statute.

Further, as to the Point which was moved, *viz.* whether a Leaſe for Years be within the Danger of the Statute, all the Juſtices agreed clearly [a] that a Leaſe or Promiſe for Years made contrary to the Form of the Statute was within the Danger of the Statute, as well as an Eſtate for Life, in Tail, or in Fee. For the Scope and Deſign of the Statute was to root out Maintenance, and Bargains or Promiſes of Titles. And if it ſhould be lawful to make a Leaſe or Promiſe or Bargain for one Year, by the ſame Reaſon it would be lawful to make it for two Years, and ſo for ten or an hundred Years, and ſome Men will maintain as much for ſuch an Eſtate, as for an Eſtate for Life, or in a Manner for an Eſtate in Tail, or in Fee. And the Intent of the Makers of the Statute was utterly to avoid ſuch Maintenance and buying of Titles, and the Words ſhall be conſtrued moſt favourably to ſatisfy the Intent of the Makers. And the Words here are not, that none ſhall bargain, *&c. the* Right or Title, for then there would be more Colour to ſay, that the Word *(the)* contains *(all)*; but the Words are, *(any* Right or Title) in which Caſe, if he has a Fee, and promiſes a Leaſe for Years, this is a Right or Title, which is contained in the Word *(any)*. And under this Word *(any)* the leſſer Eſtate ſhall be contained in the greater, as the leſſer Part ſhall be in the greater. And therefore the Statute of 23. *H.* 6. *cap.* 10. ordains, *that no Sheriff ſhall let to Farm in any manner his County*, &c. by theſe Words it is contained, that he ſhall not let to Farm any [b] Part of his County, for the leſs is contained in the greater. And as to the Caſe put, *viz.* that the Statute of *Mortmain* ordains, that *no religious Perſon ſhall buy any Lands or Tenements*, &c. which is intended of the whole Eſtate, *viz.* the Fee, and a Leaſe for Years is not within the Danger of the ſame Statute; and alſo as to the Caſe put, that the Statute *of Pernor of Profits* grants that *the Diſſeizees ſhall have an Action againſt the Diſſeizors, or their Feoffees, ſo that they take the Profits at the Time of the Writ purchaſed, notwithſtanding a Feoffment or Gift*, &c. but yet, [c] if the Diſſeizor or his Feoffee had no other Eſtate than a Uſe for Years, where the Freehold of the Uſe was in another, and thus took the Profits, an Action real would not lie againſt him, becauſe an Eſtate for Years ſhall be out of the Statute, where it is not expreſsly mentioned; As to theſe Caſes, they are not at all like the Caſe here, becauſe in the one Caſe, if the Reverſion remains as it was before, then the Services, and Ward, Marriage, and Relief ſhall belong to the Lord, and in ſuch Caſe the Leaſe for Years is out of the Intent of the Statute. And in the other Caſe, he, who takes the Profits, ought to have a Freehold in the Uſe, to make an Action real lie againſt him; for an Action real does not lie but againſt him that has a Freehold, and no other Intent than this can be ſuppoſed in the Act, which gives an Action againſt Pernors of the Profits. But our Caſe here is grounded upon another Purpoſe, to wit, to avoid buying of Titles and Maintenance, which Things are practiſed as well for a Leaſe for Years, as other Eſtate, and therefore a Leaſe for Years is included within the more extenſive Words, and within the Meaning of the Statute. And as to what was ſaid, that a Leaſe for Years cannot be taken within the Intent of the Makers of the Statute, becauſe of the Largeneſs of the Penalty, which creates a Forfeiture of the Value of the whole Land, as to this, they took it, that the greater the Penalty was, the ſooner People would avoid the Danger of the Statute: And the Words being as they are, it cannot be intended but they meant the Forfeiture of the whole Value, as well for a Leaſe, as for the Fee. For which Reaſon, it ſeemed to all the Juſtices, that if the Leaſe here be well ſhewn to be made contrary to the Form of the Statute, it ſhall be within the Danger of the Statute, as well as any other Eſtate, and that the Defendants ſhall forfeit the whole Value of the Eſtate in Fee for it.

Further, as to the Statute, the Juſtices varied in the Expoſition of it. *Cook* Juſtice. It ſeems to me, that the Leaſe for Years here is within the Statute, and that it is not neceſſary to aver [d] it to be a pretenced Right, for inaſmuch as it is ſhewn by the Count, that neither the Defendants themſelves, nor any of their Anceſtors, nor they by whom the Defendants claim, were in poſſeſſion of the Lands, nor of the Reverſion or Remainder thereof, nor took the Rents or Profits thereof by the Space of one Year, *&c. ergo* it is pretenced: for the Statute makes the Right of him, who hath not been ſo in poſſeſſion, *&c.* pretenced, and that is the Intent of the Statute, and then to aver that, which by the Statute and Declaration is apparent, is unneceſſary: For the Body of the Matter ſhews that it is a pretenced Right; [e] as if it is pleaded, that the Leſſee ſurrendered to the Grantee of the Reverſion, it is not neceſſary to plead Attornment, for that is an Attornment as well as Surrender; ſo here the ſhewing that they have not been in poſſeſſion, nor, *&c. ut ſupra*, ſhews that it is a pretenced Right, and ſuch as the Statute intends. And alſo theſe Words *(any Right or Title)* include our Caſe, for he, that makes a Leaſe for Years, claims a Right and Title. So that it ſeems to me, the Leaſe here is ſhewn to be made contrary to the Form of the Statute. — *Hales* Juſtice. I am of a contrary Opinion in this Point, *viz.* that the Plaintiff has not ſhewn the Leaſe to be made contrary to the Form of the Statute. For every Leaſe for Years made where the Leſſor has not been in poſſeſſion, nor received the Profits for a Year, according to the Statute, is not within the Danger of the Statute. [f] For if one recovers by ſeveral Writs of *Formedon* Lands in divers Counties, and many Miles diſtant, he cannot very well occupy all this in his Hands, but he may leaſe it out well enough, and ſuch a Leaſe ſhall be out of the Penalty of the Statute, although it be made within the Year. For it is reaſonable that men ſhould do to others, as they themſelves would have others do to them. And therefore it is reaſonable that a Man may leaſe his Land, to which he comes lawfully, although he has not been in Poſſeſſion for the Space of a Year. And to ſay that the Intent of the Statute was

[a] See ante 81. (n), and the Books there cited.

[b] S. P. debated M. 21. H. 7. 36. 37. S. C. M. 20. H. 7. 12, 13. Accord, *Per Fineux. Contra* 2. Brownl. 112. Poſt 124.

[c] S. P. Theol. Dig. lib. 16. cap. 9. § 3. 23.

[d] See ante 81. (e) and (h).

[e] H. 13. H. 7. 15. a. *Per Keble.*

[f] Pulton 60. a. Moor 655. 1. Hawk. P. C. 265. Same Law of a Diſſeizor obtaining the Releaſe of the Diſſeizee, or a Mortgagor redeeming his Land. Bro. Maintenance 38. B. N. C. § 427. Co. Litt. 369. a.

was to reſtrain ſuch Leaſes, would be too hard an Expoſition, and contrary to all Reaſon and Equity, but if he was out of poſſeſſion, then there is good Reaſon to reſtrain ſuch Promiſes or Bargains, for the Law preſumes they cannot be made without an Intent of Maintenance. And if the Statute had ſtopped before the ſaid Clauſe *(except, &c.)* then it had reſtrained all Perſons from making any Bargain, Leaſe, or Promiſe; but the Clauſe, *(except, &c.)* and that which comes after it, was made for the Advantage of Leſſees, and thoſe who ſhould take Eſtates. As if there was a Prohibition that none ſhould go to *Paul*'s, this reſtrains all, but if afterwards is ſays, except he ſhall firſt pay to the Mayor of *London* 20 *s.* this ſhall be for the Benefit of him that ſhall go there. So here the *(except, &c.)* and that which comes after it, is for the Advantage of thoſe who take the Eſtate. But to conſtrue it in ſuch Light, that no Man ſhall let his Land until he has been firſt in poſſeſſion for a Year without Interruption, would be againſt all Reaſon. But the Intent was that a Man ſhould not demiſe or bargain his Land to any for Maintenance, except he have been in poſſeſſion for a Year. So that here inaſmuch as the Plaintiff has not averred the Bargain and Leaſe to be made for Maintenance, he has not ſhewn the Caſe to be within the Danger of the Statute: For this was the Point of the Statute. And therefore the Statute of *Forger of falſe Deeds* is in the Copulative, *viz.* for forging and publiſhing; [a] yet if he publiſh it only, it is within the Statute, but there it ought to be averred that he publiſhed the ſame to trouble the Poſſeſſion and Title of the Plaintiff, for that is the Point of the Statute; ſo here the Leaſe ought to be averred for Maintenance, that being the Point of our Statute. And becauſe it is not ſo, it is not ſhewn to be within the Danger of the Statute. ——— *Mountague* Chief Juſtice. It ſeems to me that the Leaſe here is not ſhewn to be within the Danger of the Statute. But before I enter into the Conſideration of the Statute, I will lay down what is a pretenced Right or Title. And it ſeems to me that a pretenced Right or Title is but in one Caſe, and that is, [b] where one is in poſſeſſion of Lands or Tenements, and another, that is out of poſſeſſion, claims them, or ſues for them, that is a pretenced Right or Title. For if one has Right or Title to Land, and afterwards he comes to the Poſſeſſion of the ſame Land, his Right or Title is extinct or ſuſpended in the Land, for during the Time that he has the Land, it is not *in eſſe*, *ergo* during that Time it cannot be termed a Right or Title. And that ſuch is a pretenced Right or Title, is proved by the Statute itſelf, which has a *Proviſo* in it, that *it ſhall be lawful for any one, being in lawful Poſſeſſion, to buy or obtain the pretenced Right or Title of any Perſon or Perſons to ſuch Lands, &c.* ſo that when the Statute ſaith, *he in the Poſſeſſion may buy the pretenced Right of any other*, it declares my Definition to be true. Further, I take the Statute, [c] that if he, who is out of poſſeſſion, bargains or ſells, or makes any Covenant or Promiſe to part with the Land after he ſhall have obtained the Poſſeſſion of it, this ſhall be within the Danger of the Statute, whether he, who ſo bargains, ſells, or promiſes, have a good and true Right or Title, or not; and in this Point the Statute has not altered the Law, for the Common Law before this Statute was, that he, who was out of poſſeſſion, might not bargain, grant, or let his Right or Title, and if he had done it, it ſhould have been void. Then this Statute was made in Affirmance of the Common Law, and not in Alteration of it, and all that the Statute has done is, it has added a greater Penalty to that which was contrary to the Common Law before, *viz.* that a Man ſhall forfeit the Value of the Thing bargained or promiſed, *&c.* and to avoid ſuch Bargains or Promiſes, where a Man is out of poſſeſſion, is the only Point which the Statute here remedies. For to conſtrue the Statute, that he, who is in poſſeſſion, ſhall not make a Leaſe, Bargain, or Feoffment, except he has been in poſſeſſion, or taken the Profits for a Year before, would be a hard Law, and contrary to all Reaſon and Equity: and ſuch an Expoſition of the Statute was never intended by the Makers of it. For it was always lawful and agreeable with good Reaſon and Policy to permit him, who was in Poſſeſſion, to make Feoffments, Bargains, and Leaſes of his Land, altho' he had not been in Poſſeſſion but a Day before. [d] And that, which Law and Reaſon allows, ſhall be taken to be in Force againſt the Words of Statutes. And therefore the Statute of *Articuli ſuper Chartas cap.* 11. ordains, that *no Officer, nor any other, (for to have Part of the Thing in Plea) ſhall take upon him the Buſineſs that is in Suit*; [e] yet if the Tenant, pending a *Præcipe quod reddat* againſt him, infeoffs his Son and Heir apparent, this ſhall be out of the Danger of the Statute, as it is taken in 6. *Ed.* 3. for the Son could not be ſaid a Maintainer to the Father, but on the contrary he is bound to aid his Father as often as he can. So that there they would not expound the Statute contrary to what the Common Law and common Reaſon allowed, notwithſtanding the Words were againſt it. [f] In like manner the Statute of *Weſtminſter* 2. *cap.* 12. ordains, that in an Appeal *it ſhall be enquired, who were the Abbettors*, and that *they ſhall render Damages to the Party acquitted*; yet if the Heir abett his Mother to bring the Appeal, although he is within the Words of the Statute, he ſhall be out of the Danger of it; and ſo *Herle* took it in the ſaid Caſe of 6. *Ed.* 3. For Common Law and Reaſon ſay, that he ſhall aid his Mother, and abett her. So there is a Statute which inflicts Puniſhment *Malefactoribus* [g] *in Parcis*, yet if he does [h] no other Treſpaſs in a Park than Hunting, he is out of the Danger of the Statute, although he is within the Words, and that by the Intent of the Statute. So here in our Caſe, if it was fully within the Danger of the Words of the Statute, which are, that a Man ſhall not alien nor make a Leaſe except he has been in Poſſeſſion for a Year before, yet we are not to intend that he, who makes a Leaſe *bonâ fide* and without ill Deſign of any Land whereof he has not been in Poſſeſſion for ſo long a Time, ſhall be within the Penalty of the Statute, becauſe good Reaſon and Equity allows ſuch an one do it. But, Sir, it ſeems to me that the Words ought to receive ſuch Conſtruction as ſhall not claſh with common Reaſon, and that is in this Manner, *viz. except ſuch Perſon or Perſons, &c.*

[a] T. 9. H. 6. 26. a. *Per Babington et Paſton.* Fitz. Forger 4. Bro. 1. M. 20. H. 6. 11. pl. 22. *dubitatur Per Newton.* Fitz. Forger 7. Vide M. 9. H. 6. 50. pl. 33. Fitz. ibid. 3.

[b] Pulton 60. a.

[c] Pulton 60. a.

[d] Vin. Abr. tit Statutes E. 6. pl. 30. Ante 13.

[e] T. 6. Ed. 3. 33. pl. 19. Fitz. Champerty 10. Bro. 11. F. N. B. 172. h. 2. Inſt. 564. Sav. 95, 96. *Per Cur.* 1 Leon. 167. Moor 656. 1. Hawk. P. C. 265. 1. Finch 18. Wing. Max. reg. 78. pl. 13. Poſt 304.

[f] Mich. 34. Ed. 1. *Coram Rege* Rot. 276. *Hoyland*'s Caſe. 2. Inſt. 384. Poſt. 304. Wing. Max. reg. 78. pl. 14. Vide et Nota 2. Hawk. P. C. 199.

[g] Stat. 3. Ed. 1. cap. 20.

[h] S. P. Adjudged M. 30. Ed. 3. 11. Counteſs of *Athol*'s Caſe. Fitz. Judgment 144. 2. Inſt. 199. Ld. Raym. 845. *Per Powel* J. 11. Mod. 27. Vin. Abr. tit. Park. A. pl. 3.

&c. have been in Poſſeſſion thereof, here there ſhould be a full Point and Reſt; *or of the Reverſion or Remainder thereof*, this makes another full Sentence; *or have taken the Rents or Profits thereof by the Space of one whole Year next before*, here there is another full Period; ‡ ſo that theſe Words *(by the Space of one whole Year, &c.)* ſhall only have Relation to the next Sentence before, *viz.* to the *taking of the Rents or Profits*; and the Clauſes of being *in Poſſeſſion, Reverſion or Remainder* are abſolute, and ſtand by themſelves, and are to be thus taken, *viz.* if one hath been in Poſſeſſion, Reverſion, or Remainder, tho' it be but for an Hour, it is ſufficient, and he may alien without Danger of the Statute. And this ſeems to me the beſt Expoſition of the Statute. And yet every one who has taken the Profits for a Year may not make a Feoffment or Leaſe; for if the Iſſue in Tail of full Age marries with a Woman Diſcontinuee in Tail, againſt whom he has Cauſe of a *Formedon*, there if he makes a Leaſe or a Feoffment he is within the Danger of the Statute, becauſe he takes the Profits in Right of his Wife, and he has given the Right which he had in him, and which was not in his Wife, in Reſpect whereof he is in Danger of the Statute. So if he takes the Profits as Guardian, &c. Wherefore it ſeems to me, that *(the Space of a Year)* ſhall be referred only to the next Clauſe, and not to the Poſſeſſion, or to him in Reverſion or Remainder. And if any one thinks this Expoſition too hard, he ought to conſider that it is not ſo hard as the other, viz. that none ſhall make a Leaſe or Feoffment, if he has not been in Poſſeſſion for a whole Year before, for then he that enters * for Mortmain, or he that recovers in a Writ of Right *ſur diſclaimer*, might not make a Leaſe within the Year, according to that Expoſition, becauſe neither he, nor any by whom he claims, had been in Poſſeſſion for whole Year before, &c. whereas there the Lord does not claim the Land by the Tenant, nor by them into whoſe Hands it was amortized, but by Matter in Law; and therefore the Intent of the Statute never was according to that Expoſition, for if it ſhould be ſo taken, it would do more Harm than Good; for which Reaſon it ſeems to me that the Statute ſhall be intended *ut ſupra*. Then in the principal Caſe, inaſmuch as the Leaſe is newly made, and commences at this Day, none can make Title to it except of late Time, no more than one may to Common or a Rent granted *de novo* out of Land; and therefore the Plaintiff ought to have ſhewn that the Leaſe was in Poſſeſſion of ſome Perſon, where the Defendants pretended a Right or Title to it, or, that the Defendants promiſed a Leaſe in the Land of which they were not in Poſſeſſion, and foraſmuch as this is not ſhewn, there is not any Matter ſhewn to be done contrary to the Form of the Statute: for as the Matter is here declared, it ſhall be intended that the Defendants were in Poſſeſſion of the Land, in Reſpect it is ſhewn that they made the Leaſe, and he that makes a Leaſe ſhall be intended in Poſſeſſion. And if it be ſo, tho' they had been in Poſſeſſion but for an Hour, the Matter is out of the Danger of the Statute. Therefore it ſeems to me, that here is no Offence ſhewn to be done againſt the Statute.

‡ Wing. Max. reg. 10. pl. 3.

* Pulton 60. a.

A Report of a Judgment given in the Guildhall *of* London *in the* Huſtings *there, in the Time of Lent, in the* Seventh *Year of the Reign of King* Edward *the* Sixth, *by the Sheriffs of* London *Judges there, in an* Aſſize of freſh Force *brought by* John Pollard *and* Mary *his Wife, againſt* Bartholomew Jekyl *and others.*

MEMORANDUM, That *John Pollard* Eſquire, late one of the Serjeants at Law, and diſcharged thereof by the King's Letters Patent, and placed as Vice-Preſident of the King's Councel in the Marches of *Wales*, and *Mary* his Wife, in the *Huſtings* in the *Guildhall* of *London*, the *Monday* next before the Feaſt of *St. Martin* in the *ſixth* Year of the Reign of King *Edward* the *ſixth*, brought an Aſſize of freſh Force upon a Plaint of Intruſion commenced before the Mayor and Aldermen, and ſent to the Sheriffs according to the Cuſtom of the City, againſt *Bartholomew Jekyl*, *Ralf Foxley* and *Agnes* his Wife, and eleven other Perſons, upon a Diſſeizin done to them of Land in *London*, and ten of the Defendants appeared by Bailiff, and pleaded as follows, to wit, † *that there never was in Being any ſuch* Agnes *Wife of the aforeſaid* Ralf Foxley, *as by the Plaint aforeſaid is ſuppoſed, and this they are ready to verify, &c. Wherefore they pray Judgment of the Plaint aforeſaid, and that it may be enquired by Aſſize. And if, &c. then they ſay, that they have done no Injury nor Diſſeizin to the aforeſaid Plaintiffs touching the Tenements aforeſaid put in View, and in the Plaint aforeſaid ſpecified. And of this*, &c. And the three others pleaded the ſame Plea by Attorney. And the Plaintiffs, as to the Plea pleaded in Abatement of the Plaint, demurred in Law: and as to the other Plea, they prayed the Aſſize. And whether the Writ ſhould abate, inaſmuch as it was either always falſe or not, a Day was given for it to be argued, and it was argued and debated at *Guildhall* the laſt *Saturday* of *Hillary* Term in the *ſeventh* Year of the Reign of King *Edward* the Sixth, where it was argued for the Plaintiffs by their Councel, that Aſſizes of freſh Force purſue the Nature of Aſſizes at Common Law, ſo that the Argument in the one is the Argument of the other. And Aſſizes are the moſt ſpeedy [a] Suits in the Law, for the Jury ſhall, by the Words of the Writ, have the View before their Appearance, and altho' Warranties are favoured in Law, [b] yet in an Aſſize a Man ſhall not vouch any one, unleſs he be preſent, and this is for the Plaintiffs Expedition: [c] and a Protection will not defend the Party againſt an Aſſize, but Aſſizes are excepted by the Words of Protections, which Caſes prove how much Aſſizes are favoured in the Law. And all Things and Pleas, which are dilatory or in Abatement of Aſſizes, are eſteemed odious, and therefore ſuch Exceptions as will abate other Writs, will not abate Aſſizes, if ſo be there is a Diſſeizor and Tenant, for that is the Subſtance of the Suit, and Pleas or Exceptions, which don't diſprove that, are of little Force in Aſſizes, altho' in other Suits they are available.

In Aſſize againſt many, the Plea of *nul tiel in rerum natura* as one of thoſe named, does not abate the Plaint as to all the Defendants, but only as to that particular one, and it ſhall ſtand good againſt the reſt.

† Theol. Dig. lib. 11. cap. 7. § 12.

For the Plaintiff.

[a] See Ante 75. (*)

[b] Bro. Voucher 146. Regiſt. 196. b. 197. a. F. N. B. 178. e. 1. Finch 202. 2. Rol. Abr. 745. pl. 14. 748. X. pl. 3. 2. Inſt. 411. 8. Co. 50. a. 1. Mod. 8. Vin. Abr. tit. Vouch. Q. pl. 14.

[c] P. 21. H. 6. 42. pl. 18. Bro. Protection 53. H. 39. H. 6. 39. 8. Co. 50. a. Co. Litt. 131. a. 2. Inſt. 411. Kelw. 135. b. 2. Rol. Abr. 325. pl. 2.

available. And therefore Misnomer of one of the Defendants shall not abate the Assize, if there is another Disseizor and Tenant, as it is adjudged in many Places in the *Book of Assizes*, and yet the Writ was always false [a] And so in Assize, if the Tenant pleads Jointenancy of Parcel with a Stranger not named, altho' the Plaintiff confess it, yet it shall not abate his Assize except for that Part only, but for the rest the Writ and Plaint shall stand in Force, as it is adjudged in divers Places in the *Book of Assizes*, and yet there the Plaint was always false. And the Writ, altho' it is general, shall be intended to be brought of all that is contained in the Plaint, and so the whole shall be intended false *ab initio*; but if there is a Disseizor and Tenant for any Part, then that is sufficient, and the Law requires no other Truth in the Writ or Plaint. And to say, that one named in the Writ was dead before the Writ purchased, or to say, that there never was such an one in *in rerum naturâ*, is all one, and of the same Effect, for in both Cases the Writ was always false; and in the first Case, viz. that one named in the Writ of Assize was dead before the Writ purchased, it is adjudged no Plea in Abatement of the Writ, but if there is another Disseizor and Tenant the Writ shall be good against them. And to prove that the Law is so in that Case, these Books were cited to be adjudged in Point, *viz.* 12. *Ass.* pl. [b] 14. 23. *Ass.* pl. [c] 10. 26. *Ass. pl.* 63. 29. *Ass.* [d] pl. 62. *et* [e] 70. And also that in the said Case of 12. *Ass. pl.* 14. our principal Case is adjudged, viz. *ne unques tiel in rerum natura* is no Plea in Abatement of the Writ, if there be another Disseizor and Tenant. So that the Case of one dead before the Writ purchased, and our principal Case are both adjudged in the said Plea. Also a Case in *T.* 44. *Ed.* 3. 18. *Fitz. Brief.* 578. was cited, which Case, it was said, is abridged by *Fitzherbert* more fully for the Purpose here, than the Book at large in Print is. And it was likewise said, that the Action, which might be most fitly resembled to an Assize, is a *Quare Impedit*, which in Respect of the Danger of Lapse may well be compared to an Assize for the Expedition of it. And it was alledged, that it appears in [f] *M.* 7. *H.* 4. 34. *pl.* 23. that the Prior of *Walton* brought a *Quare Impedit* against the Bishop of *Carliel* and many others, where it was pleaded in Abatement of the Writ, that one of the Defendants was dead the Day of the Writ purchased, and he demanded Judgment of the Writ for all, *et non allocatur*; which Case may be resembled to an Assize *causâ qua supra*. And so the Writ in the principal Case shall be good. And it was said that our Case cannot be resembled to a Writ of Trespass, for that in the said Case of 29. *Ass. pl.* 62. it is adjudged, [g] that in Trespass if one of the Defendants was dead before the Writ purchased, the Writ should abate: and so is it touched by the Way in many other Books and Cases since that Time. But yet it was said, that in the Case of *Robert Passelow* in [h] *M.* 47. *Ed.* 3. 18. *pl.* 35. and in the Case of *Michel* and *Gilbert* in [i] *T.* 44. *Ed.* 3. 18. *pl.* 10. the contrary was adjudged, viz. in the first Case, that in Trespass the Writ shall not abate, where one named in the Writ was dead the Day of the Writ purchased; and in the other Case it was adjudged, that the Writ shall not abate, where it was pleaded that one named in the Writ [k] was not *in rerum naturâ* the Day of the Writ purchased, for that he was dead before; and it was said that there are more Books adjudged this Way than the other. But it was argued, that altho' the Writ of Trespass should abate in such Case, yet it might not be resembled to the principal Case. For the Law favours the Assize, and the Expedition in it, more than in Trespass: And also in Trespass, the Person is the chief and original Cause of the Action, and the Plaintiff shall punish the Person of the Defendant in Trespass, and then if any of the Defendants be dead before the Writ purchased, it stands with some Reason to abate the Writ: but in the principal Case the Land is the chief and original Cause of the Action, and then if the Land and the Estate remains, and there is a Disseizor and Tenant, it is sufficient for the Plaintiff. And therefore for these Causes it was prayed for the Plaintiffs, that the Writ might stand, and that this Plea might not be enquired, and that the Assize might be taken upon the Plea of *nul tort*, *&c.*

E contra for the Defendants.

On the contrary it was argued for the Defendants, that the Plaint ought to abate because this Assize of fresh Force shall pursue the Order and Pleading of Assizes at Common Law. And in Assizes at the Common Law the Plea pleaded here shall abate the Writ, because it proves that it was not well purchased. [l] And it was alledged, that it is holden in 27. *H.* 8. in a *Quare Impedit*, that if it be pleaded for one of the Defendants that there is *nul tiel in rerum naturâ* as one named in the Writ, this shall go in Abatement of the whole Writ, otherwise in Case of [m] Misnomer of one. And so shall it be in an Assize, which has been resembled to a *Quare Impedit*. And it was said, that the common Opinion amongst Men learned in the Law has always been, that *dead before the Writ purchased*, or, *nul tiel in rerum naturâ*, shall abate the Writ against all, in Actions as well several as joint, and in all Actions in general. And so it was prayed that the Plaint here might abate. And hereupon the Court would be advised: and they gave Day further. And in the mean time *Southcote* of the *Middle Temple* one of the Deputies of the Sheriff of *London*, and Judge in the Cause, consulted with divers of the Justices, and prayed their Advise in the Case, and all the Cases before alledged by the Councel were written in a Paper, and delivered to *Hales* one of the Justices of the Common Bench, and he perused all the Books where the Cases were alledged, and read the Books cited, and found them according as they were cited, and afterwards said to *Southcote*, that no Man learned in the Law could shew any Book adjudged contrary to the Books cited. And because there were here many Books the one Way, and none the other Way, he advised him to follow the Judgments before given. And this he also said to me myself. And at another Day afterwards in the *Guildhall* aforesaid the Court said, we take the Law to be, that the Plea does not go in Abatement of the Plaint against all, but only against the said *Agnes*. Wherefore we award the Plaint good against the others, and also do award the Assize.

[n] Afterwards the Plaintiffs Councel, having well considered the Matter, perceived that the Case was argued

[a] 14. Ass. pl. 8. Fitz. Brief 273. 753. Bro. Assize 190. Jointenancy 59. 19. Ass. pl. 14. Fitz. Brief. 757. Bro. 281. Assize 222. Confession 25. Jointenancy 37. 21. Ass. pl. 21. Bro. Assize 222. 22. Ass. pl. 6. Bro. ibid. Jointenancy 59.

[b] Fitz. Brief. 255. Theol. Dig. lib. 11. cap. 7. § 1.

[c] Bro. Brief 285. Theol. Dig. lib. 12. cap. 2. § 4.

[d] Bro. Brief. 301.

[e] Bro. Assize 305.

[f] Bro. Brief. 113. Quare Impedit 49. Theol. Dig. lib. 11. cap. 7. § 4.

[g] S. P. 10. Mod. 251.

[h] Fitz. Brief. 622. Bro. 80. Trespass 60.

[i] Fitz. Brief. 578. Bro. 70.

[k] *Contra* agreed H. 5. H. 8. Kelw. 167. a. pl. 4. Theol. Dig. lib. 11. cap. 7. § 1.

[l] M. 27. H. 8. 26. pl. 9. Bro. Bro. Brief. 3.

[m] See 8. Co. 159. b. Kelw. 167. pl. 4.

[n] Wing. Max. reg. 74. pl. 11.

argued prematurely, and before the proper Time; for the Aſſize ought to have enquired the whole Matter, and if they had found the Exception, viz. that there was no ſuch Perſon *in rerum naturâ*, as the Defendants had alledged, and had alſo found a Diſſeizor and Tenant, then the Matter ought to come in Queſtion, and that would have been the proper Time to diſpute the Point of Law ariſing thereupon, and not before. For the Plea pleaded, *ut ſupra*, was not anſwerable; for if a Man pleads in Aſſize in Abatement of the Writ, Jointenancy on the Part of the Plaintiff, or Jointenancy without Deed on the Part of the Tenant, or pleads that the Tenements are in another Town, or that the Plaintiff or Tenant is miſnamed, or the like Pleas, and pleads over, viz. *et ſi trove ne ſoit, nul tort, &c.* as he ought to do in ſuch Caſes, the Plaintiff ſhall not reply to the Pleas in Abatement of the Writ, nor are they anſwerable: for when the Defendant pleads in Abatement of the Writ, and pleads over, *et ſi trove ne ſoit, nul tort*, his Concluſion is, *et de hoc ponit ſe ſuper Aſſizam*, and the Entry ſhall be, *et Querens ſimiliter*. And ſo the Plaintiff ſhall ſay nothing elſe but *ſimiliter*, and ſhall not † anſwer ſpecially to the Plea pleaded before *nul tort*. But if the Tenant in Aſſize pleads Jointenancy by Deed with a Stranger, there the Demandant ought to anſwer it: for there he that pleads the Jointenancy ſhall not plead over to the Aſſize, but ſhall ſtay upon that only, and ſhall pray Proceſs upon the Statute, and therefore the Plea is anſwerable; but in the other Caſes the Plaintiff ſhall not anſwer to the Matter pleaded in Abatement of the Writ; neither ſhall he in our Caſe, and then if it is not anſwerable, by the ſame Reaſon the Plaintiffs might not demur upon it, for a Man may not demur upon that which does not require an Anſwer. And therefore the Matter ought to be enquired by the Aſſize, as it was done in the ſaid Caſes of 23. *Aſs. pl* 10. and 26. *Aſs. pl.* 63. For which Reaſon the Councel for the Plaintiff, taking the Law to be as is ſaid before, prayed the Court that, when the Aſſize was ſworn, they might firſt enquire of the Matter pleaded in Abatement of the Plaint, viz. if there ever was any ſuch *Agnes in rerum natura*. And the Court, at the Prayer of the Plaintiffs, charged the Aſſize to enquire of this firſt, who found, that there never was any ſuch *Agnes* Wife of the ſaid *Ralf Foxley in rerum natura*, as the Defendants had alledged. And further they found, that ſome of the Defendants only diſſeized the Plaintiffs of Part of the Tenements, and ſhewed the Certainty thereof, and of this they acquitted the reſt of the Defendants: And others diſſeized the Plaintiffs of another Part, and of that they acquitted the reſt of the Defendants, and ſo of a third, and of a fourth Part, and thus they found four ſeveral Diſſeizins at four ſeveral Times, and by the Defendants ſeverally, and aſſeſſed ſeveral Damages, viz. for every Diſſeizin a Penny againſt all the Diſſeizors of each Part, and 6 *l.* 13. *s.* 3 *d.* for the Coſts of Suit entirely againſt all together, and this was done at the Requeſt of the Plaintiff's Councel, to avoid the Danger of an Attaint, if the Jurors had not found a Diſſeizin by all jointly. Wherefore upon this Verdict, on the third *Saturday* in Lent in the *ſeventh* Year of the Reign of King *Edward* the *Sixth*, the Court awarded that the Plaintiffs ſhould recover Seizin of the Land, and their ſeveral Damages, as the Verdict aſſeſſed them, and the Coſts of Suit entirely againſt them all together, and 26 s. 8 d. beſides, for the Coſts encreaſed by the Court.

† Booth 269, 270.

Verdict.

Damages ſeveral, and Coſts entire. Kelw. 48. pl. 1.

Judgment.

In the ſame Court another Aſſize of freſh Force was brought by *Thomas Panel* Parſon of the Church of *Honeylane* in *London*, againſt *Thomas Moor* and the Corporation of *Mercers* of *London*, upon a Diſſeizin done to the Plaintiff of a Cellar under the ſame Church; and *Moor* appeared in proper Perſon, and the Corporation by Bailiff, and his Warrant was demanded, and he had no Warrant, and the Aſſize was prayed againſt the Corporation, becauſe by Law they cannot appear by Bailiff without his having a Warrant in Writing, ſo that upon the Matter they had made Default. And the other Party ſaid, that it ſhould be done in this Writ as in Aſſizes at Common Law, and the Writ of Aſſize ſaith, *Put by Sureties and ſafe Pledges the aforeſaid* (Defendant) *or his Bailiff, if he cannot be found, &c.* and ſo the Writ warrants the Appearance of the Bailiff. And to prove that a Bailiff may be to a Corporation without Deed, the Caſe of Treſpaſs brought by the Dean and Chapter of *Paul*'s in [a] 12. *H.* 7. was cited. Againſt which on the other Side was cited the Caſe in [b] 4. *H.* 7. of Debt brought by the Dean of *Paul*'s. And alſo on this Side it was ſaid, that altho' the Writ ſpeaks, *vel Ballivum ſuum*, as is ſhewn before, yet this ſhall be intended ſuch a Bailiff as the Law allows, *viz.* if the Defendant is a natural Body, then his Bailiff without Deed, and if a Body corporate, then their Bailiff by Deed. And it was ſaid, [c] altho' the Law was that one might juſtify in Treſpaſs as Bailiff to a Corporation without Deed, yet it is not like to a Bailiff in Aſſize; for there he ſhall plead touching the Right of the Freehold, and therefore he is in a higher Degree than a Bailiff of a Manor, who takes the Profits, and who juſtifies in ſuch a baſe Capacity. And it was ſaid, that a Bailiff of a Manor ſhall not have an Action of Debt for his Salary, without Deed, againſt any Corporation. And they had ſpoke to the Matter divers Days, and afterwards *Cholmley* and *Southcote* Deputies of the Sheriffs of *London*, and Judges in the Cauſe, enquired the Opinion of the Lord *Mountague*, and of *Saunders* Serjeant, and of *R. Brook* Serjeant Recorder of *London*, all of whom agreed in Opinion that the Bailiff might not appear without Warrant. Wherefore the ſaid third *Saturday* in Lent the Court ſaid, we have conſulted with ſome of the Judges, and with ſeveral learned in the Law, and it ſeems to them and to us alſo, that the Corporation cannot appear by Bailiff without Warrant in Writing. Wherefore we award that their Appearance be holden for none, becauſe the Bailiff had not any Warrant. And afterwards the Corporation appeared by Attorney, and they and *Moor* pleaded to the Aſſize. And this Matter depended by divers Continuances until a certain Day, at which the ſaid *Moor* (*relicta verificatione ſua*) pleaded in Abatement of the Aſſize, that the Plaintiff had entered into the ſaid Cellar after

Panel v. Moor, &c.

One may not appear in an Aſſize as Bailiff to a Corporation without Warrant in Writing. S. P. 1. Vent 48. Vide 3. P. Wms. 423.

[a] T. 12. H. 7. 26. a. Bro. Corporation 51. Monſtrans de faits 113. Treſpaſs 288.

[b] P. 4. H. 7. 6. Bro. Corporation 47.

[c] Vin. Abr. tit. Corporation K. pl. 26.

after the laſt Continuance, and thereof was ſeized in Fee in Right of his Church. And the Plaintiff *e contra*. And upon this the Jury gave a ſpecial Verdict, that is, they found the Matter at large, and prayed the Diſcretion of the Juſtices. And becauſe the Verdict was not full and perfect, the Plaintiff ſued a [a] Certificate of Aſſize to make the Jurors come again to be more fully examined: who came again, and made their Verdict more certain. And the Effect of both their Verdicts was, that the Plaintiff had a *Subpæna* delivered to him to be examined upon certain Interrogatories concerning the Title of the Cellar, and after the laſt Continuance the ſaid *Moor* deſired him to dine with him at his Houſe in *Honey-lane*, and being there with *Anthony Skinner* Examiner, he was required by the ſaid *Thomas Moor* to go into the ſaid Cellar to ſee the Antiquity of the ſame. At whoſe Requeſt the Plaintiff and the ſaid Examiner went into the Cellar, and the Wife of the ſaid *Moor* brought them two Candles to ſhew them the ſaid Cellar. And when they had ſeen it, they came up and went out of it. And afterwards the ſaid Examiner examined the ſaid Plaintiff in the Houſe of the ſaid *Moor* upon the Interrogatories. And hereupon the Aſſize pray the Diſcretion of the Juſtices, whether the ſaid Entry be ſuch an Entry, as that the Plaintiff ſhall be thereby ſeized of the ſame Cellar in Fee in Right of his Church, as the ſaid *Moor* by his Plea hath ſuppoſed. And they found the Seizin and Diſſeizin by *Moor*, and that the Corporation did not diſſeize the Plaintiff, and upon this Verdict the Plaintiff prayed his Judgment. And two Queſtions were moved upon this Verdict, which hung long in Abate. The firſt was, inaſmuch as the Iſſue was joined upon a certain Point, viz. upon the Entry, whether the Jurors might give a ſpecial Verdict finding the Matter at large, or if they ought to have given a preciſe Verdict, viz. that he entered, or that he did not enter. [b] For it was ſaid that the Jurors may not give a Verdict at large, except in Aſſize, and a Writ of Treſpaſs, or ſuch like, where the general Iſſue is pleaded. The other Queſtion was, if the Matter found be in Law ſuch an Entry as ſhall abate the Writ, or not. And theſe Matters were debated in *Guildhall* divers Times, and hung until *Trinity* Term in the *ſecond* and *third* Years of the Reign of King *Philip* and Queen *Mary*, and then it it was alſo debated. And it was ſaid on Behalf of the Plaintiff, that the Statute of *Weſtminſter* 2. *cap.* 30. which ordains, that *the Juſtices aſſigned to take Aſſizes ſhall not compel the Jurors to ſay preciſely whether it be a Diſſeizin or not, ſo that they do ſhew the Truth of the Fact, and require Aid of the Juſtices*, ſhall be extended by Equity to other Caſes beſides Aſſizes, for there is as great Doubt in other Verdicts, as there is in Aſſizes: and the Statute was made to relieve the Ignorance of Jurors, and therefore there is the ſame Reaſon in other Caſes as in Aſſizes. And for this Cauſe they may give a ſpecial Verdict, and find the Matter at large in any Iſſue in the Word, ſo that the Matter found at large does but tend to the Iſſue joined, and contain the certain Truth thereof. [c] And hereupon the Caſe in 41. *Ed.* 3. was alledged, where in a Writ of Account for 10 *l.* the Defendant traverſed the Receit, and the Jurors gave a Verdict at large, viz. that the Plaintiff delivered the Money to the Defendant, upon Condition that if the Defendant made him an Aſſurance of certain Land, he ſhould have the 10 *l.* and if he did not make him an Aſſurance at ſuch a Day, that he ſhould re-deliver the Money to the Plaintiff, and they ſaid he did not make him an Aſſurance of the Land at the Day, &c. and foraſmuch as, upon this Matter found at large, the Law ſaith that the Defendant is accountable, he was adjudged to account. *Ex quo* a Man may ſee, that a ſpecial Verdict finding Matter amounting to the Point in Iſſue is good, and that Judgment ſhall be given upon it. [d] And the Caſe in 26. *H.* 8. was alledged, where two as Church-wardens brought an Action, and the Defendant ſaid that the Day of the Writ purchaſed they were not Church-wardens, and upon this they were at Iſſue, and the Jury gave their Verdict, that the one was Warden the Day &c. and the other not: And there it is moved, whether or no this Verdict ſhould be received, inaſmuch as it is not preciſely found whether they were Wardens or not, but there, by the Rule of the Court, the Verdict was ſo recived and entered, for if the one was not a Warden, then they were not Wardens, and the Court, which hath Knowledge of the Law, may ſo adjudge upon the Verdict; ſo that foraſmuch as it amounted to a direct Proof of the Iſſue, the Verdict was there held good. [e] And the Caſe in 47. *Ed.* 3. was alledged, wherein a *Præcipe quod reddat* upon the Default of the Tenant one came and ſhewed that the Tenant, who made Default, held the Tenements for Term of Life of his Leaſe, the Reverſion to him, and prayed to be received, and the Demandant ſaid that the Tenant had a Fee, and upon this they were at Iſſue, and it was found by *Niſi prius* that the Tenant never had any Thing in the Land, and alſo he who prayed to be received never had any Thing in the Reverſion, and upon this Verdict found the Court were adviſed that it was receivable, for it was confeſſed both on the one Part and on the other, that the Tenant had an Eſtate for Term of Life, and the Inqueſt was not charged concerning that which the Party had confeſſed, and then when the Verdict finds that he had nothing, it follows from thence that he had not a Fee, and ſo the finding amounts to the Point of the Iſſue, tho' it has not preciſe Words. And many other Caſes were put on this Point. From which, it was ſaid, it appears that as well in general, as in ſpecial Iſſues, and as well in other Actions as in Aſſize or Treſpaſs, the Jurors may give a ſpecial Verdict, finding the Matter at large pertinent to the the Point in Iſſue. And ſo is it here.

And as to the other Point, it was ſaid, that this could not be adjudged in Law an Entry; for the Plaintiff came into the Cellar at the Requeſt of the Diſſeizor, and to ſee the Antiquity of it, and for no other Purpoſe. And the Diſſeizor could not puniſh him for this in Treſpaſs, if he were a meer Stranger: and then it ſhall not be an Entry in him. But if he had done any Act, ſo that the Diſſeizor might have had an Action again him, if he were a Stranger, there the Law ſaith, that rather than he ſhall be puniſhed, it ſhall be an Entry and Remitter to him.

[a] Vide F. N. B. 181. b. 2. Inſt. 415. 1. Finch 296.

[b] T. 9. H. 7. 4. b. *per Brian.* Bro. Verdict 56. M. 9. H. 7. 13. b. *per Fairfax.* Bro. ibid. 83. Dy. 118. a. pl. 77. N. Bendl. 37. pl. 69.

The Jury may give a ſpecial Verdict upon any Iſſue, as well general as ſpecial, and in other Actions as well as in Aſſize or Treſpaſs, ſo that the Matter found at large be pertinent to the Point in Iſſue. S. P. Co. Litt. 227. b. 9. Co. 12. b. 2. Inſt. 425. Moor 858. Hob. 227. P. 26. Eliz. cited 1. And. 37. 3. Leon. 136. *per Anderſon* C. J. S. P. C. 164. c. 165. a. And ſo is the Law now ſettled, notwithſtanding ſome ancient Opinions (*ſupra* b.) to the contrary.

[c] P. 41. Ed. 3. 10. pl. 5. Fitz. Account 24. Bro. Verdict 84.

[d] T. 26. H. 8. 5. pl. 25.

[e] M. 47. Ed. 3. 19. pl. 42. Fitz. Verdict 20. Bro. 66.

If the Tenant in an Aſſize of a Houſe deſire the Demandant to go into the Houſe to ſee the Antiquity of it, this is no ſuch Entry as ſhall cauſe the Aſſize to abate. S. P. cited 2. Brownl. 231.

1. Bulſt. 9. Palm. 434. Booth. 269. Wing. Max. reg. 194. pl. 28. 2. Danv. Abr. 791. pl. 2. *in notis.* Vin. Abr. tit. Aſſize X. pl. 44. tit. Entry E. pl. 14.

But

But here he went at the Requeſt of the Diſſeizor, in which Caſe he was not puniſhable if he had been a Stranger, and he went for another Purpoſe than to make an Entry, and therefore it ſhall not be adjudged an Entry to abate his Writ. [a] For if the Diſſeizor will aſk the Diſſeizee to come to the Houſe whereof the Diſſeizin was made, to his Daughter's Wedding, or to dine with him, or the like, it ſhall not be an Entry into the Houſe, *cauſâ qua ſupra*. [b] And the Caſe in *Longo* 5. *Ed.* 4. was alledged, where *Babington* brought an Aſſize of the Houſe of the *Fleet*, and pending the Aſſize, *Babington* with his Councel went into the Houſe to the Jury when they had the View, to ſhew Evidence upon the View, and the Plaintiff's being upon the Land in ſuch Manner, and claiming nothing, was holden no Entry nor Poſſeſſion in the Plaintiff, nor was the Writ abated by it, for he did not go there with an Intent to make any Claim or Entry into the Land. [c] And alſo the Caſe in 26. *Aſs. pl.* 42. was alledged, where in an Aſſize it was found that the Plaintiff was diſſeized, and afterwards came upon the Land, and put his Foot on it, but he took nothing of the Profits, and the other ouſted him, and by Award he recovered his Damages for the firſt Diſſeizin, notwithſtanding he was of full Age. And ſo every coming upon the Land is not an Entry. For it was ſaid, that *Littleton* in his Book held the Law to be, [d] that continual Claim ought to be made upon the Land, if he dare come there. And in ſuch Caſe if he comes upon the Land, and makes Claim, and departs preſently, this ſhall not be adjudged an Entry to his [e] Diſadvantage: for he ſhall have an Aſſize of the firſt Diſſeizin, and ſhall recover Damages from the firſt Day until the Day of the Aſſize. For his Intent was to make Claim, and not to take any of the Profits, nor to drive the Tenant out, and keep the Poſſeſſion. And ſo the Intent of the coming upon the Land is to be reſpected. And here the Intent of the Plaintiff was not to make an actual Entry, and to expel the Diſſeizor, wherefore he ought to have Judgment upon this Verdict.

[a] Co. Litt. 368. a. Wing. Max. reg. 122. pl. 2.

[b] M. Long. 5. Ed. 4. 60. Bro. Brief. 332. 2. Brownl. 235.

[c] Fitz. Affize 242. Bro. Diſſeizin 83. Seizin 23.

[d] Vide Litt. § 419.

[e] S. P. Co. Litt. 253. b.

Afterwards *Southcote* and *Fuller* Under-ſheriffs and Judges in the Court held it good to have the Opinions of the Juſtices of the Common Bench in theſe two Points, and therefore the Plaintiff retained *Dyer* Serjeant to move it, who moved it to the Juſtices in the ſaid *Trinity* Term, in the Preſence of the ſaid Under-ſheriffs. And as to the firſt Point (as it was immediately told me by the ſaid Under-ſheriffs, and many others, for I was not preſent when it was moved) the Court held that the Jurors might give a ſpecial Verdict finding the Matter at large. [f] And ſo they may upon any Iſſue, if their finding of the Matter at large tend to the Point of the Iſſue, and not elſe. And as to the other Matter, the Court held it no Entry to abate the Writ. And *Brook* Chief Juſtice then ſaid, (as it was immediately reported to me) [g] that in a *Formedon* pending before them there, the Tenant had pleaded in Abatement of the Writ, that the Demandant had entered after the laſt Continuance, and upon the Evidence it appeared that many were cutting down Trees upon the Land, and the Demandant came upon the Land to them, and admoniſhed them, upon their Peril, not to do any more than they could do by Law, and he and his Companions took this to be no Entry. So in the Caſe here. Wherefore afterwards, viz. the 27th Day of *June*, 2 & 3. *Philip and Mary* Judgment was given upon the ſaid Verdict at *Guildhall*, that the ſaid *Thomas Panel* ſhould recover againſt the ſaid *Moor*.

[f] See Ante 92.

[g] S. C. cited 1. Bulſt. 9. 2. Brownl. 258.

Judgment.

A Report of certain Things arising upon a Replevin *sued by* Richard Woodland *Plaintiff, against* Walter Mantel *and* William Redsole *Defendants, and removed by* Recordare *in* Hillary *Term, in the* fifth *and* sixth *Years of the Reign of King* Edward *the* Sixth.

Where an Encroachment is of a Thing of the same Nature with the Tenure, as Tenure by 12 d. and 2 s. is encroached, there the Tenant shall traverse the Seizin in Avowry; but if the Encroachment be of a Thing of another Nature from the Tenure, as a Hawk for a Horse, or *e contra*, there the Tenure shall be traversed, and not the Seizin. S. C. Vin. Abr. tit. Incroachment C. pl. 9. Same Diversity M. 21. Ed. 4. 64. pl. 36. Kelw. 31. b. 73. b. F. N. B. 10. g. h. 9. Co. 33. a. Winch. 18. Doc. Pla. 318.

Note, (Reader) IT appears in the Records of the King's Bench, of *Hillary* Term 4 & 5. *Edw.* 6. *Rot.* 38. that the said Plaintiff had sued a Replevin against the said Defendants for taking two Cows in the County of *Kent*, in a Place called the *Lesse*. And the said *Walter Mantel* avowed, and the said *William Redsole* as his Bailiff confessed the taking in the Place &c. And they said that the Place where, &c. contained four Acres and a half in *Horton*, and that one *John Godden* was seized in Fee of one Messuage and fifteen Acres of Land in *Horton*, whereof the four Acres and a half were parcel, and held them of the Prior of *Horton* as of his Manor of *Horton* by Fealty and Rent of 5 *s.* and by the Rent of 5 Capons, and by Suit of Court every three Weeks, and by the Service to render, as well after the Death of every Tenant dying seized thereof in his Demesn as of Fee, as after every Alienation made thereof in Fee Simple, 5 *s.* in the Name of ‡ Relief, and also by the Service to render, after the Death of every Tenant of the said Tenants dying seized, the best Beast that such Tenant had at the Time of his Death, for and in the Name of a Heriot, and they alledged † Seizin in the said Prior by the Hands of the said *Godden*: And afterwards they conveyed the Manor by the Dissolution of Monasteries to King *Henry* the Eighth, and from him to *Richard Tate* for 21 Years, and from him to the said *Walter Mantel*. And *John Woodland* having the Estate of the said *Godden* in the said four Acres and a half, and being thereof seized in Fee, and being possessed of a young Ox called a *Steer* of the Price * of 25 *s.* then being his best Beast, died. And because the said *Steer* was detained and eloigned, the said *Mantel* avowed, and the said *Redsole* as his Bailiff confessed the taking of the Cows in the said Place, in which, &c. for the said *Steer*, and within his Fee, &c. And the Plaintiff said, that true it is the said *Godden* held the said Messuage and 15 Acres of Land of the said Prior, as of the said Manor, by Fealty and 5 *s.* Rent, and 5 Capons, and Suit of Court, and Relief of 5 *s.* in Manner and Form as in the Avowry is alledged. And further said, that within the said Manor there is such a Custom, that if any Person holds any Lands or Tenements by several Services of the said Manor, and dies seized of the same Lands, then the Lord of the said Manor for the Time being shall seize the best Beast of the said Tenant, so dying seized, for a Heriot, as Heriot Custom for all the Lands and Tenements so holden of the same Lord, as of the said Manor, and the same should have to his own Use. And further said, that the said *John Woodland* being seized of the said four Acres and a half, and of divers other Lands, and being also seized of divers other Lands and Tenements holden of the said *Walter*, as of the said Manor, thereof died seized, then being possessed of the said *Steer*, and of one other Ox then being his best Beast, wherefore the Defendants seized the said other Ox, to the Use of the said *Walter*, for Heriot-custom due after the Death of the said *John Woodland*, for all the Lands and Tenements so holden of the said Manor, according to the Custom of the said Manor, without that, that the said *Godden* held the said Messuage and 15 Acres of the said Prior, as of the said Manor, by the Services to render, after the Death of every Tenant of the said Tenants dying seized, the best Beast which the same Tenant had at the Time of his Death, to the Lord of the said Manor, for and in the Name of a Heriot, in Manner and Form as in the Avowry was alledged. And upon this Bar to the Avowry two Things were moved. The first was, whether the Plaintiff ought to traverse the Tenure, or the Seizin. The second was, admitting he might traverse the Tenure, then how the Traverse ought to be. As to the first Point, it was alledged by the Councel for the Plaintiff, that he might traverse the Tenure well enough. And therefore, it was said, there is a Diversity in the Law when to traverse the Tenure, and when the Seizin. For if the Tenant holds of the Lord by Fealty only, and the Lord encroaches Rent, there altho' both make but Socage, yet the Tenant in Avowry shall traverse the Tenure, and shall not answer to the Seizin, because the Encroachment is of a different Thing from what the Tenure is. So if the Tenant holds by Fealty and a Hawk, and the Lord encroaches a Horse, there if the Lord afterwards avows for the Horse, the Tenant may traverse the Tenure, and make no Answer to the Seizin, because that which is encroached is another Thing, and of another Nature from that by which the Tenure is, And therefore that which is encroached may not be parcel of the Tenure. And so if the Tenant holds by Socage, and the Lord encroaches Knight's Service, the Tenant may traverse this in Avowry. But if the Tenant holds by Fealty and 2 *s.* Rent, and the Lord encroaches 4 *s.* or if the Tenant holds by one Horse, and the Lord enroaches two Horses, or if the Tenant holds by Suit of Court once a-Year, and the Lord encroaches Suit every Month, in all these Cases the Tenant cannot avoid this in Avowry. And therefore where the Lord charges him in Avowry with such Encroachment, the Tenant ought to traverse the Seizin, if he can do it truly, and not the Tenure, for the Encroachment is of the same Thing with the Tenure, and therefore he cannot traverse the Tenure. For true it is that he holds by the same Tenure, but not by so much, and the Quantity of the Thing is not traversable in Avowry, but the Quality only. And to avoid the Quantity encroached, he is driven to a Writ of *Ne injuste vexes*, or *Contra formam feoffamenti*. So that if he cannot truly traverse the Seizin alledged in Avowry of such Quantity, he is of Necessity driven to such Writs. And so the Nature or Quality of the Tenure or Thing is traversable in Avowry, but not the Quantity. And it was alledged that this Diversity appears in the Years of *Edward* 4. viz. in [a] *Anno* 7. and also in the Case of the Prior

‡ See O. Bendl. 181. 2. Keb. 677.

† See W. Jones 237.

* See *Major v. Brandwood* Cro. C. 260. *Talbot's* Case 8. Co. 103. a.

1. Point. For the Plaintiff.

[a] H. 7. Ed. 4. 28. Fitz. Avowry 36. Bro. 96. Traverse 227.

of

of *Lantony*, in *Anno* [b] 16. and alſo in *Anno* [c] 20. And the ſaid Diverſity was granted by the Court now.

[b] H. 16. Ed. 4. 11. pl. 11.
[c] H. 20. Ed. 4. 17. pl. 3. Bro. Avowry 104.

† *But note (as I apprehend) this Encroachment is to be intended between very Lord and Tenant, for an Encroachment by the Donor upon the Donee in Tail, or by the Leſſor upon the Leſſee for Life, ſhall not hurt them, but in the Replevin they ſhall avoid it; for there the Avowant ought to ſhew the Reſervation, which is the Commencement of the Tenure, and this only is anſwerable. And note alſo (as I apprehend) after the Encroachment, if the very Tenant makes Reſcous to the very Lord, and he brings Aſſize, he may not make Title to himſelf by Encroachment. So that the Seizin of many Services is only an Eſtoppel in Replevin.*

Nota Bene by the Reporter.

† S. P. 8. Co. 65. a. 10. Co. 108. a. Vin. Abr. tit. Incroachment C. pl. 9.

Further it was moved, as to the ſecond Point, that altho' the Tenure be traverſable in Avowry, yet the Traverſe here taken in the manner it is, was not good. For the Tenure is alledged by the Avowant to be of divers Things, viz. by Fealty, by 5 *s.* Rent, by Capons, by Suit of Court, by Relief, and by Heriot, and the Plaintiff has confeſſed the Tenure of all the Things but the Heriot, and has traverſed the Tenure of the Heriot, which is not good. For the Tenure is alledged entire, and then to traverſe *abſque hoc* that he holds by Heriot cannot be. For no Tenure is alledged by Heriot only, but by Heriot and other Services entirely, which ought to be entirely traverſed, as it is alledged in the Avowry, and not by Parcels. [d] As if an Action of Debt be brought upon an Obligation, the Defendant ſaith, that it was indorſed upon Condition to ſtand to the Arbitrement of J. S. who made an Arbitrement of three Things to be performed by him, which he has performed, and ſhews how, and the Plaintiff ſaith, that true it is he made an Arbitrement of the three Things, and alſo of one other Thing, which the Defendant has not performed, for the Non-performance whereof he brought his Action, there if the Defendant ſaith, that he made his Arbitrement of the three Things only, *abſque hoc* that he made an Arbitrement of the fourth Thing, this is no good Traverſe, but he ought to traverſe *abſque hoc* that he made an Arbitrement of the four Things. For an Arbitrement is a Thing entire, which ought to be entirely traverſed, for an Arbitrement of three Things is not the ſame Arbitrement as is made of four Things, but is another Arbitrement. So in the principal Caſe the Tenure is entire: and the Tenure whereof the Avowant ſpeaks is not to be intended the ſame Tenure of which the Plaintiff ſpeaks; and foraſmuch as the Heriot and the other Services are but one entire Tenure, he ought to traverſe the whole that is alledged, and not one Part only. And it was ſaid, that the Traverſe was accordingly ſo taken in [e] 5. *H.* 7. in the like Caſe.

2 Point. For the Defendants.

[d] 1. Saund. 307. Vin. Abr. tit. Arbitrement G. a. pl. 5.

On the contrary it was ſaid by *Anthony Wood*, that the Traverſe ought to be as it is now contained in the Record. For the Defendant has alledged that the Tenure was by ſix Things, and the Plaintiff has confeſſed the Tenure to be by five of them, and then if he ought to traverſe, *abſque hoc* that he holds by the ſix Things, his Traverſe would be repugnant to his own Confeſſion, for by ſuch Traverſe he would deny that, which he had before confeſſed, viz. that he holds by the five Things; for inaſmuch as the five Things are Part of the ſix Things, and he has confeſſed the Tenure by the five Things, and ſuch Traverſe would be a Denial thereof, *ergo* there would be a Repugnancy in the Confeſſion and the Traverſe, which the Law will not ſuffer. And as the Traverſe is here taken, there is no Contrariety: for altho' the Tenure be entire, yet it is as well denied this Way as the other, and the Matter appears as well this Way, and is as fully denied without Contradiction, as it is the other Way with Contradiction, and therefore the Traverſe as it is here is the better Way.

[e] P. 5. H. 7. 23. *E contra* for the Plaintiff.

Upon this Matter the Juſtices were of different Opinions, and each of them, at a Day appointed for it, declared their Opinions openly, but could not then agree, and the Record of the ſaid Caſe in 5. *H.* 7. was ſearched and viewed by ſome of the Juſtices, (as I heard), and at laſt *Wood* ſaid to the Councel for the other Party, that the Juſtices had agreed that the Traverſe ought to be as *Wood* ſaid, viz. [f] of the Heriot only, as above, for the Reaſon before given, and the Councel for the Plaintiff believing him took the Traverſe accordingly, for before they had taken it the other Way. But *Bromley* ſaid afterwards that the Court had not ſo agreed. And upon this the Parties were at Iſſue. And now, viz. in *Trinity* Term 7. *Edw.* 6. the Jury was charged, and Evidence was given to them on both Sides. And amongſt other Things the Defendant ſhewed divers Court Rolls, and ſeveral of them were, that ſuch particular Perſons died ſeized of certain Lands holden of the Manor of *Horton*, after whoſe Deaths the Lord had ſeized a Heriot. And the Councel for the Plaintiff ſaid, that theſe Court Rolls prove for the Plaintiff, viz. that it was a Heriot Cuſtom. For there is a Difference in Law between Heriot Cuſtom and Heriot-Service. For a Man may ſeize Heriot-Cuſtom, and take it as his own Chattle, and as that wherein he hath Property, but Heriot-Service is parcel of the Tenure, and lies in [g] *render*, ſo that if the Tenant will not render it to the Lord, he has his Remedy for it, as he hath for Rent or other Things, viz. Diſtreſs. [h] For he may come to the Land, and diſtrain whatever Beaſts he ſhall find there, and may put them in Pound until he be ſatisfied for the Heriot, as it it appears in [i] 27. *Aſs.* where in Treſpaſs for Cattle taken and carried away, the Defendant ſhewed that he was Lord, and that two Heriots were due to him by Reaſon of the Tenure for two Deſcents, and becauſe the Heriots were eloigned, he took the Beaſts found upon the Land holden of him, for the Heriots eloigned, as it was lawful for him to do, and this was adjudged a good Anſwer; and there it is ſaid, that whatever Beaſts are manuring the Land within my Fee, I may avow the taking for Heriot, if they be eloigned. By which Book it appears, that for Heriot-Service the Lord may and ought always to diſtrain, and for Heriot-Cuſtom, ſeize. And then

[f] S. P. cited as the better Opinion 1. Saund. 208. *arguendo*.

Trin. Term. 7. Edw. 6.

Whether Heriot-ſervice may be ſeized, as well as Heriot-cuſtom.

[g] *Contra* Cro. E. 32. pl. 8. *per Wray*. 1. Show. 81. *per Holt*. C. J.

[h] Vin. Abr. tit. Heriot E. pl. 4.

[i] 27. Aſs. pl. 24. Fitz. Avowry 177. Bro. Heriot 6. 1. Rol. Abr. 665. pl. 5. Vin. Abr. tit. Heriot E. pl. 2.

then the Court Rolls, which prove a Seizure of a Heriot by the Lord, prove here that it is Heriot-cuſtom. And hereupon it was ſaid for the Plaintiff to the Jurors, that they ought to find for him.—And *Chomley* and *Gerard*, who were of Councel for the Defendants, ſaid that well and true it is the Lord may diſtrain for Heriot-ſervice, but they ſaid, the Lord may alſo ſeize Heriot-ſervice, ſo that he has two Means to come at it. And that the Law is ſo, that the Lord may ſeize Heriot-ſervice, they ſaid, it appears by the Book of [a] *M.* 6. *Ed.* 3. 36. *pl.* 3. which Book they had brought to the Bar, apprehending that the other Party would take the Exception *ut ſupra*, and there they ſhewed the Caſe in the Book openly. And the Caſe there is as follows, viz. In Replevin brought againſt an Abbot for a Horſe wrongfully taken, the Abbot ſhewed that W. the Father of the Plaintiff, whoſe Heir he is, held certain Tenements of him by certain Tenure, and after the Death of the Tenant to have the beſt Beaſt in Name of a Heriot, and alledged Seizin in his Predeceſſor, and becauſe this Horſe was the beſt Beaſt at the Time of his Death, he took it as his own Beaſt in Name of a Heriot; and the Plaintiff ſaid that the Place where the taking was *is out of his Fee*, and there it was ſaid to be no Plea, becauſe he avowed the taking as for his own Beaſt. [b] For he may avow the taking of his own Beaſt wherever he can find it, as well out of his Fee, as in it; wherefore the Plaintiff relinquiſhed his Plea, and traverſed the Seizin of the Heriot; *Priſt*, &c. And upon this Iſſue was joined. And this they apprehended was a Proof that the Lord might well enough ſeize the beſt Beaſt, for there the Abbot juſtified the taking of the Beaſt, and did not avow at all, which he could not have done, if he had not a Propriety in it; and there *out of his Fee* was no Plea, which would have been a good Plea if he had avowed, and had not claimed the Beaſt as his own. And *Bromley* and *Portman* Juſtices took the ſaid Caſe as a good Proof, that the Lord might ſeize Heriot-ſervice. And *Portman* ſaid, it appears alſo by [c] 16. *Ed.* 3. that the Law is ſo.—And the Councel for the Plaintiff ſaid, that the common Opinion amongſt Men learned in the Law is, that he may not ſeize Heriot-ſervice, but Heriot-cuſtom he may, and for Heriot-ſervice diſtrain. And this Diverſity is held good Law in [d] 8. *H.* 7. and in other Books and Years of *Henry* 7. *Bromley* ſaid, this Diverſity that you put is moved by the Way in the Years of *Henry* 7. but there is no principal Caſe adjudged upon it. Then the Councel for the Plaintiff ſaid, if there be Lord and Tenant, and the Tenant holds by a Capon, or an Egg, or 12 *d.* Rent, it is not lawful for the Lord to come to the Land, and take the Capon or the Egg, or the 12 *d.* being in Arrear, altho' he find it there, but his Remedy is only to diſtrain for it. And then what Difference is there between a Capon parcel of the Tenure, and an Ox parcel of the Tenure? To which it was ſaid, there is a great Difference between the Caſes put and the principal Caſe. [e] For in the Caſes put, if the Tenant has 20 Capons, or 20 Eggs, or 20 *s.* of Money, he may give what Capon, what Egg, or what 12 *d.* he pleaſes: So that the Election is given to the Tenant who ſhall pay the Thing, and the Lord ſhall not have which he pleaſes. [f] But in the Caſe of a Heriot, the Tenant ſhall not have any Election, nor the Lord alſo, for the Lord ſhall have the beſt Beaſt, and ſuch is the Tenure, ſo that the Thing is certain, in which Caſe it is reaſonable that the Lord ſhould ſeize the Thing. Therefore in the one Caſe there is an Election given to the Tenant, and in the other not, and in the one Caſe the Lord knows the Certainty, and in the other not; and ſo is the Diverſity. And afterwards *Portman* recited the Evidence to the Jury, and ſaid, You Jurors, the Councel for both Parties have prayed us the Judges to tell you what the Law is in this Point, viz. whether the Lord may ſeize Heriot-ſervice or not. And we have adviſed together, and are agreed, and take the Law to be, that the Lord may ſeize [g] Heriot-ſervice well enough. And therefore take the Law ſo by Rule of the Court. *Quod nota.* And afterwards the Jury found for the Plaintiff upon other Matter given in Evidence.

[a] Fitz. Heriot 4. Vin. Abr. tit. Heriot G. pl. 1.

[b] N. Bendl. 30. pl. 47. Kelw. 82. pl. 2.

[c] Fitz. Heriot 2.

[d] H. 8. H. 7. 10. b. Fitz. Preſcription 23. Bro, Heriot 7. Diſtreſs 44.

[e] Wing. Max. reg. 22. pl. 5. Cro. E. 590.

[f] See Hetl. 16. Cro. E. 32. 500. touching the Election.

[g] Herewithagree Cro. E. 32. *Peter v. Knoll, per Wray* C. J. ibid, 590, *Odiham v. Smith* adjudged in Error. Cro. C. 260 *arguendo*. Gouldſb. 191. pl. 128. *per Gawdy*. Lutwy. 1367. per 3 Juſtices. 1. Show. 81. *per Holt*. C. J. Salk. 356. *per Cur.* 3. Bac. Abr. 52. againſt the Opinions in the old Books, Temp. H. 8. Bro. Heriot 6. in fine. B. N. C. § 343. Dr. & Stnd. lib. 2. cap. 9. Kelw. 82. pl. 2. *per Frewick* C. J. 84. b. *per Idem*. N. Bendl. 30. pl. 47. O. Bendl. 18. pl. 71.

A Report of certain Points, which were ruled and holden at the Seſſions held at the Town of Salop, *on* Monday *the* ninth *Day of* July, *in the* firſt *Year of the Reign of our ſovereign Lady Queen* Mary, *and continued all that Week before Sir* T. Bromley *Knight Chief Juſtice of the King's Bench, Sir* R. Townſend *Knight Serjeant at Law,* W. Simons *Apprentice, and the Queen's Attorney in the Marches of* Wales, *and* E. Plowden *Utter-Barriſter of the Middle-Temple, and others being Juſtices of the Peace, and Juſtices of Goal Delivery aſſigned in the ſaid County of* Salop, *to which Seſſion was brought the Goal of divers Counties of* Wales, *to which the ſaid County of* Salop *was the next adjoining Engliſh County, in which the Queen's Writ run, according to the Statute of* 26. H. 8. cap. 6. *and according to the Act* of Ordinance *made in the Dominion of* Wales *in* 34. & 35. H. 8.

DIVERS Perſons of the County of *Montgomery* were indicted for killing *Oliver ap David ap Hoel Vaughan* at *Berew* in the ſaid County of *Montgomery* of Malice prepenſe, *viz.* ſome for giving the Wounds whereof he died, and *Griffith ap David ap John* and others for that they were preſent, aiding, comforting, and abetting the others to commit the ſaid Murder. And they, who gave the Wounds to the ſaid *Oliver*, and killed him, had fled and eſcaped, and *Griffith ap David ap John* and the reſt were brought to the Bar. And whether they ſhould be arraigned or no, was a Doubt, and was moved to the other Juſtices by *Bromley*; for he ſaid to them, that although they, who were preſent and abbetting, were Principals as well as they, who ſtruck the Man and killed him, yet they are Principals in the ſecond Degree, *viz.* in reſpect that the others, who ſtruck the ſaid *Oliver* and killed him, are Principals in the firſt Degree by reaſon of the Act of killing him, and theſe others, who abetted them and were preſent, are alſo Principals, but that in the ſecond Degree only, and in reſpect of the firſt Act; for if the others did not kill the Man, then if the ſaid *Griffith* and the reſt, who were Abettors and preſent, ſhould be now arraigned, and it ſhould happen that they ſhould be found guilty, and afterwards the others, who are indicted for giving the Stroke and killing the ſaid *Oliver*, ſhould be taken and arraigned, and it ſhould happen that they were acquitted, as it might be, then I would know your Opinions what ſhould be done. [a] For if *A.* is indicted for the Rape of a Woman, and *B.* is indicted for that he was preſent and abetting *A.* to do it, now they are both Principals by Law, and if *B.* is arraigned, and found guilty by Inqueſt, and afterwards *A.* is arraigned, and by another Inqueſt acquitted, now Judgment ſhall not be given againſt *B.* becauſe he could not be guilty but in reſpect that *A.* was guilty: And inaſmuch as it is found that *A.* did not do the Fact, then it cannot ſtand together that *B.* was preſent when *A.* did the Fact, for he could not be preſent at the doing of a Thing, which was never done, and therefore Judgment ſhall never be given againſt *B.* but he ſhall be acquitted by the other Verdict. For if Judgment ſhould be given againſt him, an Inconvenience would follow, for it appears to the Judges that both the Verdicts were not true, but one of them was falſe, and the Court ought rather to believe the Verdict which found *A.* not guilty, than the other, for the Inqueſt which acquitted *A.* was charged upon the principal Act, *viz.* whether *A.* committed the Rape or not, and the Inqueſt charged upon *B.* was not ſo fully charged upon the principal Point, *viz.* upon the Rape done by *A.* but was charged if *B.* was guilty of the Felony whereof he was impeached, that is, if he was preſent abetting *A.* And ſo the doing of the Act by *A.* is not expreſsly, but *incluſivè et obliquè* given in Charge to the Inqueſt charged upon *B.* and then the Verdict, which finds that which is not given in Charge to them expreſsly, but by Incluſion and Implication, ſhall not be ſo much believed by the Court in this Point, as the other Verdict that is charged upon that Point only. And therefore Judgment ſhall not be given againſt *A.* [b] And he that procures another to ſue to the Court of *Rome* ſhall forfeit as much as he who ſues, and is a Principal as well as the other, and they are in equal Degree of *Præmunire*, but if both of them were indicted, *viz.* the one of the Act, and the other of the Procurement, and he, who was indicted of the Procurement, was found guilty, and the other by another Inqueſt was found not guilty, Judgment ſhould never be given againſt him that procured, becauſe he could not be an Offender but in reſpect of the Offence of the other, and he was a Principal in the ſecond Degree only, (as is ſaid before,) and inaſmuch as he, who was a Principal in the firſt Degree, was acquitted by Inqueſt charged upon that Point only, he who is in the ſecond Degree, and puniſhable in reſpect of the firſt Act, ſhall be alſo acquitted thereby. And therefore conſider our preſent Caſe, for the Priſoners now at the Bar are Offenders and Principals in reſpect that the others are Offenders, and more heinous Offenders and Principals. And as it ſeems theſe are Principals in Law, and the others who gave the Wounds whereof *Oliver* died are Principals in Deed, and then if afterwards the Principals in deed, being the chief Offenders, are acquitted by another Inqueſt, which finds that they did not ſtrike *Oliver* nor kill him, how can the Priſoners now at the Bar be abetting and preſent to that which was never done? And therefore if it ſhould ſo happen that we ſhould arraign the Priſoners at the Bar, who were abetting and preſent, and that they ſhould be found guilty, and afterwards the other Principals ſhould be acquitted, (and we ought to believe the Inqueſt which acquits the others to be true) conſider ye what is to be done. For if we ſhould give Judgment that the Priſoners at the Bar (if it ſhould ſo happen that they were arraigned, and found guilty) ſhould be hanged, and afterwards they ſhould be executed, and then the others, *viz.* the Principals in Deed, who are indicted of killing the Man, ſhould be acquitted, I would aſk you whether we ſhould not have done a great Injury to the Priſoners now at the Bar. And therefore it would be well to weigh and conſider this Matter thoroughly. And the ancient [c] Law of the Realm was, that they, who were preſent and abetting

Thoſe who are preſent and abetting a Murderer are Principals, as well as the Murderer himſelf, and ſhall be arraigned, although he that did the Murder is not attainted. S. P. 1. H. H. P. C. 437.

[a] M. 11. H. 4. 13. pl. 37. Fitz. Corone 86. Bro. Appeal 32.

[b] P. 44. Ed. 3. 7. pl. 6. Bro. Præmunire

[c] So it appears by 40. Aſſ. pl. 25. Fitz. Corone 216. Bro. 119. P. 2. St. 8. Kelw. 161. a. *Per Fineux.* C. J. in Charge to the Jury. 1. H. H. P. C. 437. 2. Hawk. P. C. 311, 312. Poſt 99, 100.

ting others to do the Act were Acceſſaries, and not Principals, and it was grounded upon the Reaſon I have ſhewn before, as I apprehend. And therefore you will conſider the Matter. And all the other Juſtices abovementioned, after adviſing thereof for two Days, held clearly enough that they might proceed with the Priſoners now at the Bar, without any Inconvenience ariſing from it. For they ſaid, [a] that when many come to do an Act, and one only does it, and the others are preſent abetting him, or ready to aid him in the Fact, they are Principals to all Intents as much as he that does the Fact: for the Preſence of the others is a [b] Terror to him that is aſſaulted, ſo that he dare not defend himſelf, for if a Man ſees his Enemy and 20 of his Servants coming to aſſault him, and they all draw their Swords and ſurround him, and one only ſtrikes him, ſo that he dies thereof, now the others ſhall with good Reaſon be adjudged as great Offenders as he that ſtruck him, for if they had not been preſent, he might probably have defended himſelf, and ſo have eſcaped: but the Number of the others being preſent and ready to ſtrike him alſo, ſhall be adjudged a great Terror to him, ſo as to make him loſe his Courage, and deſpair of defending himſelf, and by this Means they are the Occaſion of his Death. So that their Preſence is the Cauſe of Terror, and Terror is the Reaſon that he receives the Wounds, and the Wounds are the Cauſe of his Death. And then inaſmuch as both together, *viz.* the Wounds and the Preſence of the others, who gave no Wounds at all, are adjudged the Cauſe of his Death, it follows that all of them, *viz.* thoſe that ſtrike, and the reſt that are preſent, are in equal Degree, and each partakes of the Deed of the other. And the Fact, as to him that is dead, and as to the Puniſhment of it, (although it conſiſts of two Parts) yet in Law it is without Diviſion: And notwithſtanding there is but one Wound given by one only, yet it ſhall be adjudged in Law the [c] Wound of every one, that is, it ſhall be looked upon as given by him who gave it, by himſelf, and given by the reſt by him as their Miniſter and Inſtrument. And it is as much the Deed of the others, as if they had all jointly holden with their Hands the Club or other Inſtrument with which the Wound was given, and as if they had all together ſtruck the Perſon that was killed. So that it cannot be well termed that they, who gave the Wound, are Principals in Deed, and the other Principals in Law, but they are all Principals in Deed, and in one ſame Degree. And if we ſhould arraign the Priſoners now at the Bar, and the Jurors ſhould give a ſpecial Verdict, *viz.* that *Oliver* was ſtruck and killed by another named in the Indictment, and not by thoſe that are expreſſed in the Indictment to have given the Wounds, and ſhould alſo find that all the others named in the Indictment were preſent, abetting and comforting him, whom they now found gave the Stroke, to do the ſame, ſhould not this Verdict be good? Yes certainly; and the Priſoners now at the Bar ſhould upon this Verdict be adjudged to be hanged, [d] for the Jury have agreed in that which the Law ſaith is the Effect of the Indictment, that is, they have found them all Principals, and as the Law ſaith, in one ſame Degree; and ſo the Variance in the Circumſtances of the Indictment is not material. And if it ſhould happen that they, who by the Indictment are found to give the Wounds ſhould die before they are arraigned, it is clear enough that *Griffith* and the others now at the Bar ſhould be arraigned, which is a Proof that they, who are now at the Bar, are accounted in Law as much Principals as the others, and in the ſame Degree, and not in a ſecond Degree, for if it was in the ſecond Degree, then would it be hard to arraign them, when he in the firſt Degree could not be arraigned, but is diſcharged by Death. For which Reaſons it ſeemed to them that the Priſoners now preſent might be arraigned. And afterwards *Bromley* and all the Court agreed to it. And therefore they were arraigned, and pleaded, not guilty.

And *Note* that one *Morris Gittin* was indicted by the ſame Indictment as Acceſſary to them all, *viz.* to the Principals who were abſent, and to the Principals now preſent at the Bar, and he was brought to the Bar to be arraigned, and *Bromley* ſaid to the other Juſtices. You ſee that he is indicted as Acceſſary to all, but ſome of the Principals are preſent, and ſome are abſent, who are not attainted, and it is not good to arraign him with the Principals now preſent, as Acceſſary to them only, and we cannot arraign him as acceſſary to the others that are abſent, becauſe they are not attainted nor preſent to be arraigned with him. Therefore if he muſt be arraigned at all, he muſt be arraigned as acceſſary only to thoſe that are now preſent at the Bar. And then it may happen that the Principals now preſent ſhall be acquitted, or it may be found that the ſaid *Morris* was not Acceſſary to them that are now preſent, but perhaps he was Acceſſary only to thoſe that are abſent, and then it is not good to arraign him until he may be arraigned as Acceſſary to them all, and ſo it was done in the *Book of Aſſizes*. And he ſent immediately to his Houſe in *Salop* for the ſaid Book, which was brought to him ſitting on the Bench. And he read the Caſe, which was in [e] 40. *Aſſ. pl.* 25. as follows, *viz.* a Woman ſued an Appeal in the King's Bench of the Death of her Huſband againſt ſixteen, *viz.* againſt *R. W.* and three others as Principals, and againſt the reſt, of Preſence, Force, and Aid. And one of them, *viz.* the firſt Principal was outlawed, and two others who were appealed as Principals came and pleaded, not guilty. And they who were appealed of Force and Aid, *viz.* the twelve, came by Exigent to anſwer, and were not arraigned at all, becauſe ſaith *Knivet*, although one Principal was attainted, it may be that they were not Abettors, nor of Aid to him, but to the others who are not attainted, for which Reaſon until they are attainted they ſhall not be arraigned, *&c.* and they were let to Mainprize. And all this appears in the ſaid *Book of Aſſizes*. And *Bromley* alſo ſaid, that it was in like manner held for Law in *Hill.* 7. *H.* 4. *coram Rege*, for he had noted it in the Margent of his Book of Aſſizes.

And Note *in the ſaid Term of* Hill. 7. H. 4. *there are two Caſes touching this Matter*, fo. 31. *of the old Print, and* fo. 107. *of the new Print.* [f] *The firſt is, that in an Appeal brought by a Woman of the Death of her Huſband, three were appealed as Principals, and one of them was before that arraigned at the Suit of the King, and attainted, and after died before the Writ of Appeal purchaſed,*

[a] 34. H. 8. Bro. Corone 172. B. N. C. § 237. M. 11. H. 4. 13. pl. 30. *Per Hul.* Bro. Corone 187. Moor 53. pl. 155. 4. Co. 42. b. 9 Co. 67. b. 11. Co 5. b. 2. Inſt. 182. S. P. C. 41. b. c. d. Kely. 47. Dalt. Juſt. cap. 145. § 10. cap. 161. § 3. H. P. C. 215. 1. H. H. P. C. 437. 2. Hawk. P. C. 312. Kitch 50. Poſt 1 Co.

[b] 2. Hawk. P. C. 312. thinks it is not neceſſary to the making an Abettor a Principal, that the Perſon on whom the Felony is committed ſhould be under any Terror from the Abettment

[c] 9. Co 67. b. 11. Co. 5. b. 1. H. H. P. C. 437. 2. Hawk P. C. 312.

[d] S. P. 9. Co. 67. b. 112. a. 1. H. H. P. C. 437, 438. 2. H. H. P. C. 185. 292. 2. Hawk. P. C. 437. § 39. Salk. 334. 335. 3. Mod. 121.

Where there are many Principals, ſome of which are preſent and ſome abſent, and one is indicted as Acceſſary to them all, his Arraignment ſhall be ſtaid until he may be arraigned as Acceſſary to all at once. S. P. 2. Hawk. P. C. 322. Wing. Max. reg. 63. pl. 35.

[e] Fitz. Corone 216. Bro. 119. 1. H. H. P. C. 624.

Nota bene by the Reporter.

[f] M. 7. H. 4. 27. pl. 4. 35. pl. 4. Bro. Appeal. 19. Corone 19. where Exception was taken that the Writ ſhould abate, becauſe it was falſe when it was purchaſed againſt one that was dead before, but by the Rule afterwards it ſeems this was utterly diſallowed.

chaſed,

chaſed, and the others were not outlawed, and upon the Plea of the Acceſſaries the Inqueſt was taken at the Bar, and by the Advice of the Juſtices of the one Bench and of the other it was awarded that the Inqueſt ſhould not be taken as to the Acceſſaries, becauſe none of the Principals were attainted at the Suit of the Party. And ſo Note (Reader) *the Cauſe of this Judgment was not meerly for that the Acceſſaries ſhould not be put to anſwer until all the Principals were attainted, but it was becauſe none of the Principals was attainted at the Suit of the* [b] *Party, but only at the Suit of the King. But* Note, *the Inqueſt was there taken againſt* J. Staver, *one of the Principals, who was found not guilty,* &c. *and the Acceſſaries had Day until the Day of the Exigent returnable againſt the other Principal. And ſo* Note *although it was then uſual to arraign the Principal and the Acceſſary together, and to charge one Inqueſt with them, as it appears in the ſame Year of* 7. H. 4. *yet it was not ſo done in the ſaid Caſe, becauſe the other Principal was not attainted nor preſent to be arraigned; which Caſe agrees with the ſaid Caſe in* 40. Aſſ. *and with the Purpoſe for which it was cited.* [c] *The other of the ſaid Caſes in* 7. H. 4. *was, that a Woman appealed four Men,* viz. *two as Principals, and two as Acceſſaries, and at the Day of the Exigent returnable againſt the Principals, one of them came by* Superſedeas, *and the other was outlawed, and the* Capias *was returned againſt the Acceſſaries, and the Woman counted againſt him that appeared, and prayed an Exigent againſt the Acceſſaries: And it was ſaid, that one of the Principals was not then attainted, wherefore the Exigent was not awardable againſt the Acceſſaries, for they were appealed as Acceſſaries to both the Principals, in which Caſe it was not reaſonable that the Exigent ſhould be awarded, until both the Principals be attainted: but otherwiſe it had been, if they had been appealed as Acceſſaries to him only who was outlawed, becauſe he was attainted. But it was ſaid if the Acceſſaries had been preſent, they ſhould be put to anſwer, and ſhould be arraigned with the Principal that appeared, and one Inqueſt ſhould paſs upon them both, for if the Inqueſt ſhould find the Principal, that was preſent, not guilty, yet the ſame Inqueſt ſhould enquire if the Acceſſaries be guilty as Acceſſaries to him that is outlawed; and afterwards the Parties agreed. And all this appears in the ſaid Book of* 7. H. 4. *ſo that the laſt Caſe is not adjudged the one Way, or the other: but the better Opinion there is (as it ſeems to me)* [d] *that the Exigent ſhall not be awarded againſt the Acceſſaries, until the Principal, who then appeared, was tried.*

[b] S. P. St. P.C. 47. B. 1. H. H. P. C. 625. H. P. C. 2. 12. Hawk. P. C. 321. § 39. 2. Inſt. 184. Vin. Abr. tit., Acceſſary G. pl. 11.

[c] H. 7. H. 4. 36. pl. 5. Fitz. Exigent. 4. Bro. Appeal. 22. Corone 20. Vin. Abr. tit. Acceſſary G. pl. 12.

[d] Herewith agrees 2. Inſt. 183. 2. H. H. P. C. 200. 2. Hawk. P. C. 307. § 132.

Wherefore upon the ſaid Book of 40. *Aſſ.* being read, as aforeſaid, and upon the ſaid Book of 7. *H.* 4. cited, it was now ſaid that it is good to follow the ſame Books. And it was ſaid, that the Inconvenience which might poſſibly happen, if the Court ſhould now arraign *Morris Gittin*, would be in this Point, *viz.* if he ſhould be now arraigned as Acceſſary to the Principals now preſent, and it ſhould be found by the Inqueſt that he was not Acceſſary to them, and ſo ſhould be now acquitted, then although he was *in rei veritate* Acceſſary to the Principals now abſent, yet he cannot be arraigned hereafter as Acceſſary to them, if they ſhould be afterwards taken, arraigned, and attainted, becauſe his Life was put in Danger before for the Death of the ſaid *Oliver*; and although the being Acceſſary to one is not being Acceſſary to another, but is ſeveral Facts, yet it was ſaid that the Death of *Oliver* is but one, and not ſeveral Facts, and then the Life of *Morris Gittin* ſhall not be put in Danger for the Death of *Oliver*, or for the Dependances upon it, more than once. And therefore it was ſaid, that if the Court ſhould now arraign *Morris*, and would not prevent the Miſchief, it might happen by this Means that he would be abſolutely acquitted, where he deſerves Death, and therefore it would be the better Way to arraign him when he may be oppoſed, and ought to anſwer if he was Acceſſary to all the Principals, or to any of them. But the other Juſtices did not agree to this Cauſe of ſtaying the Arraignment, for they ſaid, that although he be now arraigned as Acceſſary to the Principals now preſent, and ſhould be thereof acquitted, [e] he might by Law be well arraigned afterwards as Acceſſary to the other Principals. And ſo the Bench diſagreed as to this Cauſe. *But the Reaſon why the Acceſſary ſhall not be arraigned as acceſſary to one Principal, until the other Principals be attainted, ſeems by the ſaid Book of* 7. H. 4. *(as I apprehend by the Reaſons given in the ſaid laſt Caſe thereof) to be, becauſe there is greater Reaſon to take one* [f] *Inqueſt to try if he be Acceſſary to both, or to ſome of them, than two Inqueſts, where one might make an End of the whole, therefore according to this Reaſon, notwithſtanding the Acquittal by one Inqueſt of being Acceſſary to one, he may be arraigned as Acceſſary to another, ſo that becauſe it is the leaſt Trouble to the Country, and as ſuch the better Way to take one Inqueſt, than two, this ſeems to be the Reaſon that he ſhall not be arraigned until he ſhould be arraigned as Acceſſary to all together. From whence it ſeems, that the Cauſe of reſpiting the Arraignment until he may be arraigned as Acceſſary to all the Principals together, is more out of good* [g] *Diſcretion than out of Neceſſity.* However it now ſeemed to the Court the beſt Way to purſue the ſame Courſe that the Sages before have uſed. And therefore by the Advice of the whole Court, the ſaid *Morris Gittin* was reſpited from Arraignment, until he might be arraigned as Acceſſary to all the Principals at once.

[e] 1. H. H. P. C. 624. H. P. C. 222.

Nota bene by the Reporter.

[f] 2. Hawk P. C. 323.

[g] Herewith agrees H. P. C. 222. 1. H. H. P. C. 624. But 2. Hawk. P. C. 322. ſays, there are great Authorities to the contrary, and that there is no Inſtance in the Books wherein the Court has actually proceeded to the Trial of an Acceſſary in ſuch a Caſe, before all the Principals have either appeared or been attainted.

And Note *(Reader) that the ſaid Caſe in* [h] 40. Aſſ. *proves, that the Law* [i] *anciently was, that thoſe who were preſent and abetting were not Principals, but Acceſſaries, as the Lord* Bromley *ſaid before, for the Book is, that four were appealed as Principals, and the others of Preſence, Force, and Aid. And alſo in* [k] Mich. 40. Ed. 3. 42. *it appears that one* William de C. *was appealed for that he was aiding, preſent, and commanding one* T. *who on a certain Day killed* W. de R. *Huſband of the Wife: and becauſe the Principal was not attainted by Exigent, nor in other Manner, the Defendant was let to Mainprize, and afterwards the Principal was attainted by Exigent, and then* W. *was put to anſwer. So* Note (Reader) *that theſe two Books as to this Point,* viz. *that they who were preſent, aiding or commanding the Principal,* &c. *nevertheleſs were not put to anſ-*

Nota bene by the Reporter.

[h] 40. Aſſ. pl. 25.

[i] See ante 97(e), and the Books there cited.

[k] Fitz. Corone 90. Bro. Mainprize 6. S. C. 40. Aſſ. pl. 8.

wer until the Principals were attainted, are contrary to that which was done above in the Arraignment of the ſaid Griffith ap David. *But the ſaid two Books are therein grounded upon this Point only,* viz. *in that the Law was then taken that they who were preſent and commanding to do the Act, were only Acceſſaries, and not Principals. But of late Time the Law has been held contrary in this Point, for now they are taken to be* [a] *Principals by all the Sages of the Law.* [b] *For in* Mich. 4. H. 7. 18. pl. 10. *it appears that* Huſſey *put this Queſtion, whether he, that is preſent at the Death of a Man, and encourages another to ſtrike and kill the Perſon, is a Principal; and it was holden by all the Juſtices of both Benches, that he is a Principal, though he doth not ſtrike him, and notwithſtanding that the* [c] *Count in every Appeal is, that every Principal wounded him and ſtruck him mortally, for theſe are but Words of Form, and the Blow of him that ſtruck is the Blow of him that commanded him, inaſmuch as he was preſent; and all this appears there. And in the Years of* [d] Henry 4. *the Reader may ſee the Law often adjudged accordingly,* viz. *that thoſe who are preſent and abetting to do the Act are Principals, as well as he that does it.* [e] *And it ſeems the Law was ſo changed in the Time of the ſaid King* Henry 4. *where the former Courſe was reproved and corrected in this Point. So* Note, *that at this Day thoſe who are preſent and abetting or ready to do the Act, are Principals as well as he that does it, and may be arraigned notwithſtanding the other Principals are abſent and not attainted.*

[a] See ante 98(a), and the Books there cited.
[b] Fitz. Corone 60. Bro. 141. Appeal 85. 1. H. H. P. C. 437. Vin. Abr. tit. Acceſſary B. pl. 14.
[c] S. P. C. 41. c. Dalt. Juſt. cap. 161. § 3.
[d] See Accord. M. 7. H. 4. Stath. Corone 21.
[e] 1. H. H. P. C. 437.

Alſo at the ſame Seſſions *George Saliſbury, John Vane Saliſbury, Richard Saliſbury,* one called *Pigot,* and another called *Knowſley,* were arraigned upon an Indictment of Murder, for killing one in the County of *Denbigh,* who was Servant to Doctor *Ellis.* And they all pleaded, not guilty, and one Inqueſt was charged upon them all, and they challenged divers peremptorily, and all agreed in the Challenge, and becauſe there were not Jurors enough left in the Inqueſt to paſs upon them, a *Tales* * was awarded returnable immediately, after which Return the Priſoners challenged peremptorily, and did not agree in the Challenge, for ſome challenged ſome of the Jurors peremptorily, and the others prayed that they might be ſworn, and it was debated by the Bench what ſhould be done, *viz.* if he that is challenged ſhall be drawn againſt all. And afterwards they held, that although the five were arraigned together, and although in Judgment of Law it was not a joint Arraignment, but ſeveral Arraignments, becauſe their Offences are ſeveral, yet inaſmuch as one *Venire Facias* was awarded for all, the Juror challenged by one ſhall be drawn againſt all. And one of the Bench ſhewed the others an Abridgment, which he had then ready, of an Appeal againſt *Beauchamp* in *Trin.* 9. *Ed.* 4. which was as follows, *viz.* [f] In an Appeal againſt many, who pleaded, not guilty, and one *Venire Facias* was awarded againſt all, and one of the Defendants challenged a Juror peremptorily, and by the Advice of all the Juſtices of the one Bench and of the other it was holden, that inaſmuch as the *Venire Facias* is joint, the Challenge of him is good for all, for he may not be drawn againſt one, and taken for the reſt. Wherefore now by Award of the Court, thoſe challenged by one were drawn againſt the others, and ſo divers were drawn. And the Court perceived that the Priſoners were minded to ſever in the Challenge of the whole Panel, ſubtily and craftily to ſtay the Trial for that Time, for by that Means each of the Priſoners would challenge peremptorily as many as they might without Danger, *viz.* [g] 20. and then at the Challenge of one of them only, 20. with them that were before challenged jointly by all ſhould be drawn againſt every one. For although at the Challenge of one only the Juror ſhall be drawn againſt all, yet it ſhall not be accounted the Challenge of any other, if he does not agree to it, for each of them ſhall have his entire Number of 20. So that one ſhall not be excluded of his Number by the Challenge of the other, but ſhall take Advantage, and not Damage by it. And there was but a ſmall Number of Perſons then in the Town of ſufficiency to be ſworn, ſo that by this ſubtile Invention (if a Remedy was not found out) the Trial would be now ſtaid. And therefore it was debated on the Bench, whether the Panel might be ſevered, that is, if the ſame Panel might be made between the Queen and each of the Priſoners by himſelf only, ſo that the ſame Men might ſerve for five ſeveral Inqueſts, and whether it might be done, conſidering that the *Tales* being a judicial Writ which iſſued out, was founded upon the Inqueſt, which was joint for all the five Priſoners. And it was ſhewn to the Court what was written in the ſaid Caſe of 9. *Ed.* 4. concerning the ſame Matter, for there it is contained as follows, *viz.* It was ſaid, that at the Goal Delivery if one Inqueſt be demanded to paſs upon two or three, and one challenges peremptorily, then the Clerk ſhall ſever the Felons each by himſelf. And afterwards the whole Court agreed, that the firſt Panel and the *Tales* alſo might be divided and made ſeveral for each of the Priſoners, and that they would do ſo upon the Requeſt of the Queen's Attorney. Wherefore the Court ſaid to the Priſoners, we perceive your Subtlety well enough, which merits but ſmall Favour from the Court, and therefore tell us if you will agree in your Challenges, for if you will not, the Clerk ſhall ſever the Panel. And afterwards all the Priſoners agreed in their Challenges, and the Inqueſt was full, and Evidence was given. And at the End of the Evidence, the Inqueſt demanded of the Court this Queſtion, *viz.* if ſo be in Truth, *John Vane Saliſbury* was in the Company of them, who of their Malice prepenſe killed him that is dead, and when he ſaw them combating together, took Part with them ſuddenly, and had not Malice prepenſe, and ſtruck, with the others, him that is dead, whether this be Murder or Manſlaughter in *John Vane Saliſbury.*

The Court anſwered, if *John Vane Saliſbury,* had not Malice prepenſe, but ſuddenly took part with them who had Malice prepenſe, this is Manſlaughter in him, and not Murder, becauſe he had not Malice prepenſe. *Quod nota bene (Lector) for I have heard this greatly doubted,*

* *Note,* it has been held that a *Tales* is not grantable by Juſtices of Goal Delivery, State Tri. Vol 4. fo. 179 to 182. But in Kelw. 176. pl. 10. it was awarded in an Appeal before ſuch Juſtices. See 2. Hawk. P. C. 409. § 19.

[f] T. 9. Ed. 4. 27. pl. 40. Fitz. Challenge 56. Bro. 84. Venire Facias 32. Dy. 246. pl. 70. Co. Litt. 156. b.

[g] Stat. 25. H. 8. cap. 3.

Where ſeveral are arraigned upon one Indictment for the ſame Offence, every Priſoner may challenge peremptorily his Number, and if one *Venire Facias* is awarded for all, he that is challenged by one ſhall be drawn againſt all. S. P. Dy. 246. pl. 70. Moor 13. pl. 48. 2. H. H. P. C. 263. 268. 2. Hawk. P. C. 407. § 9. H. P. C. 256. Kely. 9.

But in ſuch Caſe, before Juſtices of Goal Delivery, the Panel may be ſevered, and the ſame Jury be returned between the King and each of the Priſoners by himſelf. S. P. 2. H. H. P. C. 264. H. P. C. 256. 2. Hawk. P. C. 407. § 9. Cromp Juſt. 113. b. pl. 2. Kely. 9.

If divers intend to murder a Man, and another enters in the Affray ſuddenly without Malice prepenſe, and kills the Perſon, this is not Murder but Manſlaughter. S. P. H. P. C. 42. Sir *Ferdinando Cary*'s Caſe 14. Jac. Kely. 61. 136. 1. Hawk. P. C. 82. § 35. 85. § 50. Dalt. Juſt. cap. 145. § 10. 3. Bulſt. 206. 3. Bac. Abr. 667. 12. Mod. 628. *Per Holt* C. J.

viz.

viz. if the Maſter lies in Wait in the High Way to kill a Man, and his Servants attend upon him, and the Maſter does not make his Servants privy to his Intent, and afterwards he, for whom the Maſter lies in Wait, comes, and the Maſter attacks him, and his Servants, ſeeing their Maſter fighting, take his Part, and all of them kill the Man, whether or no this ſhould be Murder in the Servants, as it ſhall be in the Maſter, becauſe they, without Malice prepenſe, took Part with him that had Malice prepenſe. But this is by the above Rule of the Court put out of Doubt, viz. that it ſhall only be [a] *Manſlaughter in the Servants.* And *Note* that the Court ſaid thus to the Jury; you, Jurors, have heard the Evidence which has been given to prove the Priſoners guilty of the Murder whereof they are impeached, which Evidence proves that the Conſpiracy was to kill Doctor *Ellis*, and the Malice prepenſe was againſt him, and not particularly againſt his Servant who is killed, and therefore perhaps you will imagine that the Evidence does not maintain the Indictment, becauſe no Malice was againſt the Servant, whom the Priſoners perhaps did not know, nor ever heard of him before; and we think it proper to tell you what the Law is in this Point, to the Intent that you may not err in it. And, Sirs, we take the Law to be, that the killing of him is Murder in the Priſoners, if they killed him upon the Malice which they had againſt the Maſter, ſo that if you ſhall find that they had Malice againſt the Doctor, that Malice does in the Eye of the Law make the killing of him that was killed, who was the Doctor's Servant, and in his Company, to be Murder. And therefore you muſt take the Law ſo: *quod nota bene Lector.* And the Reaſon whereupon this Judgment was founded was this, viz. when a Man has Malice againſt another, and intends to kill him, and endeavours to put his Purpoſe in Execution, and kills one that reſiſts his Purpoſe, it cannot be otherwiſe conſtrued but that by Neceſſity of Reaſon he has Malice againſt all thoſe who would defeat his Deſign, and that he would offer Violence to them that would defend the Perſon againſt whom his Malice is directed, rather than deſiſt from his Purpoſe, and therefore if he kills them to whom he had before-hand intended to offer ſuch Violence, this cannot be any Thing elſe than Murder; and ſo the Act declares his Intent before, and the Malice againſt the Principal begets in himſelf another Malice againſt thoſe whom he preſumes will reſiſt his Purpoſe, which Malices are combined one to the other inſeparably. And afterwards the Jurors found *Richard Saliſbury*, *Pigot*, and *Knowſley* guilty, who were afterwards executed at *Denbigh*, where the Man was killed. And they found, that *George Saliſbury* was not guilty. And they found alſo, that *John Vane Saliſbury* killed the Man, but not of Malice prepenſe, and ſo they acquitted him of the Murder, and found him guilty of Manſlaughter. And whether *John Vane Saliſbury* ſhould be utterly acquitted by this Verdict, inaſmuch as he was arraigned for Murder, and is thereof acquitted, or whether the Court ſhould give Judgment upon him that he ſhould be hanged for the Manſlaughter, or whether this Verdict ſhould ſerve only againſt him for an Indictment of Manſlaughter, and be of no other Effect, or what elſe ſhould be done with him, was privately conſidered and debated by the Bench among themſelves. And the Opinion of the whole Court was in a manner clearly, that they might give Judgment upon him to be hanged for the Manſlaughter. For they held, that the Jury might give a Verdict at large, and find the whole Matter. * As if one is arraigned for the Death of a Man, and he pleads, not guilty, the Jury may find that he killed him in his own Defence. And then here when he was arraigned for killing a Man upon Malice prepenſe, the Subſtance of the Matter was, whether he killed him or not, and the Malice prepenſe is but Matter of Form or the Circumſtance of killing. And altho' the Malice prepenſe makes the Fact more odious, and for this Cauſe the Offender ſhall loſe divers Advantages, which he ſhould otherwiſe have, as Sanctuary, Clergy, and the like, yet it is nothing more than the Manner of the Fact, and not the Subſtance of the Fact, for the Subſtance of the Fact is the killing him, † and then when the Subſtance of the Fact, and the Manner of the Fact are put in Iſſue together, if the Jurors find the Subſtance and not the Manner, yet Judgment ſhall be given according to the Subſtance. As if a Man arraign an Aſſize for a Diſſeizin with Force, and the Defendant pleads the general Iſſue, and the Jurors find the Diſſeizin, but not with Force, yet the Plaintiff ſhall have his Judgment, for the tortious Expulſion was the Subſtance, and the Force the Manner, and then when the Subſtance is found, he ſhall have Judgment for it, and ſhall be acquitted of the Force. So the killing the Man was the Subſtance, and the Malice prepenſe the Manner, and then when the Subſtance is found, viz. the killing the Man, Judgment ſhall be given upon it. But altho' the Court held in a manner clearly, that they might give Judgment upon him for the Manſlaughter, yet they thought it good, and it was agreed, to reprieve the Priſoner, until the Opinions of the other Sages of the Law were known. And therefore they did reprieve him.

Nota bene by the Reporter.

[a] So is the Law clearly holden 1. H. H. P. C. 438. 446. H. P. C. 52. 1 Hawk. P. C. 85. § 49. Crompt. Juſt. 23. Dalt. Juſt. cap. 145. § 9. Ld. Raym. 1302. 11. Mod. 251.

If in an Affray againſt one upon Malice, another, who defends the Perſon aſſaulted, be killed, it is Murder. S. P. 1. H. H. P. C. 438. H.P.C. 50. Dalt. Juſt. cap. 145. § 9. 1. Hawk. P.C. 83 § 41.

If A is indicted of Murder upon Malice prepenſe, the Jury may acquit him of the Murder, and find him guilty of Manſlaughter. S. P. Co. Litt. 282. a Dal. 14. pl. 2. 2. H. H. P. C. 293. 302. 2. Hawk. P. C. 493. § 4. H. P. C. 267. And upon this Verdict he ſhall have Judgment to be hanged for the Manſlaughter. Temp. H. 8. Bro Coron 222. B. N. C. § 335. 9. Co. 67. b.

* P. 37. H. 8. Bro. Appeal 122. 2. H. H. P. C. 302. H. P. C. 267.

† 9. Co. 67. b. Wing. Max. reg. 11. pl. 30.

A brief Report of the Opinions of the Juſtices of the King's Bench *in a Caſe upon the Statute of Diſſolution of Abbies*, 31. H. 8. cap. 13. *argued in the Term of* St. Michael *in the* firſt *and* ſecond *Years of the Reign of King* Philip *and Queen* Mary, *between* Richard Fulmerſton *Plaintiff, and* Simeon Steward *Defendant, in an Action of* Treſpaſs *brought in the County of* Suffolk. *And the Record is to be ſeen among the Records of* Eaſter *Term* 6. Ed. 6. Rot. ultimo.

Mich. 1. & 2. *P. & M.* Where pleading of Seizin in a College, without ſaying *in jure Collegii*, and of Part of a Statute, and of the Enrollment of a Deed to the King, without ſhewing the Manner thereof, and of Seizin in the King as in right of his Crown by the Statute of 31. *H.* 8. *cap.* 13. ſhall be good. And where a Leaſe made within a Year next before the Statute of 31. H. 8. to one who had another Leaſe at the time of the making of it, was good and for what time. S. C. Dyer 102. pl. 1.

THE Plaintiff declares of his Cloſe broken at *Elveden* in the ſaid County, in the *third* Year of the Reign of King *Edward* the *Sixth*. The Defendant ſaith, that the Place where &c. was 100 Acres of Paſture in *Elveden* parcel of the Manor of *Elveden*, which Manor *George Wyndham*, Maſter of the College of *Ruſhworth* in the County of *Norfolk*, and his Fellows, the 20th Day of *December* in the 30th Year of King *Henry* the *Eighth*, by their Deed leaſed to the Defendant, to have from the *Invention of the Croſs* then laſt paſt for 50 Years then next to come, and by Virtue hereof he juſtifies, and gives Colour to the Plaintiff. The Plaintiff by the Replication ſaith, that a long Time before the ſaid Leaſe, *&c.* one *John Purpet*, then Maſter of the ſaid College, and his Fellows, were ſeized of the ſaid Manor, whereof the 100 Acres are, and at the ſame Time when, &c. and for Time immemorial were parcel, in their Demeſn as of Fee; who in the *eleventh* Year of the Reign of King *Henry* the *Eighth* leaſed to *Edward Beſteny* the ſame Manor whereof, &c. by the Name of their Manor of *Elveden*, and of all their Lands, &c. appertaining to the ſaid Manor, together with the Lands and Paſtures at *Deadmans-grave*, except the Tenements late *Largients*, to have from the *Invention of the Croſs* in the Year of our Lord 1524, until the End of 60 Years then next coming. And ſhews further, that the ſaid *Beſteny* in 20. *H.* 8. granted over his Eſtate to the Defendant, and afterwards the ſaid *Purpet* died, and the ſaid *Wyndham* was choſen Maſter, *&c.* and he and his Fellows made the Leaſe to the Defendant in the ſame Manner as in the Bar is alledged, the ſame Defendant then being poſſeſſed of the other Term. And alledges further that Part of the Act of Parliament made in 31. *H.* 8. which gives the Colleges and Houſes of Religion then ſtanding, and which ſhould afterwards come to the King's Hands, to him, in the ſame Eſtate and Condition as they then were; and alledges alſo that Part of the Act, which makes Leaſes then made of the Poſſeſſions of Colleges and other Houſes, which ſhould afterwards come to the King, to be void, if another Leaſe for Years at the making thereof was in Being, and then not determined, &c. And ſhews alſo that the ſaid *Wyndham* and his Fellows ſurrendered the College to King *Henry* the *Eighth* in the 33 Year of his Reign, by Deed enrolled in the Chancery, by Virtue of which Grant and Act the King was ſeized of the ſaid Manor whereof, *&c.* in his Demeſn as of Fee, in Right of his Crown. And the ſame King being ſo ſeized granted the ſaid Manor whereof, &c. to the Earl of *Surry* in Fee, who conveyed it to the Plaintiff in Fee, by Virtue whereof he entered and was ſeized, until the Defendant did the Treſpaſs, &c. And further he avers, that the firſt Leaſe was in Being at the Time when the ſecond Leaſe was made, and that the ſecond Leaſe was void by the Statute. The Defendant by the Rejoinder ſhews the Proviſo and Ordinance in the Statute, *viz.* where a Leaſe for Years is made to one, who then holds the ſame Tenements to Farm for a Term of Years then not expired, that then the ſame Perſon ſhall have them for 21 Years only from the Time of the making of the Leaſe, &c. ſo that the ancient Rent be thereupon reſerved, and ſo that the ſame Leaſe or Leaſes do not exceed 21 Years. And ſaith further, that by Virtue of the ſaid Proviſo and Act, the ſaid Leaſe by him pleaded in Bar was good, ſufficient, and available in him for 21 Years at leaſt from the Time of the making of it, which 21 Years were not then paſſed. And upon this Rejoinder the Plaintiff demurred in Law.

Exception 1.

And it was argued this Term by many Apprentices, and by all the Serjeants at the Bar. And divers Exceptions were taken to the Replication and to the Rejoinder. And it was argued that the Replication is not good, becauſe it is there ſaid, that a long Time before the making of the Leaſe mentioned in the Bar, one *John Purpet*, then Maſter of the ſaid College, and his Fellows were ſeized of the ſaid Manor whereof, &c. in their Demeſn as of Fee, and it is not ſaid, *in Right of the College*, and it might be that they were ſeized in Fee in their own proper Capacity. For the Maſter and Fellows of a College have two Capacities, *viz.* to them and their Heirs, and to them and their Succeſſors, for they are a Body not conſiſting of dead Perſons, as Friars, Monks, or Nuns, but conſiſting of ſuch Perſons as have each by himſelf Capacity to take to him and his Heirs; and then the Replication ſhall be taken moſt ſtrongly againſt him that pleads it, and that is, the Plaintiff, and ſo it ſhall be taken that the Maſter and his Fellows were ſeized to them and to their Heirs. But if it had been pleaded, that an Abbot or Prior were ſeized in Fee, this has but one Intendment, *viz.* in Right of the Houſe, for an Abbot or Prior have but one Capacity, and that is, to the Uſe, and in Right of the Houſe: And they have not Capacity to them and their Heirs, and therefore it ſhall be good without ſhewing how they were ſeized, and it ſhall be taken *in jure domus*. But Maſter and Fellows, and Dean and Chapter, and ſuch like, have two Capacities, as is ſaid before, and therefore it ought to be expreſſed in what Right they were ſeized, or elſe it ſhall be taken moſt ſtrongly againſt him that pleads it, and that ſhall be, to them and their Heirs, and if it ſhould be ſo taken, the Sequel of the Matter makes againſt the Plaintiff; for which Reaſon the Replication is not good.

[a] Dy. 103. pl. 5. Heath's Max. 147. Kitch. 452. Vin. Abr. tit. Seizin K. pl. 20. See 3. Keb. 69.

[b] T. 24. H. 8. Bro. Feoffm. al uſe 40. B. N. C. § 60. Dy. 8. pl. 18. 1. Rol. R. 332. 385. 3. Leon. 176. Popham 72. Jenk. 195. pl. 1. 2. Vern. 399. Bac. Read. on Stat. of Uſes. Law of Uſes, 5. 170. Vin. Abr. tit. Uſes C. pl. 6. Poſt. 538.

And as to this Exception, all the Court held, that the Exception was not good. For the Juſtices ſaid, when it is pleaded that *John Purpet*, Maſter of the College, and his Fellows were ſeized in Fee, this has but one Intendment, and that is, in Right [a] of the College. [b] For a Corporation

poration cannot be intended to be ſeized to any other's Uſe. But if he had recited their ſeveral Names, and had called them Maſter and Fellows, then it might be intended that they were ſeized to them and to their Heirs; but when the proper Name of the Maſter is not recited, but he calls him Maſter, and ſaith alſo, his Fellows, this is the uſual Recital of a Corporation, and then when he ſaith, the Corporation was ſeized, none can intend that thoſe who compoſe the Corporation were ſeized in their own proper Capacities, for thence it would follow that the Corporation was not ſeized, where he has alledged in Fact that the Corporation was ſeized. But if it was pleaded, that *J. S.* Dean of ſuch a Place, or Parſon of ſuch a Church, or Prebendary of ſuch a Prebend was ſeized in Fee, this has two Intendments, viz. it might be in his own proper Capacity, (for when they purchaſe to their own proper Uſe they are often named by ſuch Names) or it might be that they were ſeized as Dean, Parſon, or Prebendary. But it cannot be ſo intended in the Caſe of a Corporation, for they ſhall be intended ſeized in that Capacity by which they are named. [a] And it was ſaid, if the Huſband and Wife are vouched, it is a good Counterplea to ſay, that the Wife or her Anceſtors never had any Thing, whereof they might make a Feoffment, &c. for it ſhall be intended that they are vouched in Right of the Wife. And it was alſo ſaid, that a Corporation cannot be ſeized to another's Uſe. And all the Juſtices agreed that the ſaid Exception was of no Weight, and they diſallowed it.

[a] 22. Aſs. pl. 30. Fitz. Counterplea de Vouch. 26. Bro. 42. M. 18. Edw. 3. 53. pl. 68.

Another Exception was taken to the Replication, viz. that the Plaintiff by the Replication has ſhewn the Leaſe made in 11. *H.* 8. of the Manor, &c. *ut ſupra*, except the Tenements late *Largients*, and has not averred that the 100 Acres of Paſture were not parcel of the Exception; and if they were parcel of the Exception, then they did not paſs by the ſame Leaſe made in 11. *H.* 8. and if they did not paſs by that Leaſe, then they did not paſs from *Beſteny* to the Defendant, and from thence it follows, that the Defendant was not poſſeſſed of the 100 Acres at the Time of the new Leaſe taken in 30. *H.* 8. and if he was not poſſeſſed of the 100 Acres at the Time of the new Leaſe, then the new Leaſe is good. For the Plaintiff intends to avoid the new Leaſe by the Statute, becauſe at the Time of the making of it the Defendant had a former Leaſe in the ſame Thing, and if he had not, then the Leaſe alledged in Bar is not anſwered nor avoided, and therefore it belongs to the Plaintiff to convey to the Defendant a former Leaſe in the ſame Thing, whereof he was poſſeſſed at the Time of taking the new Leaſe. And if it ſhall be taken parcel of the Exception, then it did not paſs by the firſt Leaſe; and it ſhall be intended parcel of the Exception, inaſmuch as the contrary is not ſhewn. [b] As in 8. *Ed.* 4. where there was a general Pardon granted to all, except thoſe who were adherent to M. and his Son, there it was agreed by the Juſtices, that he who would plead a general Pardon ought to ſurmiſe in his Plea, that he was not adherent to M. for there it is ſaid, that he ought to prove himſelf ſuch a Perſon as may enjoy the Benefit of the Pardon. So here, where there is a Leaſe with an Exception, and the Plaintiff would take Advantage of the Leaſe in conveying it to the Defendant, and thereby to avoid the new Leaſe, he ought to ſhew that he is fully able to do it, which he is not if he does not ſhew that the 100 Acres were not parcel of the Tenements late *Largients*. [c] For Pleas and eſpecially Replications ſhall be taken moſt ſtrongly againſt him that pleads them; and therefore the 100 Acres ſhall be taken parcel of the Exception, inaſmuch as the contrary is not averred.

Exception 2.

[b] M. 8. Ed. 4. 7. pl. 1. Fitz. Pardon 3. Bro. Charter de &c. 46. Pleadings 124. P. 4. H. 7. 8. pl. 9. Moor 303. pl. 454. Dy. 27. pl. 180. 1. And. 250. 1. Leon. 306. 2. Leon. 28. Stat. Tri. Vol. 2. fo. 5. 2. Hawk. P. C. 396. § 60. Poſt. 484.

[c] See Ante 46. (a) and the Books there cited.

To this Exception it was anſwered at the Bar by *Gawdy* Serjeant and others, that the Exception in the Leaſe may not be taken to extend to the ſaid 100 Acres, becauſe by the Bar it is alledged that the 100 Acres are, and at the Time of the Treſpaſs ſuppoſed were, parcel of the ſaid Manor, and this is confeſſed by the Replication, and further it is confeſſed that they have always been parcel of the ſaid Manor. And then the Exception does not go to reſtrain the Leaſe of any Part of it, for that comes under the *per nomen*, for it is ſaid that they leaſed the Manor whereof, &c. *per nomen* of their Manor of, &c. and of all their Lands, &c. except the Tenements late *Largients*. So that it is averred that the whole Manor whereof, &c. was leaſed by the *per nomen*, with the Exception, &c. wherefore the Exception is parcel of the *per nomen*, and not of the Thing averred to be demiſed. And it was ſaid, that the Court (if it be not expreſly ſhewn to the contrary) ought to take it ſo, becauſe it is a common Learning, [d] that every Grant, Demiſe, or Leaſe ſhall be taken moſt ſtrongly againſt him that makes it, and ſhall be conſtrued to paſs the moſt to the Grantee or Leſſee, and here if the Court ought to take the Exception to extend to the 100 Acres, then it would follow from thence that they would take the Leaſe recited moſt ſtrongly againſt the Leſſee, inaſmuch as leſs would paſs to him; and therefore it was ſaid, that the Court ought to adjudge of the Recital now in taking it moſt ſtrongly againſt the Leſſor, as they ought to do with Regard to the firſt Demiſe, and ſo the Court ought to take it that the 100 Acres paſſed, and that they were not parcel of the Exception. And therefore the Replication is good enough, notwithſtanding this Exception, and the 100 Acres are well enough conveyed to the Defendant from the firſt Leſſee. Alſo it was anſwered, that this Exception is not effectual for another Cauſe. For if the Exception extended to the 100 Acres, then the 100 Acres, during the Leaſe, were ſevered from the Manor, and not parcel of it, for the 100 Acres being in Poſſeſſion cannot be parcel of that which is a Reverſion. [e] As if one makes a Leaſe for Life of a Manor, except 20 Acres of it, theſe 20 Acres may not be parcel of the Reverſion. For if the Reverſion of the Manor is granted, the Acres in Poſſeſſion ſhall not paſs, for they are not parcel of the Manor, but are ſever'd for the Time. [f] But if a Leaſe is made of 20 Acres parcel of a Manor, yet the Reverſion of them is parcel of the Manor, [g] for a Reverſion may be parcel of a Thing in Poſſeſſion, or appendant to a Thing in Poſſeſſion, but Poſſeſſion may not be parcel of, or appendant to a Reverſion: And ſo is the Diverſity, which (it was ſaid) appears in the *Quare Imped't*

[d] 5. Co. 7. b. 6. Co. 36. a. 8. Co. 145. a. Co. Litt. 183. a. 197. a. Winch 96. Poſt. 287. Ante 10. (i)

[e] 5. Co. 11. b. 11. Co. 47. b. Cro. E. 522. Co. Lit. 324. b. Dy. 103. pl. 6. Jenk. 310. pl. 91. Pig. on Recov. 46, 47, 48. 215. Poſt. 104. *per Bromley* C. J. Vin. Abr. tit. Manor Q. pl. 1.

[f] See Vin. Abr. tit. Manor C. pl. 5. Poſt. 422.

[g] Co. Lit. 325. a. 5. Co. 11. b. 11. Co. 47. b. Pig. on Recov. 48.

Impedit brought by the King againſt the Abbeſs of *Sion* in [a] 38. *H.* 6. And if the 100 Acres are by the Exception diſmembered for the Time from the Manor by the Leaſe made in 11. *H.* 8. then they might not paſs by the Leaſe made in 30. *H.* 8. for the firſt Leaſe had then Continuance, and therefore the 100 Acres were disjointed from the Manor, which might not paſs by the Leaſe of the Manor, and ſo the Replication deſtroys the Leaſe contained in the Bar; wherefore the Exception (if it extends to the 100 Acres) makes for the Plaintiff, and againſt the Defendant, and ſo the Objection againſt the Replication is of no Weight.

[a] T. 38. H. 6. 38. a. *per Priſot.* Bro. Compriſe 28, Grants 69.

And it was argued by divers of the Juſtices, that the Exception (altho' it comes under the *per nomen)* goes to the Thing before demiſed, and reſtrains the Demiſe in Part, for the *per nomen* is but demonſtrative, altho' they were the Words of the firſt Demiſe, and if the Exception in the *per nomen* will not ſuffer all the Things ſpecified in the *per nomen* before to paſs, but reſtrains Part thereof, then it cannot be averred that more paſſed than the *per nomen* with the Exception than the Exception will permit, and ſo ſince the Exception is before the *habendum*, it is now to be argued as if it was upon the Words of the firſt Demiſe only. And the Caſe being ſuch, then ſince it ſtands indifferent whether the 100 Acres are parcel of the Tenements late *Largients* or not, it ſhall be taken moſt ſtrongly againſt him that pleads it, and that ſhall be, that the Acres are parcel of the Exception. [b] As if a Man is bound to pay *J. S.* 20 *l.* before the Feaſt of our Lord's Nativity, it is no Plea to ſay, that he has paid it, but he ought to ſhew when, or elſe it ſhall be intended that he paid it after the Feaſt, and before the Suit. So in a *Dum fuit infra ætatem*, if the Tenant pleads a Releaſe of the Demandant, it is no Plea if he does not ſay, that the Releaſe was made by him being of full Age, for elſe his Plea ſhall be taken moſt ſtrongly againſt him that pleads it, and that is, that it was made by him within Age. So here it ſhall be taken moſt ſtrongly againſt him that pleads it, and that is, that the Acres, where the Treſpaſs is ſuppoſed to be done, are parcel of the Exception. And afterwards all the Juſtices agreed, that the 100 Acres ſhall be taken Part of the Exception. But as to the Conſequences ariſing thereupon they did not agree in the ſame Opinion. [c] For *Portman* Juſtice ſaid, notwithſtanding the 100 Acres be excepted out of the former Leaſe, yet they ſhall paſs well enough by the ſecond Leaſe, viz. the Leaſe pleaded in Bar; for the Acres excepted during the Term only are not diſmembered nor disjointed from the Manor, but remain parcel of the Manor afterwards; for if one has a Right of Action for the Manor, and ſues his Writ, he ſhall not make any Exception hereof in his *Precipe*, for it is always parcel of the Freehold. And ſo if the Lord of a Manor has the Wardſhip of a Tenant, who holds of a Manor, now the Chattle which he hath in the Land ſuſpends the Poſſeſſion of the Seigniory, yet the Seigniory remains parcel of the Manor, notwithſtanding the Poſſeſſion is ſuſpended, and ſhall paſs by a Feoffment of the Manor. And ſo the Exception, which is but for a Term, does not make it to be no Parcel of the Manor, but it may be Parcel of the Manor which is in Reverſion. As if a Leaſe is made for Life of an Acre parcel of a Manor, yet the Reverſion thereof remains parcel of the Manor, ſo *e contra* this Exception which is in Poſſeſſion may be parcel of the Manor in Reverſion. And then by the ſecond Leaſe viz. by the making of the Leaſe pleaded in Bar, that which was excepted in the firſt Leaſe paſſes as parcel of the Manor; from whence it conſequently follows, that the Statute does not avoid the Leaſe of the 100 Acres made in 30. *H.* 8. becauſe the Acres were not in the Hands of the Defendant at the Time of taking the new Leaſe. And ſo upon the Matter of the Exception in the Leaſe it appears that the Bar is not anſwered by the Replication, and therefore the Plaintiff ſhall be barred. But *Bromley* Chief Juſtice was of a contrary Opinion, for he ſaid, the Exception and the Conſequent ariſing from it makes for the Plaintiff. For the 100 Acres being excepted out of the firſt Leaſe made in 11. *H.* 8. may not paſs to the Defendant by the ſecond Leaſe. For the Exception makes them to be no Parcel of the Manor for the Time the firſt Leaſe endured. And therefore (he ſaid) the Diverſity in the ſaid Caſe cited in 38. *H.* 6. is good Law, for there it is put, [d] that if a Man makes a Leaſe for Life, or Years, of an Acre parcel of a Manor, yet the Reverſion continues parcel of the Manor, ſo that a Fine of the Manor ſhall make the Reverſion to paſs, for the whole Eſtate of the Acre was parcel of the Manor before, and altho' the Freehold is ſevered, yet the Fee-ſimple remains parcel of the Manor: [e] But if a Man leaſes his Manor for Life, or Years, except his Villains, now they are in groſs, and not regardant; [f] for nothing that is in Poſſeſſion may be parcel, appendant, or regardant of or to a Reverſion, for it is repugnant in itſelf. For if a Man makes a Leaſe of a Manor for Life, except the Services of *J. S.* who holds of the Manor, now the Services, nor any Part of the Eſtate therein, are not parcel of the Reverſion during the Leaſe. For if a Man had Cauſe to have a Writ of Right againſt *J. S.* for the Land which before that was holden of the Manor, he ſhall not maintain it in the Court of the Manor during the ſaid Leaſe, becauſe during that Time the Land is not holden of the Lord as of the Manor, but as of a Seigniory in groſs. So in the principal Caſe, by the Exception the 100 Acres are become in groſs, and not parcel of the Manor. And then when the laſt Leaſe of the Manor, which is pleaded in Bar, was made, the 100 Acres did not paſs by the Leaſe of the Manor, becauſe they were not parcel of the Manor. And ſo the Matter of the Replication anſwers the Bar, for the Effect of the Bar is, that the 100 Acres were parcel of the Manor leaſed, and by the Replication it is ſhewn that then they were not parcel of the Manor, and conſequently were not leaſed, and ſo the Matter of the Replication is a Traverſe to the Bar, but it is only [g] *argumentive*, and not fully anſwered without a Traverſe in deed. As if a Man pleads in Bar of an Acre a Feoffment made by *J. S.* of the Manor, whereof the Acre was parcel, it is no Plea for the other ſay, that before the ſaid Feoffment *J. S.* enfeoffed him of the Acre, except he takes an expreſs Traverſe that it was not parcel of the Manor at the Time of the Feoffment.

[b] 1. Finch. 46. 2. Finch. 64. Noy's Max. 14.

[c] Dy. 103. pl. 6.

[d] Same Diverſity Co. Litt. 324. b. Cro. E. 522. Pig. on Recov. 46, 47, 48. 215.

[e] Dy. 103. pl. 6.

[f] Co. Litt. 325. a. Pig. on Recov. 48.

[g] 1. Leon. 77.

So

So it is in the Caſe here, the Subſtance of the Matter of the Replication makes for the Plaintiff, but it wants a Traverſe. Wherefore the two Judges did not agree in the Conſequence ariſing upon the Exception of the ſaid 100 Acres.

Another Exception was taken to the Replication, *viz.* that the Plaintiff has recited part of the Act of 31. *H.* 8. and has not recited the whole. For it was ſaid, it is an entire Act, and ought to be entirely recited, as other Matters of Record. But the whole Court agreed, that the Replication was good, notwithſtanding this Exception. [a] For it is the common Courſe in all Courts to recite only that Part of the Statute which makes for him who recites it, as the Statutes of Non-reſidence, of Maintenance, of giving of Liveries, and the like. Exception 3.

[a] See ante 65 (f) and the Books there cited. 4. Bac. Abr. 656. Vin. Abr. tit. ſtatutes E. 3. pl. 16.

Another Exception was taken to the Replication, *viz.* that the Manner of the Enrollment of the Surrender is not ſhewn. For it was ſaid, he ought to ſay that the Deed was acknowledged before ſuch a Man then being a Maſter of the Chancery, or Maſter of the Rolls, or Lord Chancellor, to which the other Party might have an Anſwer. [b] But *Whiddon* and *Portman* Juſtices held that the Exception was of no Weight, [c] for the King cannot take the Surrender without Matter of Record, and the Enrollment only makes it of Record, which ſhall be [d] intended by the Pleading to be duly made, without any Circumſtance being ſhewn, and if ſuch Circumſtance ſhould fail to make it an Enrollment, then the Party might traverſe the Enrollment, and it ſhould be tried by the Record. And it was ſaid, if a Man pleads a Fine levied by Huſband and Wife, he ſhall not ſhew how the Wife was examined, nor before what Juſtice it was acknowledged, nor ſuch other Circumſtances, but he ſhall ſay generally that a Fine was levied. And ſo here the Plaintiff ſhall ſay generally, that it was enrolled. *Bromley* did not touch this Point in his Argument. Exception 4.

[b] Dy. 103. pl. 7.

[c] See 1. Keb. 720. *Keeling* ſaid it had been adjudged that a ſurrender of a Copy-holder to the King Lord of a Manor, was good without matter of Record.

[d] L. P. Co. Litt. 303. b. 1. Leon. 184.

Another Exception was taken to the Replication, *viz.* that it is contained therein, that the King by Force of the ſaid Deed enrolled was ſeized in his Demeſn as of Fee in Right of his Crown, whereas he was not ſeized in Right of his Crown, for in the Act of 31. *H.* 8. it is recited that divers Abbots, *&c.* had ſurrendered their Houſes to the King before that, *&c.* and it is ordained and enacted, that the King ſhall have them and all other religious and eccleſiaſtical Hereditaments, which ſhould fall after the ſaid Act, to him his Heirs and Succeſſors for ever, and does not ſay, as Parcel of his Crown; but the firſt Act, *viz.* that made in 27. *H.* 8. ordains that the King ſhall have all the Poſſeſſions given to him thereby, that is, thoſe under the annual Value of 300 Marks, as Parcel of his Crown; but this Act has no ſuch Words, and therefore it is but a Purchaſe, in which Caſe it ſhall not be Parcel of the Crown, &c. But the whole Court diſallowed the Exception, for the Statute ſaith, that the King ſhall have them to him his Heirs and Succeſſors, which Word *(ſucceſſors)* declares that they are annexed to the Crown, and ſhall go in Succeſſion, and that he ſhall have them as King. Exception 5.

Another Exception was taken to the Replication, *viz.* that in the End of it it is averred, that the ſecond Leaſe was void by the Statute, and the Averment ought to have been, that it was void in the Hands of the King by the Statute. For the ſecond Leaſe was not void againſt the Abbot, but it was good until the Tenements came to the King, and when the Inheritance was in his Hands the Leaſe was void, and ſo it ought to be averred, and that the King granted the Land as Land in Poſſeſſion to the Earl of *Surry*, *&c.* and not to aver it, as it is averred, for this Averment may be taken to intend that it was void at firſt, or that it was void after the Grant of the Manor made to the Plaintiff; Wherefore, *&c.* But the Juſtices in their Arguments did not give any Anſwer to this Exception. Exception 6.

As to the Rejoinder, all the Juſtices held that the Defendant by the Rejoinder had departed from his Bar. [e] For in the Bar he pleads a Leaſe for 50 Years, and in the Rejoinder he concludes upon a Leaſe for 21 Years. And although the 21 Years ſhall be accounted Parcel of the 50 Years, yet it ſhall be a Departure; for now the End of the Leaſe is ſhorter than the Leaſe pleaded in Bar, for the Leaſe in Bar was a full and entire Leaſe ending at ſuch a Day, and now it is ſhewn to end ſooner, and therefore it varies from the Leaſe intended in the Bar. And the Defendant might have ſhewn the Statute, and the whole Matter at firſt, wherefore he ſhall not be aided now by the ſaid Branch of the Statute. [f] And if a Man will ſhew that *J. S.* was ſeized in Fee, and granted to him a Rent Charge, and avows for it, the Plaintiff ſaith, that *J. S.* had nothing in the Land at the Time of the Grant, the Defendant by the Rejoinder ſhews that *J. S.* was then *Ceſtuy que Uſe* in Fee, and ſo the Grant good, this is a Departure, for by the Avowry *J. S.* ſhall be intended ſeized in Fee, and that the Grant was good by the common Law, and now by the Rejoinder the Defendant does not maintain it, but will enable himſelf by the Statute *of Uſes*, and ſo will aid himſelf by * Statute Law. So here the Leaſe pleaded in Bar ſhall be intended a full Leaſe by the common Law, and now by the Rejoinder he will rely upon a Leaſe for a ſhorter Time made good by Statute Law, and this Matter comes after the firſt Leaſe, and under it, and not before it, and therefore it is not purſuant to the Bar. [g] As if a man pleads in Bar a Feoffment of *J. S.* the Plaintiff ſhews that *J. S.* diſſeized him, and after enfeoffed the Defendant, upon whom he re-entered, *&c.* the Defendant by Rejoinder ſhews that the Plaintiff after the Diſſeizin confirmed the Eſtate of *J. S.* and afterwards *J. S.* infeoffed him, this is a good Plea, and no Departure, becauſe the Confirmation was made before the Feoffment, and ſo it fortifies the Bar: But if he had pleaded by the Rejoinder a Confirmation made by the Plaintiff to himſelf, ſuch Rejoinder had been a Departure, becauſe it came after the Feoffment pleaded in Bar. So here the Act of Parliament came after the Leaſe, which he might have pleaded in Bar. And therefore it is a Departure by the Opinion of the whole Court.

[e] Dyer 103. pl. 2. Litt. R. 170. Doc. Pla. 121. 1. Finch. 181. 2. Finch 52. 1. Keb. 469.

[f] T. 21. H. 7. 25. b. 26. Bro. Departure 12. Pleadings 46. Litt. R. 215. Yelv. 14. Vin. Abr. tit. Departure A. pl. 40.

* And when a Man in his former Plea pleads an Eſtate made by the common Law, in the ſecond he ſhall not make it good by Act of Parliament Co. Litt. 304. a. Lutw 1425, 1426.

[g] M. 6. H. 7. 8. a. *Per Keble.* Fitz. Departure 10. H. 18. Ed. 4. 24. b. *Per Collow.* Bro. ibid. 24. Doc. Pla. 120. Co. Litt. 304. a. 1. Finch 180. 2. Finch 50, 51. 392. 4. Bac. Abr. 123.

Exception 7. Another Exception was taken to the Rejoinder, *viz.* that it is not ſhewn therein, nor by the Bar, that any Rent was reſerved upon the ſecond Leaſe, and the Proviſo in the Act recited in the Rejoinder is conditional, *viz.* it makes the Leaſe good for 21 Years, ſo that the ancient Rent be reſerved thereupon, or elſe not, and it is not ſhewn that any Rent was reſerved upon the ſecond Leaſe, for which Reaſon the Rejoinder is bad, for the Defendant ought to have ſhewn that ſuch Rent was reſerved, and ought to have averred that it was the ancient Rent, and ſince he has not ſhewn it, he has not ſhewn himſelf to be within the Purview of the Proviſo. To which the whole Court agreed.

And as to the principal Matter, *viz.* admitting it had been alledged that the ancient Rent was reſerved, and that the Pleading had been good, it was well debated whether the ſecond Leaſe ſhould be good for all the Years limited in it, or whether it ſhould be utterly void by the Statute, or if it ſhould be good for 21 Years only. And all the Juſtices agreed unanimouſly, that the ſecond Leaſe ſhould be good for 21 Years only, to be accounted from the Time of the making ſuch ſecond Leaſe. But *Portman* and *Bromley* did not agree in the Reaſon thereof. For *Portman* ſaid, we ought to conſider two Branches of the Statute. The firſt is the Branch which makes void Leaſes made within a Year before the Statute of ſuch Poſſeſſions as after the Statute ſhould come to the Hands of King *Henry* the Eighth, becauſe the ſame Thing was in Leaſe before. The ſecond Branch is the Proviſo and Part of the Statute recited in the Rejoinder. And as it ſeems to me, if the ſaid ſecond Branch had not been made, both the Leaſes had been void, * for the taking of the ſecond Leaſe by the Defendant is a Surrender of the firſt Leaſe which he had at that Time by the Courſe of the common Law. And it ſeems to me alſo, that by the ſaid firſt Branch the ſecond Leaſe had been utterly void, if the ſaid laſt Branch of the Statute had not been made. For the Words of the ſaid firſt Branch concerning Leaſes then made are, *if any eccleſiaſtical Governor of any eccleſiaſtical Houſe or Place, which after the Statute ſhall come to the King, within one Year before the firſt Day of the Parliament hath made any Leaſe, under his common Seal, for Years of any Hereditaments, whereof and in which any Eſtate or Intereſt for Life Year or Years, at the Time of the making of ſuch Grant or Leaſe, then had its Being or Continuance, and then was not determined, finiſhed, or expired, that then every ſuch Leaſe ſhall be utterly void, and of no Effect*, which Words would avoid the ſecond Leaſe in our Caſe, for it was made by an *eccleſiaſtical Governor, viz.* the Maſter and Fellows of a College, and *under their common Seal*, and *within a Year before the firſt Day of the Parliament*, and *of Hereditaments which afterwards came to the Hands of King Henry the Eighth*, and *in which an Eſtate for Years, at the Time of the making ſuch new Leaſe, then had its Being or Continuance, and then was not determined, finiſhed, or expired.* For (as I apprehend) this Clauſe *(then had its Being or Continuance, and then was not determined, finiſhed, or expired,)* is one ſame Sentence ſpoken and put two different Ways, and each Part of the Sentence taken by itſelf alone contains in itſelf as much as both the Parts. For that Leaſe, which hath its Being, is not finiſhed, and if it is not finiſhed, it hath its Being, and if it has its Continuance, *ergo* it is not expired, and if it is expired, *ergo* it has not Continuance. And ſo, as I ſaid, it is one Subſtance of Matter expreſſed by Words two Ways, each Way containing in itſelf the contrary, which Contrariety is proved mutually by the other Words, and ſo each of the Phraſes of Speech contains one ſame Sentence and Subſtance, and not divers. And then, I ſay, that at the Time of making the new Leaſe, the ancient Leaſe had its Being and Continuance, and then was not determined, finiſhed, or expired. For theſe Words, *(at the Time of the making of ſuch Leaſe)* have the ſame Meaning with the Words *(when the Leaſe was made)* and then I ſay, that when the new Leaſe was made, the firſt Leaſe had its Being, and was not determined, for it was determined by the making of the new Leaſe, in which Caſe it may be ſaid, that at the Time of the making the new Leaſe, the ancient Leaſe had its Being, or was in Force. For if the Tenant enfeoffs the Lord in Fee, hereby the Seigniory is extinct, yet it may well be ſaid that at the Time of the Feoffment the Seigniory was in *eſſe*, and it is the uſual Phraſe in that Caſe. And therefore (as it ſeems to me) the Thing, which is determined by any Act, may be ſaid to be in *eſſe* at the Time of that Act done. So here this firſt Clauſe of the Statute, which makes void Leaſes of Things in which any Eſtate or Intereſt for Years at the Time of the making of them had its Being or Continuance, and then was not determined, or finiſhed, would have determined the new Leaſe, if the ſecond Clauſe had not been added to it; and for Remedy thereof was the ſecond Branch made, which does not come properly under a Proviſo, but is a new Act, which ordains, that *if any Governor aforeſaid, within one Year next before the firſt Day of the Parliament, hath made any Demiſe, Leaſe, or Grant to any Perſon for Years of any Tenements, which Perſon, at the Time of the ſaid Demiſe, Leaſe, or Grant, had and held the ſame Tenements to Farm for Years then not expired, that then the ſame Perſon, to whom any ſuch Demiſe, Leaſe, or Grant has been made, ſhall have and hold the ſame Tenements for the Term of 21 Years only from the Time of the making of the ſaid Demiſe, Leaſe, or Grant, if ſo many Years be ſpecified, limited, and expreſſed in the ſame Demiſe, Leaſe, or Grant, or for ſo many Years as are expreſſed in ſuch Demiſe, Leaſe, or Grant, ſo that the ancient Rent be thereupon reſerved, and ſo that the ſame Leaſe or Leaſes do not exceed 21 Years.* Which Branch is very obſcure by Reaſon of theſe Words therein, *viz. ſo that the ſame Leaſe or Leaſes do not exceed 21 Years.* And how theſe Words ſhall be taken in our Caſe, inaſmuch as the new Leaſe was made for 50 Years, we are to conſider. And herein it is to be ſeen whether the ſaid Words are conditional or not, as the Words of the Reſervation of the ancient Rent are, and whether they ſhall be referred only to the laſt Part of the Disjunctive, that is, to theſe Words *(or for ſo many Years, &c.)* or if they ſhall be referred to both the Parts of the Disjunctive. And (as it ſeems to me) this Branch of the Statute will make the Leaſes good for 21 Years, which

Portman J.

* M. 14. H. 8. 15. a. *Per Brudnel et Brook.* Bro. Leaſe 14. Surrender 14. 5. Co. 11. b. Perk. § 617. 3. Bac. Abr. 345.

which the firſt Branch would have utterly avoided. And therefore it is to be obſerved, that our Caſe is within all the Words of the ſaid Branch, (except only the ſaid Words concerning the ancient Rent, and the Extent of the Leaſe above the Number of 21 Years) for it was made by ſuch a Governor as is mentioned in the ſaid Branch, and within one Year next before the firſt Day of the Parliament, and to ſuch Perſon as at the Time of the Demiſe held the ſame Tenements to Farm for Years then not expired. And what Impediment then is there to the contrary, but that the Leaſe ſhall be good for 21 Years from the Time of the making? None certainly, unleſs the Clauſe concerning the Reſervation of the ancient Rent, and the Number of Years exceeding 21, be an Obſtacle thereto. And as to the ancient Rent not being reſerved, I have ſhewn before that the Pleading is not good upon that Account, and ſo my Opinion appears before in this Point. And as to theſe Words, *viz. ſo that the ſame Leaſe or Leaſes do not exceed 21 Years*, [a] they are referred only to thoſe Words which are the laſt Part of the Disjunctive, *viz. or for ſo many Years as are expreſſed in ſuch Demiſe, Leaſe, or Grant*, for they cannot be intended to refer to the firſt Branch, *viz. that it ſhall be good for 21 Years.* For the Intent of the Makers may not by any Means be taken to make Leaſes for 21 Years to be good for 21 Years, and no other Leaſes exceeding 21 Years, for there were not many ſuch Leaſes made, for when Men ſaw that all Abbies were likely to be ſuppreſſed, they took new Leaſes for a very long Time, and the Abbots and other Governors were content to enlarge the Leaſes of their Farmors, who were their Friends, and of their Acquaintance, for a very long Time. And to make ſuch Leaſes good for a reaſonable Time, *viz.* for 21 Years only, was the Intent of the two Branches of the Statute, and not only to make good the Leaſes made for 21 Years, for if the Statute ſhould be ſo taken, it would affect but a ſmall Number of Leaſes, but the Intent of the Makers was, as I have ſaid above. And then the ſaid Clauſe, *viz. and ſo that the ſame Leaſe or Leaſes do not exceed 21 Years*, has Relation only to the laſt Part of the Disjunctive, *viz. or for ſo many Years as in ſuch Demiſe, Leaſe, or Grant are expreſſed.* And the ſaid Clauſes added together ſtand thus, *viz.* or for ſo many Years as in ſuch Demiſe, Leaſe, or Grant are expreſſed, ſo that the ſame Leaſe or Leaſes do not exceed 21 Years, and this is the proper Relation of the ſaid Clauſe. As if I would ſay, you ſhall have my Land for 21 Years, or for ſo many Years as *J. S.* ſhall appoint, ſo that it does not exceed 21 Years, there the *(ſo that)* has Relation to the laſt Part of the Disjunctive only, *viz.* to the Number appointed by *J. S.* and not to the Number appointed by me. So in our principal Caſe, the *(ſo that)* ſhall have Relation to the ſaid laſt Part of the ſaid Disjunctive. And if the *(ſo that)* be thus referred, then it is not a Condition, for it cannot reſtrain unto 21 Years the Term that is ſhorter than 21 Years, and therefore it is not a Condition, but is a full Demonſtration of the ſaid laſt Part of the Disjunctive, which in Effect is but ſuperfluous and ſuperabundant. And in this Manner the Branch ſhall be conſtrued, as it ſeems to me. And ſo (as I have ſaid before) this laſt Branch makes good that, which the firſt Branch would otherwiſe have taken away, and revives that, which the other Branch (if it had been made at another Time) would have extinguiſhed. And therefore the Leaſe ſhall be good only for 21 Years, unleſs it be hindered by reaſon of the ancient Rent not being reſerved.

[a] Wing. Max. reg. 10. pl. 3.

Bromley argued the ſame Day that the others argued. And alſo at another Day afterwards the Judges ſpoke to the Matter. And the Effect of *Bromley*'s Argument both Times, as to the Point of the Statute, was as follows. It ſeems to me, that the firſt Leaſe is ſurrendered by the taking of the ſecond Leaſe, as hath been ſaid, [b] for both the Eſtates could not be in one ſame Perſon at one ſame time, [c] and therefore when the Defendant being poſſeſſed of the firſt Term took a new Leaſe of the ſame Tenements to commence preſently, this by the Courſe of the common Law is a Surrender of the firſt Leaſe. And as to that which has been objected at the Bar to the contrary, *viz.* that it ſhall not be a Surrender, becauſe the Statute makes the ſecond Leaſe void, for the Cauſe why it ſhould be a Surrender is the taking of the ſecond Eſtate, and if the Statute makes the taking of the ſecond Eſtate to be meerly void, then the Operation of the common Law, as to the Surrender, is thereby taken away; Sir, as to this I ſay, that it is Part of the Matter in Diſpute, whether the ſecond Leaſe be void by the Statute, or not. But notwithſtanding I grant it to be ſo, yet the Statute which ſaith it ſhall be void may not be conſtrued to make it void *ab initio*, and as if it had never been made, but it ſhall be expounded to make it void as to the King, and after the ſame Lands are come to the Hands of the King, and not otherwiſe, for at the Time of the making the ſecond Leaſe the Maſter and Fellows were lawfully ſeized in Fee, and had then good Power to make a new Leaſe; and ſo the Words of the Statute ſhall not be intended to make it void *ab initio*, and therefore it does not avoid the Operation of the common Law in the Surrender. [d] For if a Man makes a Leaſe for 40 Years, the Leſſee afterwards takes a new Leaſe for 20 Years, upon Condition that if he does not ſuch an Act, the Leaſe ſhall be void, and after he breaks the Condition, ſo that thereby the ſecond Leaſe is void, yet it is not ſo void, nor with ſuch Relation as to take away the Surrender of the 40 Years, for the Surrender, by the taking the new Leaſe for 20 Years, was executed abſolutely at that Time, and it is not defeated although the Condition makes the ſecond Leaſe void *ab initio* for divers Purpoſes. And if a Recovery is had of Land, which is afterwards reverſed by Error, which avoids the Recovery, yet it does not ſo avoid it that the Recoveror ſhall be puniſhed by Treſpaſs for taking the Iſſues in the mean time. So if the Feoffor enters upon the Feoffee for Condition broken, yet he has not ſo avoided the Feoffment as to puniſh the Feoffee for the mean Profits received. Therefore where Things are made void by the common Law, or by ſtatute Law, it is to be conſidered how, and that ſhall be ruled by common Reaſon. And ſo the Statute here (admitting it makes void the ſecond Leaſe, as

Bromley C. J.

[b] Poſt 194. *Per Dyer.*

[c] M. 14. H. 8. 15. a. *Per Brudnel et Brook.* Bro. Leaſe 14. Surrender 14. 5. Co. 11. b. Perk. § 617. 3. Bac. Abr. 345.

[d] Co. Litt. 218. b. 1. Finch 44. 2. Finch 62. 3. Bac. Abr. 460.

in

in rei veritate it makes ſome Leaſes void) ſhall not ſo make void the ſecond Leaſe, as if it had never been made. And the firſt Leaſe (as I have ſaid before) is ſurrendered by the taking of the ſecond Leaſe. And this Surrender (although the Statute ſhould make the ſecond void) is not defeated. And as to the ſecond Leaſe, it ſeems to me that the ſaid firſt Branch of the Statute will not defeat it, but it would have been good for the whole 50 Years if the ſaid ſecond Branch had not been made, and the Senſe of the Words of the ſaid firſt Branch, being rightly diſcuſſed and known, will make this manifeſt. For the Words of the ſaid Branch are as have been recited. And the Doubt lies in theſe Words, *viz. in which an Eſtate for Years, at the Time of the making ſuch new Leaſe, then had its Being or Continuance, and then was not determined, finiſhed, or expired.* And, (as it ſeems to me) this Clauſe is not one Sentence put and expreſſed two different Ways, ſo that each Part of the Sentence, taken by itſelf alone, contains in itſelf as much as both the Parts together, as it was laſt ſaid, but it is two ſeveral Sentences, between which the Copulative *(and)* is interpoſed, which makes it that no Leaſe ſhall be avoided thereby, except both the Parts of the Copulative are firſt performed. And that there are here two Sentences, and two Things to be performed, whereof one may be performed, and the other not, is eaſily proved. For the Words are, *which then had its Being, and then was not determined.* And, Sir, ſome Things at one ſame Time may be in *eſſe*, and not determined, and ſome Things at one ſame Time may be in *eſſe*, and be determined. As if a Man hath Land charged with a Rent Charge to *J. D.* and he makes a Feoffment thereof to *J. S.* there the Rent at the Time of the Feoffment was in *eſſe*, and not determined, for the Rent was in *eſſe* before the Feoffment, and at the Time of the Feoffment, and after the Feoffment, and therefore it may be well ſaid, that at the Time of the Feoffment the Rent had its Being, and then was not determined. But if he had made a Feoffment of the ſame Land to *J. D.* who had the Rent out of it, there at the Time of the Feoffment the Rent had its Being, and then was determined, for it was determined by the Feoffment. And ſo you ſee there that theſe Words *(which had its Being)* and the Words *(and was not then determined)* are not of one ſame Effect, but are ſeveral Clauſes joined together by the Copulative, and which have ſeveral Senſes and ſeveral Effects, the one contrary to the other. And ſo in our Caſe, the Statute having theſe Clauſes joined together by the Copulative *(and)* makes void no Leaſe but ſuch wherein both the Parts of the Copulative are firſt performed; which are not in the ſecond Leaſe in our Caſe, but one Part only is performed, which is, that at the Time of the making of it an Eſtate for Years had its Being and Continuance; and if the Clauſe had ſtopped there, I would confeſs the ſecond Leaſe had been void. But the ſecond Part of the Clauſe is not performed, which is, *(and then was not determined, finiſhed, or expired;)* for here the firſt Leaſe, at the Time of the making of the ſecond, was determined and finiſhed. And ſo no Leaſe is made void of any Hereditament but only of ſuch wherein an Eſtate for Years, at the Time of the making the Leaſe, had its Being, and was determined; and in our Caſe an Eſtate for Years, at the Time of the making the Leaſe, had its Being, and was determined; wherefore it is out of the annulling Words of the Statute. For theſe Words *(at the Time of the making)* mean *(the ſame Inſtant of the making)* for they do not contain the Time before, nor the Time after, but the very Inſtant of the making, which the Statute intends to be the End of one Time, and the Beginning of another, for it ſaith, *at the Time of the making had its Being, and was not determined*, which Words imply that at that Time ſome Things may have their Being, and alſo be determined (to which the Statute does not extend), and ſome Things may have their Being, and be not determined, which laſt are intended by the Statute. And ſo there is an Inſtant intended by the Statute, which contains a *Being* and a *Determination*, to which the Statute does not extend, but it extends only to Things then *in Being* and *not determined.* And our Caſe is, that it was *in being* and *determined* at one ſame Inſtant, and ſo the ſecond Leaſe is out of the Danger of this Branch. And therefore it ſhould be good for the whole 50 Years, notwithſtanding the ſame Branch. And, Sir, it has been objected at the Bar by my Brother *Gawdy* to the contrary, *viz.* that theſe Words *(at the Time of the making)* ſhall be intended the Time before the Act done, and that the firſt Leaſe was not determined until the ſecond Leaſe was made, and this Word *(making)* is the Time before; and hereupon he put an Example, as if a Man is bound in 20 *l.* to give him Meat and Drink to one for the Time he is in making his Houſe, or his Account, there he is bound to give him Meat and Drink while he is in making the Houſe, or the Account, and when the Houſe or the Account is made, then he is diſcharged from giving him Meat and Drink: and therefore *(making)* ſhall be there intended the Time before the Act done. So here (as he ſaid) the Statute makes void Leaſes of Things, in which an Eſtate for Years, at the Time of the making of them, had its Being, which Word *(making)* as he apprehended, ought to be taken for the Time in which the neceſſary Circumſtances preceding the Delivery, as writing or ſealing, were in doing. Sir, as to this I anſwer, that the Caſe of making a Houſe, or Account is good Law, for the common Phraſe of Speech, and the Matter itſelf ſhews that the Word *(making)* extends there only to the Time which is before the Act finiſhed. But here in our principal Caſe, this Word *(making)* contains in itſelf the Time of the Conſummation of the Act. As in an Action of Debt upon an Obligation the Defendant pleads that *tempore confectionis ſcripti* (which is at the Time of the making the Deed,) he was within Age, if Iſſue be joined upon it, the Plaintiff may give in Evidence, that at the Time of the Delivery of the Deed the Defendant was of full Age, and that is ſufficient, although the Defendant gives in Evidence that at the Time of the writing and ſealing of the Deed he was within Age, for there theſe Words *(at the Time of the making the Deed)* * mean the Time in which all the Circumſtances that contribute to the making of it were accompliſhed and conſummated. And ſo in our Caſe, the Words *(at the Time of the making the Leaſe)* mean the

* 5. Co. 1. a. *Per Cur.* Ld. Raym. 480. *Per Holt*, C. J. the time of the making commences by the delivery.

the Time when the Leaſe takes effect, and is conſummated. Wherefore it ſeems to me, that notwithſtanding this Objection or any other Matter in the ſaid firſt Branch of the Statute, the new Leaſe ſhould be good for the whole 50 Years. And in order to abbreviate ſuch long Leaſes as were not touched by the ſaid firſt Branch, the ſecond Branch was made, which is properly a Proviſo, and not a new Act; the Words of which are as have been recited, and the Doubt lies in theſe Words, *viz. and ſo that the ſame Leaſe or Leaſes do not exceed 21 Years.* And it ſeems to me, that theſe Words are not conditional, nor are to be referred to the Number of Years contained in the Writing of the new Leaſe, but they are to be referred to the Number of Years appointed and limited in the ſame Branch, *viz.* to the Number of 21 Years, to which Number the long Terms are abridged. And that they ſhall be ſo referred, is proved by the Words of the ſame Branch. For the Words thereof are, *that then the ſaid Perſon, to whom ſuch Demiſe, Leaſe, or Grant hath been ſo made, ſhall have and hold the ſame Lands for the Term of 21 Years only from the Time of the making of ſuch Demiſe, Leaſe, or Grant, &c.* which Word *(only)* proves that the Words *(ſo that the ſame Leaſe or Leaſes do not exceed 21 Years)* ſhall not be referred to the Number of Years contained in the Writing of the new Leaſe. For if they ſhould be ſo referred, then the Word *(only)* has no Senſe or Meaning at all; nor has it any apt Signification to ſerve ſuch Conſtruction, for if it had been put by Words at large, *viz.* that the ſame new Leaſe ſhall be good for 21 Years only, if 21 Years or a leſſer Number are contained in ſuch new Leaſe, what Sort of Phraſe would this have been? And to what Purpoſe had the Word *(only* there ſerved? Certainly to no Manner of Purpoſe, but it would have been abſurdly put there; for the Word *(only)* is a Word of Abbreviation, and the Words *(that he ſhall hold for 21 Years only)* is as much as to ſay, he ſhall hold for 21 Years and no more, which is not a proper Expreſſion if there were only 21 Years in all limited in the Leaſe, for then it cannot abridge that which is not, for an Abridgment is to reduce a Thing leſs from greater, and a Term may not be abridged unto 21 Years, if it does not exceed the Number of 21 Years. And ſo (as I ſaid) the word *(only)* will not permit the Words *(ſo that the ſame Leaſe or Leaſes do not exceed 21 Years)* to be referred to the Number of Years limited in the new Demiſe, but they refer to an Abbreviation of a greater Term than 21 Years to 21 Years. Wherefore the ſaid Words are not conditional, but are in Nature of a double Repetition, and it is all one as if the Words *(ſhall be good for)* had been put inſtead of the Words *(ſhall not exceed)* and then the Sentence had been thus, *viz.* ſo that the ſame Leaſe or Leaſes ſhall be good for 21 Years; and thus it is as a double Repetition of one ſame Thing. And therefore, (as I ſaid) the Word *(ſo that)* is not a Condition, as it ſhall not be in many other Caſes put by my Brother *Dyer* at the Bar, *viz.* in Writs which go to Sheriffs to ſeize Goods for the King, the Words are, *Ita quod nullus ad ea manum apponat:* and in the Statute *de donis conditionalibus, ita quod non habeat poteſtatem alienandi*, which don't make a Condition, but are a full Declaration of the Thing before ſpoken. And ſo ſhall they be here, and thus according to my Expoſition every Word has its apt Signification and Relation, and the Leaſe ſhall be good for 21 Years. And, Sir, if this Word *(only)* had not been in the Branch, yet the Clauſe *(ſo that it does not exceed 21 Years)* might not reaſonably be referred to the Number of Years contained in the new Leaſe, nor be conſtrued a Condition, or to make totally void all Leaſes limited for more than 21 Years, for it cannot be reaſonably taken that ſuch was the Intent of the Makers of the Statute, for it would be againſt all Reaſon and Equity utterly to avoid Leaſes newly made, and to leave their former Leaſes void alſo, for although it might be preſumed that the new Leaſes were made by the Governors of Houſes for this Reaſon only that they ſaw they muſt quit their Poſſeſſions, yet it could not be intended but that their former Leaſes were made without that Deſign, and foraſmuch as the new Leaſes were good and lawful by Law when they were made, it would not be equitable to make them totally void, and leave no Eſtate at all in them; and therefore it is moſt reaſonable to [a] expound the Words, which ſeem contrary to Reaſon, according to good Reaſon and Equity. [b] And ſo the Judges, who were our Predeceſſors, have ſometimes expounded the Words quite contrary to the Text, and ſometimes have taken Things by Equity contrary to the Text, in order to make them agree with Reaſon and Equity. Thus the Statute of 25. *Ed.* 3. *cap.* 16. ſaith, that *by Exception of Nontenure of Part no Writ ſhall abate, but for the Quantity of the Nontenure which is alledged*; [c] yet in a *Præcipe quod reddat* of a Manor, if the Tenant pleads Nontenure of Parcel, the whole Writ ſhall abate; and ſo it has been adjudged ſince the Statute, becauſe the Manor is a Thing entire, in which Caſe the Demandant ought to have an Exception in the Writ; and therefore the Judges have taken it to be againſt Reaſon that by his Demand of the whole Manor he ſhould recover againſt him that is but Tenant of Parcel of the Manor, for which Cauſe they have expounded the Statute to extend only to Writs where the Things demanded are ſeveral, as Acres are, and not where the Things are entire; which Expoſition is quite contrary to the Text, for the Text is, that no Writ ſhall abate, and they have expounded it that ſome Writs ſhall abate, and ſo their Expoſition excludes the Generality of the Statute, and makes it particular; and therefore they have conſtrued it contrary to the Text, in order to make it agree with Reaſon. And in the ſame Manner they have expounded the Statute *de Prerogativa Regis, cap.* 3. which ſaith, that *the King ſhall have primer Seizin after the Death of ſuch as hold of him in chief, of all Lands whereof they were ſeized in their Demeſn as of Fee, &c.* which Statute is general, yet it has been expounded, [d] that if a Man holds of the King by Socage in chief only, the King ſhall not have *primer Seizin* of all his other Lands. And ſo the Judges have expounded the Text which is general to be but particular, which Expoſition is contrary to the Text, becauſe the Text is contrary to Reaſon, that for ſo ſmall a

[a] Popham 173.
[b] Hob. 346. 4. Bac. Abr. 649. Vin. Abr. tit. Statutes E. 6. pl. 31.
[c] M. 5. H. 7. 7. pl. 16 Fitz Brief. 187. Bro. 320. Dy. 291. pl. 67. Theol. Dig. lib. 8. cap. 22. § 23. Vin. Abr. tit. Nontenure D. pl. 9. Wing. Max. reg. 70. pl. 70. Poſt 205.
[d] 38. H. 8. Bro. Livery 62. B. N. C. § 322. Stamf. Prerog. 13. b. Poph. 173. Poſt

Tenure[a] 4.

Tenure a Man ſhould pay ſo great a Charge, and therefore they took it that the Intent of the Makers of the Statute could not be according to the letter. And the Statute of *Weſtminſter* 2. *cap.* 22. of *Ceſſavit* ſaith, *Writs of Entry ſhall be made for the Heir of the Demandant againſt the Heir of the Tenant, and againſt them to whom ſuch Land ſhall be aliened,* [a] yet if the Demandant in a *Ceſſavit* dies, the Heir ſhall not have a *Ceſſavit*, becauſe he ſhall not have the Arrearages; and ſo the Statute has been expounded and taken, which Expoſition is quite contrary to the Text to all Intents and Purpoſes, becauſe the Text is contrary to all Reaſon, to give an Action to the Heir for one Thing, in Conſideration of another Thing which is not due to him. And the Statute of *Glouceſter cap.* 3. ordains, that *upon the Alienation of Tenant by the Curteſy if Warranty be pleaded againſt the Heir, he ſhall be barred if he hath Aſſets by Deſcent; but if Aſſets be not then deſcended to him, but in Time afterwards be deſcended by the ſame Father, then ſhall the Tenant recover againſt him of the Seizin of his Mother by a judicial Writ that ſhall iſſue out of the Rolls of the Juſtices before whom the Plea was pleaded, &c.* [b] And by the Equity of the ſame Statute it is taken, that if the Warranty of Tenant in Tail with Aſſets be pleaded in Bar, where he has no Aſſets at all, but afterwards Aſſets deſcend to the Iſſue, there the Tenant ſhall have a *ſcire facias* to have the Aſſets, and not the Land entailed, for if he ſhould have the Land entailed, then it was conſidered that if he had aliened the Aſſets, the Iſſues inheritable to the Tail ſhould afterwards have a *Formedon*, and ſhould recover the Land entailed, and therefore in order to make a perpetual Bar to the Iſſue touching that which the Feoffee with Warranty ſhould have, it was taken more reaſonable to give the Aſſets, than the Land entailed to the Tenant, and for this Reaſon he ſhall have a *ſcire facias* for the Aſſets, and not for the Land entailed. And ſo there the Thing taken by Equity of the Statute is in a different Order and Degree from the principal Thing given by the Statute, for the Statute ordains that the Tenant ſhall have the Land aliened, and that the Iſſue ſhall retain the Aſſets, and by the Equity of the Statute it is taken that the Tenant ſhall have the Aſſets, and that the Iſſue ſhall retain the Land aliened, and ſo Reaſon ſhall guide the Expoſition of the Words of Statutes, and the Equity of them. And if the Words of Statutes ſhall be conſtrued contrary to the Text, and Things ſhall be taken by the Equity of Statutes in other Manner than the principal Proviſion of the Statute is, and all this in order to make them agreeable with Reaſon, then I ſay, that in our principal Caſe the ſaid Words *(ſo that ſuch Leaſe or Leaſes ſhall not exceed* 21 *Years)* admitting that there had not been another Expoſition of them in the ſame Branch, may not be conditional, nor defeat the whole Eſtate, but ſhall be taken by Reaſon to abridge the Eſtate unto 21 Years. But, (as I ſaid) the ſaid Word *(only)* declares and explains the other Words. And therefore it ſeems to me, that the new Leaſe in our Caſe ſhall be good for 21 Years. And ſo *Note*, all the Juſtices agreed that the Leaſe ſhould be good for 21 Years in the principal Caſe, notwithſtanding it was made for 50 Years.

[a] Vet. N. B. 138. b. 2. Inſt. 402. 8. Co. 118. a. 2. Brownl. 265. Wing. Max. reg. 35. pl. 23.

[b] H. 21 H. 7. 10. a. b. *Per Vaviſor.* Bro. Scire facias 142. M. 11. H. 4. 21. b. *Per Hankf.* Bro. ibid. 17. 74. 130. 8. Co. 53. a. Co. Litt. 366. a. 2. Inſt. 293, 294. Wing. Max. reg. 15. pl. 9. reg. 17. pl. 22. See Moor, 347.

And *Note* that *Dyer* Serjeant in his Argument ſaid, if one having a Leaſe for 10 Years takes a new Leaſe, within a Year of the making of the Statute, for 40 Years, to commence after the other Leaſe ended, that the Leſſee ſhall hold the Land until 21 Years only, to be accounted from the Time of the making the laſt Leaſe; for he ſaid, that ſuch was the Intent of the laſt Branch of the Statute, which ſaith, *ſo that the ſame Leaſe or Leaſes do not exceed* 21 *Years*, which Word *(Leaſes)* being in the plural Number warrants his ſaying, as he held. But there the firſt Branch would avoid the ſecond Leaſe, and then the ſaid ſecond Branch of the Statute would revive that in Part, which the firſt Branch (if it had been made at another Time) would extinguiſh. But *Quære* in the ſaid Caſe put by *Dyer*, if the firſt Leaſe had been for 40 Years, and the laſt alſo for 40 Years, whether the ſaid laſt Branch of the Statute would abridge the firſt 40 Years unto 21 Years only. And *Note* at the ſaid other Day after the Argument of the Juſtices, when they ſpoke of the Matter of the *Inſtant*, *Portman* ſaid, we have Need of a Philoſopher to explain it. And one who then ſtood at the Bar ſaid, that an Inſtant was thus defined in Logic, *viz.* * *Inſtans eſt unum indiviſibile in tempore, quod non eſt tempus, nec pars temporis, ad quod tamen partes temporis copulantur.*

Quære.

* Co. Litt. 185. b. Vin. Abr. tit. Inſtant. A. pl. 1.

A brief Report of a Caſe argued in the Court of Wards *and* Liveries *before Sir* Francis Englefield *Knight, Maſter of the ſame Court, and the Council thereof, and* Portman *and* Saunders *Juſtices then being preſent at the ſame Cauſe, in the Term of* St. Michael *in the* firſt *and* ſecond *Years of the Reign of King* Philip *and Queen* Mary, *upon an Office found in the County of* Suffolk, *after the Death of* Amy Townſend, *late Wife of* Roger Townſend, *returned into the Chancery, and from thence certified in the ſaid Court.*

BY an Office taken at *Beccles* the 25th Day of *March*, in the *ſeventh* Year of the Reign of King *Edward* the *Sixth*, by virtue of a Writ of *Mandamus*, after the Death of the ſaid *Amy*, directed to the Eſcheator of the ſaid County, it was found, that the ſaid *Amy* was ſeized in Tail of the Manor of *Akenham*, and other Lands in the ſaid County, and being ſo ſeized took to Huſband the ſaid *Roger Townſend*, who the 28th Day of *July*, in the 29th Year of the Reign of King *Henry* the *Eighth*, made thereof a Feoffment in Fee to divers Perſons, to the Uſe of him and his ſaid Wife for Term of their Lives, and for the Life of ſuch of them as ſhould longeſt live, and after their Deceaſe to the Uſe of *John Townſend* their Son and Heir apparent for Term of his Life, and after his Deceaſe to the Uſe of *Richard Townſend* Son and Heir apparent of the ſame *John*, and *Catharine* the Wife of the ſame *Richard*, and the Heirs of the Body of the ſaid *Richard* begotten, and for Default of ſuch Iſſues, to divers other Uſes contained in the ſaid Office. By virtue of which Feoffment, it was found, that the ſaid *Roger* and *Amy* were ſeized of the Premiſſes in their Demeſn as of Fee Tail, as in Right of the ſaid *Amy*, and the ſaid *Amy* as in her Remitter and better Right. And that afterwards, *viz.* in the Time of King *Edward* the *Sixth*, they made a Leaſe for 21 Years of Part of the Premiſſes, which was found by the ſaid Office to be made according to the Statute of 32. *H.* 8. *cap.* 28. in all Points, which Leaſe was come to the Hands of one *Thomas Townſend*, as Executor of the firſt Leſſee. And it was alſo found, that the ſaid *John* was dead. And alſo it was found, that the ſaid *Richard* had Iſſue *Roger Townſend*, and died alſo, and that after their Deaths the ſaid *Amy* died, and that afterwards the ſaid *Roger* Huſband of *Amy* died. And that the ſaid *Roger* Son of *Richard* was within Age, and that the Premiſſes were held of the King by Knight's-Service. And now this preſent Term of *St. Michael* aforeſaid it was argued by the Councel of *Peter Seintgill* who had married the ſaid *Catharine*, that the King was not entitled by the ſaid Office, and that the ſaid Leaſe was not good, but that the Remainder to *Catharine* is good, and continues: For upon the Matter the Feoffment made by the Huſband was a Diſcontinuance, and by the Eſtate which came by the Limitation of the Uſe *Amy* was not remitted, but was in only as a Purchaſer of the Poſſeſſion executed by virtue of the Statute of 27. *H.* 8. *cap.* 10. which makes no Remitter in the Wife. And this, as the principal Point and Matter, was debated among other Points ariſing in the ſaid Office. And it was argued on Behalf of the ſaid *Thomas Townſend*, and of the King and Queen, by *Gilbert Walpole*, Serjeant *Catline*, and Serjeant *Dyer*, that ſhe was remitted. For the Diſcontinuance made by the Feoffment diveſted the Poſſeſſion once out of the Wife, and was a Wrong to her; and when the Poſſeſſion came again to the Wife during the Coverture, without Wrong to be aſſigned in the Wife, then by the Rules of the common Law the Wife was preſently in her Remitter, and that as well when the poſſeſſion, after the Wrong done to her, came to her again by the Limitation of the Uſe, and the Conjunction of the Poſſeſſion thereto by the Statute, as if it had come to her again by a new Feoffment; for Poſſeſſion attained by a new Feoffment, and by the Execution of the Uſe by the Statute are of one ſame Effect, for each of them is a new Purchaſe to the Wife, without Wrong or Folly in her, for in both Caſes the Poſſeſſion is executed in her during the Coverture againſt her Will, for the Agreement of the Huſband is an Agreement for him and his Wife during the Coverture, and when the Coverture is diſſolved by the Death of the Huſband, the Poſſeſſion is adjudged to be in the Wife, whether ſhe will or no, and ſhe ſhall be Tenant to the *Præcipe* of every Stranger, until ſhe has diſclaimed or done ſome other Act to the contrary; and beſides there is not any Perſon againſt whom ſhe may bring her Action of *Cui in vita* to purge the firſt Wrong, from whence it follows that ſhe is remitted. And the Statute of 27. *H.* 8. is no Hindrance hereto, for in the Statute are two Clauſes touching the Execution of the Uſe. The firſt is, that *where any Perſon or Perſons ſtand or be ſeized, or that at any time afterwards ſhall happen to be ſeized of any Tenements to the Uſe, Confidence, or Truſt of any Perſon or Perſons, &c. that in every ſuch Caſe every Perſon or Perſons, who have or afterwards ſhall have any ſuch Uſe, Confidence, or Truſt in Fee Simple, Fee Tail, for Term of Life or Years, or otherwiſe, ſhall from thenceforwards ſtand and be ſeized, deemed, and adjudged in lawful Seizin, Eſtate, and Poſſeſſion of and in ſuch Tenements, &c. to all Intents, Conſtructions, and Purpoſes in the Law, of and in ſuch like Eſtates as they had or ſhall have in Uſe, Truſt, or Confidence of or in the ſame.* And the Effect of this Branch is no other than to diveſt the Poſſeſſion out of the Feoffees, and to put it in the *Ceſtuy que Uſe*, and to give him the ſame Quantity of Eſtate in the Land as he had before in the Uſe. The ſecond Clauſe is, that *the Eſtate, Title, Right, and Poſſeſſion, which was in ſuch Perſon or Perſons, who were or afterwards ſhall be ſeized of any Lands, Tenements, or Hereditaments, to the Uſe, Confidence, or Truſt of any ſuch Perſon or Perſons, or of any body politic, ſhall be from thenceforth clearly deemed and adjudged to be in him or them, who have or afterwards ſhall have ſuch Uſe, confidence, or Truſt, according to the ſame Quality, Manner, Form, and Condition, as they had before in or to the Uſe, Confidence, or Truſt which was in them.* The Effect of which Branch

Where a Man, ſeized of Lands in Right of his Wife, makes a Feoffment to the Uſe of himſelf and his Wife for Life, the Poſſeſſion whichcomes back again to the Wife by the Execution of it to the Uſe by Force of the Statute of 27. *H.* 8. *c.* 10. does not work a Remitter in her. S. C. Dyer 106 pl. 19. Vide Dy. 23. pl. 148. Moor 151. 171. 3. Leon. 22. 93. 2. Bulſt. 31. Hob. 235. 298. 3. Keb. 411. 1. Lev. 49

Branch is to put the Poſſeſſion in him that had the Uſe, in ſuch Quality, Form, and Condition as the Uſe was. So that the firſt Branch ſerves to veſt the Land in the *Ceſtuy que Uſe* according to the Quantity of the Eſtate, and the ſecond veſts it in him according to the Quality of the Eſtate. And none of the Branches is any Impediment to the Remitter, for notwithſtanding the Statute puts the Poſſeſſion of the Land in *Amy* according to the Quantity and Quality of the Uſe, yet when it is come to the Wife, the Poſſeſſion is afterwards changed and altered by Reaſon of her former Right. For although the Statute gives the Poſſeſſion from the Feoffees to the *Ceſtuy que Uſe* according to the Eſtate, Quality, and Form of the Uſe, yet it does not ſay that it ſhall continue ſo, for the Statute reaches to the firſt Conveyance of the Poſſeſſion, and not to the Continuance of it afterwards. And if *Amy* had been enfeoffed by Feoffment, the Poſſeſſion would have paſſed by the Feoffment, and the Remitter have come afterwards; ſo here the Poſſeſſion is given by the Statute to the Perſon who then had the Right of the Tail, and afterwards the Remitter came, ſo that the Remitter takes place ſecondly in Point of Time. Wherefore the Statute which conveys the Poſſeſſion according to the Quantity and Quality of the Uſe ſhall not hinder the Remitter which came after the Poſſeſſion given and veſted by the Statute, but will ſtand with the Remitter very well; and eſpecially ſince there is in the Statute a Saving to every Perſon and Perſons, (other than thoſe who were ſeized to Uſe) all ſuch Right, Title, Entry, Intereſt, Poſſeſſion, Rents, and Actions, as they had before the making of the Statute; in which Branch the Right of *Ceſtuy que Uſe*, to whom the Poſſeſſion is conveyed by the Statute, is ſaved, and if it be ſaved by the Statute, and the Poſſeſſion is conveyed to him by the ſame Statute, then it cannot be ſaid but that the Statute contains and implies a Remitter in them to whom the poſſeſſion is conveyed by Force of the Statute, and who had a Right before, or elſe the Right ſaved by the Statute ſhould not avail him to whom it is ſaved, for if it be ſaved by the Words of the Act, and he ſhould not take Advantage of it any Way, then is it no Saving at all, and there was no Way for *Amy* to take Advantage of it, except it be by Remitter, and therefore ſhe ought to be remitted. And if ſhe might not be remitted as well where the Poſſeſſion came to her by Execution of it to the Uſe, as by a Feoffment to her, then the Huſband might charge the Land with a Rent-Charge to the Value of it, or be bound in a Statute-Merchant, or make other Incumbrances, and afterwards make a Feoffment to the Uſe of the Wife, and thereby bind the Land of the Wife after his Death. Wherefore if ſhe ſhould not be remitted great Inconvenience would enſue from hence, to avoid which Reaſon requires that ſhe ſhould be remitted. And it was alſo ſaid on this Part, that the Words of the Statute are in the affirmative, *viz.* " the Eſtate of the Feoffees ſhall be adjudged in them that had the " Uſe," which Words affirmatively [a] ſpoken are not properly put to exclude the Operation of the common Law in the Remitter, but to do that they ſhould be in the negative; as the Statute of *Marlbridge* which ſaith, *non ideo puniatur Dominus per redemptionem*; and the Statute of *Magna Charta*, *nullus capiatur aut impriſonetur propter appellum fœminæ de morte alterius quàm viri ſui*, and the like. But the Words being ſpoken affirmatively here may not obſtruct the common Law in its Operation, eſpecially ſo as to bind Femes Covert, who are many Times exempted out of the Penalty of general Statutes which do not except them ſpecially, and that by the Judgment of the common Law upon the Statutes. For which Reaſons it was here ſaid that *Amy* was remitted. And it was ſaid by ſome of them before mentioned, that altho' ſhe was not remitted in Deed, yet it is found by the Office that by virtue of the Feoffment the Huſband and Wife were ſeized in Tail, *viz.* the ſaid *Amy* in her Remitter and better Right, which Words are ſpoken preciſely, ſo that if the Matter before found will not prove it, yet they ſhall ſtand as the Effect and Subſtance of the Matter, which ſhall put the Party to traverſe it, if it is not true. And Caſes were put hereupon, where Juries give a Verdict at large in Actions, and alſo conclude to the Point of the Iſſue, that the Concluſion ſhall be effectual, and the Matter at large being contrary to it is thereby avoided. So in the Caſe here; for which Cauſes it was ſaid, that the Office is ſufficient to entitle the King to the Wardſhip of the Land not leaſed, and of the Reverſion, and to the Rent of the Land leaſed, and that the Leaſe was good.

[a] Affirmative Statutes don't alter the common Law, Dy. 50. pl. 3. 2. Inſt. 200. 313. 448. 472. 6. Co. 19. b. Hob. 173. Palm. 495. 542. Hardr. 27. Jenk. 212. pl. 49. 1. Rol. R. 91. Cro. C. 172. Show. P. C. 64. 3. Keb. 403. 4. Bac. Abr. 641. Vin. Abr. tit. Statutes E. 6. pl. 1. Poſt 113.

E contra. On the other Side it was argued by one of the Middle-Temple, and by *Gerard*, *Prideaux*, and Serjeant *Daliſon*; and they ſaid, it is to be conſidered that the Feoffment made by the Huſband in *July* 29. *Hen.* 8. was a Diſcontinuance to the Wife, for the purging whereof ſhe was driven to her *cui in vita*, and could not avoid it by Entry, as ſhe may ſince the Statute of 32. *H.* 8. *cap.* 28. And then when ſhe has an Action given her to recontinue the Poſſeſſion, and ſhe does not uſe it, but comes to the Poſſeſſion by other Means, ſhe ought to take it in ſuch Order and with ſuch Appendances as the Law limits to that Means, and not otherwiſe, and here the Means whereby the Wife came to the Poſſeſſion, which the Huſband had taken from her by the Feoffment, is the ſaid Statute of 27. *H.* 8. And in what Manner ſoever the Statute appoints and limits the Poſſeſſion to her, in that Manner we ought to adjudge her in Poſſeſſion, and not otherwiſe, although ſhe be a Feme-Covert; for Coverture or Infancy is not material here, not being excepted by the Statute. And then the Statute is to be conſidered. And the ſaid firſt Branch of the Statute ſaith, that *every Perſon, who afterwards ſhall have any Uſe, Confidence, or Truſt in any Tenements, &c. ſhall be thenceforth adjudged in lawful ſeizin, Eſtate, and Poſſeſſion of and in ſuch Tenements, to all Intents, Conſtructions, and Purpoſes in the Law, of and in ſuch like Eſtates as they had in the Uſe, Truſt, or Confidence of or in the ſame.* And the ſecond Branch ſaith, that *the Eſtate of the Tenant who had the Land to Uſe ſhall be adjudged in the Ceſtuy que Uſe, according to ſuch Quality, Manner, Form, and Condition as they had before in or to the Uſe, which was in them.*

And then the Eſtate limited in Uſe to the Wife is to be conſidered, which was but an Eſtate for Life jointly with her Huſband, and if the Eſtate in Uſe limited to the Wife was an Eſtate for Life, which is but a Freehold, and the Statute ſaith that the *Ceſtuy que uſe* ſhall be adjudged in lawful Seizin, Eſtate, and Poſſeſſion of the Land, of and in the like Eſtate as he had in the Uſe, from thence it follows that the Wife ſhall be adjudged in Seizin and Poſſeſſion of the Land, of an Eſtate of Freehold jointly with her Huſband, and of no other Eſtate; and therefore ſhe may not be ſeized in Tail. And the Clauſe which ſaith, that the Eſtate and Poſſeſſion of the Land ſhall be adjudged in the *Ceſtuy que uſe*, according to ſuch Quality, Manner, Form, and Condition as he before had in the Uſe, will not ſuffer the Wife to be remitted, for ſhe had the Uſe as a new Purchaſe, and the Statute makes her to have the Land in the like Manner, *ergo* ſhe has the Land as a Purchaſer, and the Eſtate Tail ſhe had perhaps by Deſcent, and if ſhe ſhould be adjudged in her Remitter, ſhe ſhould be adjudged in the Land by Deſcent, whereas the Statute ſays, that ſhe ſhall have the Land thereby as a new Purchaſe, and the other Party ſays that ſhe ſhall have it by Deſcent, which is meerly contrary to the Statute. [a] For, it was ſaid, altho' the Statute is in the affirmative (as it has been recited) yet in Senſe and Subſtance it contains in itſelf a Negative, and theſe Words (*that the Eſtate and Poſſeſſion, which was in the Tenant of the Land, ſhall be adjudged in the Ceſtuy que uſe, according to ſuch Quality, Manner, Form and Condition as he had before in the Uſe*) contain in themſelves a Negative, viz. in no other Quality, Manner, Form, and Condition, which is as ſtrongly contained in the affirmative Words, as if it had been put in expreſs Words. [b] And ſo do all other Statutes, which in affirmative Words appoint or limit an Order or Form in Things which were not at the Common Law. As the Statute of *Weſtminſter* 2. *cap.* 4. which ordains that in a *Quod ei deforceat if the Tenant pleads a Recovery, and maintains the Title thereof, the Demandants ſhall vouch to Warranty, as if they were Tenants*, [c] there if the former Action was ſuch wherein he might not vouch, as a *Scire Facias*, the Demandant ſhall not vouch at all, becauſe it is a new Ordinance concerning a Thing which was not at the Common Law, and the Word (*as if*) is an Adverb ſimilitudinary, which has the Senſe of (*in the ſame Manner as if, &c.*) And altho' theſe Words are ſpoken affirmatively, yet they contain in themſelves a Negative, viz. and in no other Manner, ſo that theſe Words (*ſhall vouch to Warranty as if they were Tenants*) have the ſame Effect of all theſe Words, viz. ſhall vouch to Warranty as if they were Tenants, and in no other Manner. And the Statute of 11. *H.* 7. *cap.* 20. ordains, that *if a Woman, who hath a Jointure made by her Huſband* (in ſuch Form as the Statute limits) *after the Death of her Huſband diſcontinue or alien with Warranty, or by Covin ſuffer a Recovery, &c. that it ſhall be lawful for him to whom the Inheritance of the Tenements, after the Death of the Woman, ſhall belong, to enter into the ſame Tenements, and them to poſſeſs and enjoy in Manner and Form as he ſhould have done, if no ſuch Diſcontinuance, Warranty, or Recovery had been had or made*, there if the Woman makes a Diſcontinuance with Warranty, or ſuffers a Recovery contrary to the Intent of the Statute, and the Daughter and Heir in Tail of the Huſband inheritable to the Land enters, where the Wife is then *enſeint* of a Son begotten by the Huſband, and afterwards the Son is born, he may enter and ouſt the Daughter, (as it was ſaid by the Opinion of *Mountague*, then Chief Juſtice of the Common Bench, in his Argument in *Wimbiſh*'s [d] Caſe, which Opinion (it was ſaid) is good Law; for the Statute ſaith *that it ſhall be lawful for the Perſon, to whom the Inheritance of the Tenements, after the Death of the Woman, ſhall belong, to enter into the ſame Tenements, and them to poſſeſs and enjoy in manner and Form as he ſhould have done, if no Diſcontinuance, &c. had been made.* Which Words making a new Ordinance, (altho' they are ſpoken affirmatively) contain in themſelves a Negative alſo, and have the ſame Meaning as if it had been thus expreſſed, viz. it ſhall be lawful for the Perſon, to whom the Inheritance, after the Death of the Woman, ſhall belong, to enter into the ſame Tenements, and them to poſſeſs and enjoy in Manner and Form as he ſhould do, if no Diſcontinuance, &c. had been made, and in no other Manner and Form. In which Caſe if the negative Words had been ſo expreſſed, the Son ſhould enter, and ſo he ſhall in the other Caſe, for the affirmative Words containing the Manner of a new Ordinance are of the ſame Effect as Words ſpoken affirmatively and negatively alſo. [e] But if a Thing is at the Common Law, a Statute cannot reſtrain it unleſs it be in negative Words, as in the Caſes of the Statute of *Marlbridge*, *non ideo puniatur Dominus per redemptionem*, and the Statute of *Magna Charta*, *nullus capiatur aut impriſonetur propter appellum fœminæ, &c.* And ſo if a Statute was made, that it ſhould be lawful for Tenant in Fee Simple to make a Leaſe for 21 Years, and that ſuch Leaſe ſhould be good, the Statute ſo made in the affirmative might not reſtrain him from making a Leaſe for 60 Years, but a Leaſe made for more than 21 Years ſhould be good, becauſe it was good by the Common Law, and therefore if the Statute would reſtrain him, it ought to have negative Words, as, that it ſhall not be lawful for him to make a Leaſe for more than 21 Years, or that a Leaſe made for a longer Time ſhall not be good. And ſo is the Diverſity, where a Statute makes an Ordinance by affirmative Words, touching a Thing which was before at the Common Law, and which was not before at the Common Law. But in our principal Caſe, the Words of the Act which give the Eſtate in the Land to the *Ceſtuy que Uſe*, *in the ſame Quality, Manner, Form, and Condition as he had before in the Uſe*, ordains and appoints the Manner of a Thing which was not before at the Common Law: And therefore altho' the Words of the Act are in the Affirmative, [f] yet they contain a Negative, viz. and in no other Quality, Manner, Form, or Condition. And then if the Wife here ſhall have it in no other Manner or Form, ſhe muſt of Neceſſity have it as a new Purchaſer, in which Capacity ſhe had the Uſe, and alſo ſhe muſt have it in the ſame Eſtate, viz.

[a] 3. P. Wms. 461.

[b] Hob. 28. 1. Sid. 56. 11. Co. 64. 2. Hardr. 18. 27. 1. Keb. 149. Comb. 302. 12. Mod. 359. 1. Show. 50. 2. Show. 30. 3. P. Wms. 460, 461. Strange 258. 4. Bac. Abr. 611. Vin. Abr. tit. Statutes E. 6. pl. 9. Poſt. 206.

[c] H. 14. H. 7. 18. a. b. *per Keble*. Bro. Parliament. 21. Pernor de Profits 10. 11. Co. 62. b. Strange 258. Vin. Abr. tit. Voucher K. 3. pl. 3. fo. 53.

[d] Ante 56. (n)

[e] Dyer 50. pl. 3. 2. Inſt. 200. 313. 448. 472. 6. Co. 19. b. Hardr. 27. Hob. 173. Palm. 495. 542. 1. Rol. R. 91. Cro. Car. 172. Ante 112. Vin. Abr. tit. Statutes E. 6. pl. 5.

[f] 3. P. Wms. 461.

viz. a Freehold jointly with her Huſband for their Lives, and not in Tail by the Remitter, for that would be contrary to the Words of the Act, and the Senſe of the Words, as it is ſaid before. And if the Poſſeſſion is given to her in ſuch Quality and Order, then it cannot afterwards change in her, for if the firſt Poſſeſſion does not work a Remitter, it ſhall never after work a Remitter, where the Entry of the Party is taken away. [a] But if the Diſſeizor makes a Feoffment in Fee to the Uſe of the Diſſeizee, and afterwards the Diſſeizee enters, there he ſhall be remitted by his Entry, but before his Entry he ſhall not be remitted, but ſhall be adjudged in Poſſeſſion by virtue of the Statute, *cauſâ qua ſupra*; but when he enters, his Entry ſhall not be adjudged in reſpect of the Eſtate before executed by the Limitation of the Uſe, but in Reſpect of the firſt Diſſeizin, and therefore he ſhall be adjudged to be remitted. But in our principal Caſe the Entry was taken away by the Diſcontinuance; in which Caſe if the firſt Eſtate does not remit the Wife, her Entry or Continuance afterwards cannot remit her. And when the Statute of Uſes was made, there were many that were *Ceſtuy que Uſe* in Fee, who had a Right of Eſtate Tail to the Land, and had a Title of *Formedon* by Reaſon that their Anceſtors, being Tenants in Tail of the Land, made Feoffments to their own Uſes in Fee, and when the Statute was made, the Poſſeſſion of the Land was thereby conveyed to them; [b] and yet it has been held by the Opinion of all the Judges that they were not remitted, becauſe the Statute gives the Poſſeſſion to them in ſuch Form as they had the Uſe; and the Name of the Perſon, in whoſe Caſe (as it was ſaid) the Judges were of that Opinion, was mentioned. Therefore in our Caſe the Remitter cannot happen after the firſt Eſtate any more than in that Caſe. And if ſhe ſhould be remitted, then the Remainders here would be void, for the Act ſaith, *that he who hath any Uſe in Remainder, or Reverter, ſhall be adjudged in lawful Seizin, Eſtate, and Poſſeſſion of the Lands, Tenements, Remainders, Reverſions, &c. of the like Eſtate as he had in the Uſe*, and ſo if the Remitter was here granted, from thence it would follow that it happened ſo ſoon that the Remainder could not veſt, but it would deſtroy the Remainder, which being granted deſtroys the Text of the Statute, which ordains, *that they ſhall have the Remainders of the Land as they had the Uſe*, for which Reaſons the Remitter cannot ſtand with the Words of the Act. And as to the Inconvenience which it is ſaid would follow if ſhe ſhould not be remitted, viz. that ſhe ſhould hold the Land charged with the Incumbrances made by the Huſband, this is no Inconvenience at all, [c] for ſhe might after the Death of her Huſband diſagree to the Uſe and Poſſeſſion conveyed by Means thereof; and bring her Action of *Cui in vita* againſt him who is in the next [d] Remainder, for the bringing of her Action againſt him is a Diſagreement in the Wife, and then the Poſſeſſion veſts [e] in the next in Remainder as if the Wife had not been named, or as if ſhe had been named, and had been a dead Perſon in Law. As if the Uſe had been appointed to the Wife in Fee, then the Wife might bring her Action of *Cui in vita* againſt the Feoffor, or his Heir, and they ſhould be Tenants to her Action. For when a Feoffment is made to the Uſe of one in Fee, who refuſes, it is as if it had been appointed to the Uſe of a Friar or Monk, or to the Uſe of an inanimate Thing, as *Paul's* Steeple, and then the Feoffment is without Conſideration, and ſhall be to the Uſe of the Feoffor. And ſo the Wife has a Tenant for her *Cui in vita*, and by the bringing of it ſhe might purge and avoid all Incumbrances. And it was alſo argued, that the Wife here, as the Matter has now happened, might not be remitted by the Common Law, if a Re-feoffment had been been made to her and her Huſband, becauſe the Huſband has ſurvived the Wife. [f] And in Proof thereof, the Caſe in *T.* 21. *Ed.* 3. was alledged, which is, that the Huſband made a Feoffment, the Feoffee re-infeoffed the Huſband and Wife, the Wife died, the Heir of the Wife entered, and the Huſband brought an Aſſize, and becauſe the Huſband ſurvived the Wife, ſo that the Heir of the Wife had one againſt whom he might bring his Action, it was awarded that the Aſſize by the Huſband was maintainable. [g] So here inaſmuch as the Huſband hath ſurvived, it might not be adjudged a Remitter in the Wife, if the Eſtate had been made by an immediate Feoffment according to the Courſe of the Common Law. [h] And as to what has been ſaid, that the preciſe finding that the Wife was remitted ſhall ſtand in Force until it be traverſed, altho' the Matter before does not prove it, this is not ſo. [i] For the Office of 12 Men is no other than to enquire of Matters of Fact, and not to adjudge what the Law is, for that is the Office of the Court, and not of the Jury, and if they find the Matter of Fact at large, and further ſay that thereupon the Law is ſo, where in Truth the Law is not ſo, the Judges ſhall adjudge according to the Matter of Fact, and not according to the Concluſion of the Jury; and ſo here the finding [k] of the Remitter is void, if the Matter before does not prove it, which *Dyer* being on the other Side *conceſſit*, and diſcharged the two, who laſt argued, from this Point. Wherefore upon the whole Matter the Wife was not remitted, but the Remainder to *Catherine* is good, and continues, and then ſhe and the ſaid *Peter Seintgil* her Huſband ought to have the Land; and thereupon it was prayed that ſo they might without being impeached by the Court, and whereas an Order was before made by the Court that the ſaid *Peter Seintgil* ſhould pay to the King the Iſſues and Profits of the Land not leaſed, if it was adjudged that the King was entitled, it was prayed that he might be diſcharged from thence. And upon this the Court, after the Arguments were had, adviſed upon the Matter, and afterwards all the Court and the ſaid Juſtices agreed that the Wife was not remitted. And the Decree recited that the Wife was not remitted by Force of the Uſe, and the Execution of the Poſſeſſion by the Statute.

† *Note, the ſaid ſaving in the Statute extends to Rights, Titles, and Actions which were before the Statute of* 27. H. 8. *and not to Rights, Titles, or Actions given ſince the Statute.*

[a] Hob. 256.

[b] 34. H. 8. Bro. Remitter. 49. B N. C. § 251. Dy. 24. pl. 148 77. pl. 39. 2 Bulſt. 31. Hob. 255.

[c] 2. Rol. R. 10.

[d] 1. Leon. 199.

[e] See Poſt. 414.

[f] T 21. Ed. 3. 26. a. Fitz. Remitter 15. Bro. 41. & 21. Aſs. pl. 2. Bro. ibid. 21.

[g] S. P. *Frerez* Caſe H. 30. Ed. 3. 2. b. M. 39. Ed. 3. 29. b. *per Caund.* Fitz. Remitter 7. T. 14. Ed. 4. 8. a. *Per Brian.* M. 41. Ed. 3. 18. 19. M, 4. H. 6. 3. a. *Per Cheine.*

[h] Dy. 106. pl. 20. 4. Co. 42. a. 8. Co. 155. a. 9. Co. 13. a. 25. 1. Rol. R. 132. 2. Bulſt. 314. Vaugh. 149.

[i] Where a Jury finds the Matter of Fact at large, and further concludes againſt Law, the Verdict is good, and the Concluſion ill. S. P. 4. Co. 42. b. 11. Co. 10. b Dy. 361. pl. 15. Hob. 53 222. Moor 105. Litt. R. 110. 183. Hardr. 16. Heath's Max. 223

[k] 2. Co. 75. a.

Nota bene, by the Reporter.

† Hob. 256.

The Decree containing the Judgment and the Cauſe thereof.

Where by Inquiſition taken at *Beccles* in the County of *Suffolk*, the 25th Day of *March* in in the *ſeventh* Year of the Reign of our late Sovereign Lord King *Edward* the *Sixth*, before *John Spencer* Eſquire then Eſcheator of the ſaid County, by virtue of the King's Writ of *Mandamus* to the ſame Eſcheator directed, after the Death of *Amy Townſend* late Wife of Sir *Roger Townſend* Knight, it was found that the ſaid *Amy* long before her Death being ſeized in her Demeſn as of Fee Tail, to her and to the Heirs of her Body lawfully begotten, of and in the Manor of *Akenham* with the Appurtenances in the ſaid County, and of and in twenty Meſſuages, four hundred Acres of Land, one hundred Acres of Meadow, one hundred Acres of Paſture, two hundred Acres of Wood, and 10 *l.* Rent, with the Appurtenances in *Akenham*, *Cleydon*, and *Hemingſton* in the ſaid County of *Suffolk*, and of and in the Advowſons of the Churches of *Akenham*, *Cleydon*, and *Hemingſton* aforeſaid, took to her Huſband the ſaid Sir *Roger Townſend*. By Force whereof the ſaid Sir *Roger Townſend* and *Amy* were ſeized of and in the Premiſſes in their Demeſn as of Fee Tail, as in the Right of the ſaid *Amy*. And ſo ſeized, the ſaid Sir *Roger Townſend*, the 28th Day of *July*, in the 29 Year of the Reign of the late King *Henry* the *Eighth*, infeoffed Sir *John Shelton* Knight, and divers others and their Heirs and Aſſigns of and in all the Premiſſes, to the Uſe of the ſame Sir *Roger* and *Amy* his Wife for the Term of their Lives, and the longer Liver of them, and after to the Uſe of *John Townſend* Son and Heir Apparent to the ſame Sir *Roger* for Term of Life of the ſame *John*, and after his Deceaſe to the Uſe of *Richard Townſend* Son and Heir Apparent of the ſame *John*, and to the Uſe of *Catherine* Wife of the ſame *Richard*, and the Heirs of the Body of the ſame *Richard* lawfully begotten; and for lack of ſuch Iſſue, to other Uſes expreſſed in the ſame Office. And further it was found by the ſame Office, that the ſame Sir *Roger* and *Amy*, by Virtue of the ſaid Feoffment, and of the Statute lately made for the Execution of the Poſſeſſion of Lands to ſuch Perſon as had any Uſe of or in the ſame, were ſeized in their Demeſn as of Fee Tail in the Right of the ſame *Amy*, and the ſame *Amy* in her Remitter and better Right. And that they ſo being thereof ſeized did by their Writing indented, dated the 26 Day of *October* in the 4 Year of the Reign of the ſaid King *Edward* the *Sixth*, demiſe and let the Site of the ſaid Manor of *Akenham* with divers Parcels of the ſame Manor recited in the ſaid Office according to the ſaid Indenture, unto the ſaid *Richard Townſend* for Term of 21 Years, by virtue of which Leaſe the ſaid *Richard Townſend* being poſſeſſed of the ſaid Eſtate in the ſaid Manor and other the Premiſſes for Term of the ſaid 21 Years made his laſt Will and Teſtament, and by the ſame Will did conſtitute and ordain his Executor *Thomas Townſend*, and after the ſaid *Richard* died, by and after the Death of which ſaid *Richard Townſend*, the ſaid *Thomas* as Executor of the ſaid *Richard*, by virtue of the ſaid Leaſe for Term of Years grown to his Hand by the ſaid laſt Will and Teſtament, did enter upon the ſaid Site of the ſaid Manor and other the Premiſſes contained in the ſaid Leaſe; before which Time, that is to ſay, in the 35 Year of the Reign of the ſaid King *Henry* the *Eighth*, the ſaid *John Townſend* was deceaſed, and after the ſaid *Amy*, and likewiſe the ſaid Sir *Roger Townſend* died. By and after whoſe Deaths, the ſaid Manor and other the Premiſſes, being holden of the ſaid King *Edward* the *Sixth* by the Moiety of one Knights-Fee, did deſcend and come to *Roger Townſend* Couſin and Heir of the Body of the ſaid *Amy* lawfully begotten, that is to ſay, Son and Heir of the ſaid *Richard Townſend*, Son and Heir of the ſaid *John Townſend*, Son and Heir of the ſaid *Amy*, which ſaid *Roger Townſend* was of the Age of eight Years at the taking of the ſaid Inquiſition, as by the ſame Inquiſition returned into the Chancery, and there of Record remaining more plainly may appear. Whereupon ſince the Return of the ſaid Office, as well the Rents and Profits of the ſaid Manor and other the Premiſſes hath been demanded by the Maſter and Counſel of the King's and Queen's Majeſties Court of Wards and Liveries to their Highneſs's Uſe, as alſo the ſaid *Thomas Townſend* hath enjoyed the ſaid Leaſe of 21 Years before mentioned until in *Eaſter* laſt paſt, that *Peter Seintgil* Gentleman and *Catherine* his Wife before Wife of the ſaid *Richard Townſend*, claiming the Poſſeſſion of the ſaid Manor and other the Premiſſes with the Rents and Profits thereof from the Death of the ſaid *Richard Townſend*, alledged that the ſame did to them juſtly appertain and belong in the Right of the ſaid *Catherine* during her Life, being next in Remainder to the ſaid Manor and other the Premiſſes by virtue of the ſaid Feoffment thereof conveyed by the ſaid Sir *Roger Townſend*, as is aforeſaid. For the Proof whereof, and to avoid the Title of the Queen's Majeſty the ſaid *Peter Seintgil* had further Day until the *quindena* of the holy *Trinity* then next following, at which Day the ſame *Peter Seintgil* with his learned Counſel, and likewiſe the ſaid *Thomas Townſend* appeared in the ſaid Court, perſiſting in their ſundry Titles before ſet forth, which was had and debated at ſeveral Days given in the ſame *Trinity* Term. And for the Order of the ſaid Parties for that Time it was decreed by the Counſel of the ſaid Court, that either Parties with the Advice of their learned Counſel ſhould reduce their ſaid Matters into brief Caſes to be delivered to the ſaid Counſel of this Court, to be adviſed therein

until the *quindecim* of *St. Michael* then next following. And for the Order in the ſaid Manors and other the Premiſſes in the mean time, the ſaid *Peter Seintgil* was admitted and licenſed by the Maſter and Counſel of the ſaid Court to receive the Rents of the Free Tenants and Copyholders of the ſaid Manors, and became bound in 100 *l.* to repay the ſame as the ſaid Maſter and Counſel in the ſaid *Michaelmas* Term ſhould award and determine. And likewiſe it was ordered that the ſaid *Thomas Townſend* ſhould before the Feaſt of *All Saints* then next following bring and deliver into this Court as well the Rents reſerved upon the ſaid Leaſe with the Arrearages thereof, and the Arrearages of the Increaſe and Improvement of the ſame Rent, to be repaid over to them to whom the Right thereof ſhould appertain by the Judgment of the ſaid Maſter and Counſel. And ſince, this preſent *Michaelmas* in the *firſt* and *Second* Years of the King's and Queen's Majeſties Reign, upon the Sight of the Caſes delivered to the ſaid Maſter and Counſel by both the ſaid Parties, it hath been argued by the Counſel on both Sides three ſeveral Days for that Matter appointed, in the Preſence as well of two of the King's Juſtices at the Law, as of the ſaid Maſter and Counſel, whether the ſaid *Amy* were remitted to the Eſtate newly to her executed by the aforeſaid Statute, as is before recited, and whether the ſaid Office were ſufficient to entitle the King's and Queen's Highneſs to the Wardſhip of the ſaid Manor and other the Premiſſes during the Nonage of the ſaid *Roger Townſend* the younger, or not. And foraſmuch as upon thorough debating and arguing thereof it ſeemeth to this Court, and to the ſaid Juſtices, that the ſaid *Amy* by the ſaid Eſtate conveyed to her of the ſaid Lands, by Force of the ſaid Uſe, and the Execution of the Poſſeſſion thereof to her by the ſaid Statute, was not remitted to the ſaid Eſtate Tail, but that the ſame remained diſcontinued, and by Reaſon thereof the Remainder limited to the ſaid *Catherine* is good, and continueth in her, until the ſaid Eſtate Tail be recontinued, and by Means thereof the ſaid *Peter* and *Catherine* ought to have and enjoy the Poſſeſſion of the ſaid Manor and all and ſingular the Premiſſes, and that the ſaid Matter compriſed in the ſaid Office is not ſufficient in the Law to entitle the King's and Queen's Highneſs to any the Premiſſes, it is therefore ordered and decreed by the ſaid Maſter and Counſel of this Court, the 26 Day of *November* in the *firſt* and *ſecond* Years of the Reigns of our Lord and Lady, that the ſaid *Peter Seintgil* and *Catherine* his Wife, in the Right of the ſame *Catherine*, ſhall, notwithſtanding the ſaid Title found by the ſaid Office, as is aforeſaid, from henceforth have, hold, and enjoy the ſame Manor and other the Premiſſes, with the Rents and Profits thereof from the Death of the ſaid *Richard Townſend*, during the Minority of the ſaid Heir, (if the ſaid *Catherine* do ſo long live) without lett of this Court, or any other on the Behalf of this Court. And that likewiſe without lett of the ſame Court the ſaid *Peter Seintgil* and *Catharine* and either of them ſhall have and take their Remedy, as by their learned Counſel ſhall be thought good, by the Common Law or otherwiſe againſt the ſaid *Thomas Townſend* his Executors or Aſſigns, as well for the Poſſeſſion of the ſaid Demeſns, and other the Premiſſes contained in the ſaid Leaſe, as for Payment of the Arrearages of the Rents, and of the Increaſe and Improvements thereof ſince the Death of the ſaid *Richard Townſend*. And it is further ordered and decreed by the ſaid Maſter and Counſel, that the Auditor General of the ſaid Court ſhall defalk and allow the Arrearages of the Rent of the ſaid Manor and other the Premiſſes, and this Decree ſhall be his ſufficient Warrant for the Accompliſhment thereof, and to engroſs the Account thereof accordingly. Provided always that if at any Time hereafter any other ſufficient Matter ſhall appear to the ſaid Maſter and Counſel for the King and Queen's Majeſty's Title, their Heirs or Succeſſors, of and in the ſaid Manor and other the Premiſſes during the Minority of the ſaid Heir, that then this preſent Decree to be void.

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A Report of a Challenge taken in the Common Bench *in the Term of* St. Michael *in the* firſt *and* ſecond *Years of the Reign of King* Philip *and Queen* Mary, *by the Earl of* Derby, *in an* Aſſize *brought before the Juſtices of the ſame Bench by* John Newdigate *Plaintiff againſt him and* John Anſell *for Lands in the County of* Middleſex. *The Parties were at Iſſue, and the Aſſize was awarded, and the Jury appeared, and the Challenge was taken as hereafter follows. And it appears in the Rolls of the ſaid Term, viz. Rot.* 1454.

AND thereupon the aforeſaid *Earl* challenges the Array of the Panel of the Aſſize aforeſaid, becauſe he ſays, that he the aforeſaid *Earl* is, and on the Day of obtaining the Writ of aſſize aforeſaid, and before, was one of the Nobility and Peers of this Kingdom, having a Place and Voice in every Parliament of the ſame Kingdom; and becauſe the Array of the Panel of the Aſſize aforeſaid was arrayed by *Thomas Offley* and *William Hewet* late Sheriffs of the aforeſaid County of *Middleſex*, no Knight being named and returned in the ſame Panel of that Array, as there ought to be according to the Law of this Realm, and this he is ready to verify; wherefore the ſame *Earl* prays Judgment, and that the Panel may be quaſhed.

Mich. 1. & 2. *P. & M.* A good challenge that no Knight is returned, when a Peer of the Realm is Party. S. C. Dyer 107. pl. 37. Vin. Abr. tit. Trial G. c. pl. 4. L. C. Dy. 108. pl. 18. But *Note*, the Law is now altered in the Point of this Caſe by the Statute of 24. *Geo.* 2. cap. 18.

And the aforeſaid *John Newdigate* ſays, that the aforeſaid Challenge of the aforeſaid *Earl* to the Array of the Panel of the Aſſize aforeſaid by the ſaid *Earl* above alledged, is inſufficient in Law to quaſh the Array of the ſaid Panel, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer that Challenge in Manner and Form aforeſaid above alledged, and this he is ready to verify, wherefore he prays Judgment, and that the Array of the ſaid Panel may be affirmed.

And the aforeſaid *Earl*, for that he has above alledged ſufficient Challenge to quaſh the Array of the Panel aforeſaid, which he is ready to verify, which ſaid Challenge the aforeſaid *John Newdigate* does not deny, nor thereunto in any wiſe anſwer, but altogether refuſes to admit the Averment thereof, prays Judgment, and that the Array of the Panel of the Aſſize aforeſaid may be quaſhed.

Upon this Demurrer the Court took good Advice, for the Caſe was a rare Caſe, and none of the Juſtices or Serjeants could remember it to have been ever put in Practice in their time, but that it was deviſed and determined to be put in Practice in the Aſſize brought by *Wimbiſh* againſt the Lord *Willoughby*, but it did not go forwards. And no Book or Caſe was found except one, which was in *Mich.* 13. *Ed.* 3. * where the Caſe appears to be as follows, *viz.* "In "a *Quare impedit* againſt the Biſhop of *Exeter* and others, upon the Plea of the Biſhop the In- "queſt was taken at the Bar. ¶ *Stouff.* You ſee how that the Writ requires that he ſhould cauſe "Knights and other good Men to come, and he has not returned a Knight, for which Reaſon "we apprehend you will not take this Inqueſt, eſpecially ſeeing a Peer of the Realm is Party. "¶ *Gein.* The Words of every *venire facias* are ſo, and yet a Man ſhall take the Inqueſt although "no Knight be returned. ¶ *Stone.* We have great Regard to their coming the firſt Day, and "alſo when a Peer of the Realm is Party the Law is otherwiſe than between other Perſons, "wherefore ſince no Knight is returned, we award that the whole Inqueſt go without Day."— Theſe are the Words of the Caſe, but in ſome Books the Caſe is differently expreſſed, though the Subſtance and effect of it is the ſame in all the Books that I have ſeen. And the Juſtices conſidered well the ſaid Book, and the uſual Words in the Writ of *venire facias*, which is, *we command you that you cauſe to come before &c.* 12 *as well Knights, as other free and lawful Men, &c.* which Words *viz. (as well Knights)* were not (as it was ſaid) firſt put in the Writ to no Purpoſe. And they thought it well to take good Deliberation upon the Matter, it being a rare Caſe, leſt they ſhould otherwiſe give Judgment contrary to Law, or ſhould deny the Peers of the Realm that Privilege which the common Law gives them. And afterwards they agreed and gave Judgment as follows.

* Fitz Challenge 115. Enqueſt 43. Bro. 99. Juron 48 Panel 14. Trials 142. B. N. C. § 465. Dy. 107. pl. 27.

And becauſe the Juſtices here will adviſe of and upon the Challenge before they give Judgment thereon, Day is given as well to the aforeſaid *John Newdigate* as to the aforeſaid *Earl*, and likewiſe to the aforeſaid *John Anſell*, and alſo to the Recognitors aforeſaid now here appearing, until *Thurſday* next after the *Octave* of *St. Martin* next coming, to hear their Judgment thereupon. At which *Thurſday* here came as well the aforeſaid *John Newdigate*, as the aforeſaid *Earl* and *John Anſell* by their Attornies aforeſaid, and the aforeſaid Recognitors being called in like Manner came. And thereupon the aforeſaid Challenge of the aforeſaid *Earl* to the Array of the Panel of the Aſſize aforeſaid being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here, that the Array of the Panel of the ſaid Aſſize, in Manner and Form aforeſaid by the aforeſaid late Sheriff of *Middleſex* arrayed and returned, is inſufficient and of no Force or Effect in the Law. Therefore it is conſidered, that the ſaid Panel be quaſhed, and wholly holden for none.

The reſt of the Record. Judgment.

A Report of a Caſe argued and adjudged in the Common Bench *by the Juſtices of the ſame Bench in* Trinity *Term, in the* firſt *and* ſecond *Years of the Reign of King* Philip *and Queen* Mary, *in an Action of* Debt *brought by Sir* Richard Buckley *Knight Plaintiff againſt* Rice Thomas *Defendant. And the Record was as follows.*

Mich. Term. 1 & 2. *P. & M. Rot.* 1373. *Middleſ.* Same Precedent Raſt. Entr. 286. a.

* Note the Writ of Debt here brought againſt the Sheriff without touching any Statute in the Writ, but in the Count. Theol. Dig. lib. 10. cap. 28. § 15.

RICE *Thomas* of *Lanvayr* in the County of *Caernarvon* Eſquire, Sheriff of the County of *Angleſea*, was ſummoned to anſwer *Richard Buckley* Knight of a Plea that he render to him 100*l.* which he owes him and unjuſtly detains, &c. And whereupon the ſame *Richard* by *Robert Bedingfield* his Attorney ſays, that whereas in a * Statute made in the Parliament of the Lord *Henry* the *Sixth* late King of *England*, holden in the *twenty-third* Year of his Reign, amongſt other Things it is contained, whereas by Authority of a Parliament holden at *Weſtminſter* in the *firſt* Year of the Reign of the Lord *Henry* late King of *England* the *fifth* from the Conqueſt, amongſt other Things it was ordained, that Citizens and Burgeſſes of Cities and Boroughs coming to the Parliament ſhould be choſen Men, Citizens and Burgeſſes reſident, abiding, and free in the ſame Cities and Boroughs, and none other, as in the ſame Statute of the aforeſaid *firſt* Year of King *Henry* the *fifth* more fully appears. Which ſaid Citizens and Burgeſſes have always in Cities and Boroughs been choſen by Citizens and Burgeſſes, and no other, and to the Sheriff of the County returned, and upon their Returns received and accepted by the Parliament before then holden. And alſo whereas by Authority of a Parliament holden at *Weſtminſter* the *eighth* Year of the Reign of the ſame late King *Henry* the *Sixth*, it was ordained in what Manner and Form the Knights of the Shires coming to the Parliaments from thenceforth to be holden ſhould be choſen, and how the Sheriffs of the ſame Counties thereupon ſhould make their Returns, as in the ſame Statute more fully appears: By Force of which Statute Elections of Knights to come to the Parliaments ſometimes have been duly made, and lawfully returned, until then of late Time that divers Sheriffs of the Counties of the Realm of *England*, for their ſingular Avail and Lucre, have not made due Elections of the Knights, nor in convenient Time, nor good Men and true returned, and ſometimes no Return of the Knights, Citizens, and Burgeſſes lawfully choſen to come to the Parliaments, but ſuch Knights, Citizens, and Burgeſſes have been returned which were never duly choſen, and other Citizens and Burgeſſes than thoſe which by the Mayors and Bailiffs were to the ſaid Sheriffs returned; and ſometimes the Sheriffs have not returned the Writs which they had to make Election of Knights to come to Parliament, but the ſaid Writs have embeziled, and moreover made no Precept to the Mayor and Bailiff, or to the Bailiffs or Bailiff, where no Mayor is of Cities and Boroughs, for the Election of Citizens and Burgeſſes to come to Parliament, by Colour of theſe Words contained in the ſame Writs, *viz. that in your full County you cauſe two Knights to be elected for your County, and for every City in your County two Citizens, and for every Borough in your County two Burgeſſes.* And alſo becauſe ſufficient Penalty and convenient Remedy for the Party in ſuch Caſe grieved was not ordained in the ſaid Statutes againſt the Sheriffs, Mayors, and Bailiffs, which do contrary to the Form of the ſaid Statutes, the ſame late King *Henry* the *Sixth*, conſidering the Premiſſes, by the aforeſaid Authority of the ſaid Parliament holden the ſaid *twenty-third* Year of his Reign ordained, that the ſaid Statutes ſhould be duly kept and obſerved in all Points: and moreover, that every Sheriff, after the Delivery of any ſuch Writ to him made, ſhould make and deliver without Fraud a ſufficient Precept under his Seal to every Mayor and Bailiffs, or to Bailiffs or Bailiff, where no Mayor is of the Cities and Boroughs within his County, reciting the ſaid Writ, commanding them by the ſame Precept, if it be a City, to chuſe by Citizens of the ſame City, Citizens, and in the ſame Manner and Form if it be a Borough, by the Burgeſſes of the ſame to chuſe Burgeſſes to come to the Parliament. And that the ſame Mayor and Bailiffs, or Bailiffs or Bailiff where no Mayor is, ſhould return lawfully the Precept to the ſame Sheriffs, by Indentures betwixt the ſame Sheriffs and them to be made of the ſaid Elections, and of the Names of the ſaid Citizens and Burgeſſes by them ſo choſen, and thereupon that every Sheriff ſhould make a good and rightful Return of every ſuch Writ, and of every Return by the Mayors and Bailiffs, or Bailiffs or Bailiff where no Mayor is, to him made. And that every Sheriff at every Time that he doth contrary to that Statute, or any other Statute for the Election of Knights, Citizens, and Burgeſſes to come to the Parliament before that time made, ſhould incur the Pain contained in the ſaid Statute made the ſaid *eighth* Year, and moreover ſhould forfeit and pay to every Perſon thereafter choſen Knight, Citizen, or Burgeſs in his County to come to any Parliament, and not duly returned, or to any other Perſon, which in Default of ſuch Knight, Citizen, or Burgeſs will ſue, one hundred Pounds, whereof every Knight, Citizen, and Burgeſs ſo grieved, ſeverally, or any other Perſon which in their Default will ſue, ſhould have his Action of Debt againſt the ſaid Sheriff, or his Executors or Adminiſtrators, to demand and have the ſaid hundred Pounds, with his Coſts ſpent in that Caſe. And that in ſuch Action taken by virtue of the ſame Statute made in the aforeſaid *twenty-third* Year, the Defendant ſhould not wage his Law of the Demand aforeſaid in any wiſe; and that no Defendant in ſuch Action ſhould have any Eſſoign, as in the ſame Statute made the ſaid *twenty-third* Year amongſt other Things more fully appears. And alſo whereas in a Statute made in a Parliament of the Lord *Henry* the *Eighth* from the Conqueſt, late King of *England*, holden at *Weſtminſter* upon Prorogation there the *fourth* Day of *February* in the 27th Year of the ſaid late King, among other Things it is enacted and eſtabliſhed by the Authority of the ſame Parliament, that the Country or Dominion of *Wales* ſhall for ever from thenceforth be, ſtand, and continue incorporated, united, and annexed to and with this Realm of *England*, and that every Perſon and Perſons born and to be born in the ſaid Country or Dominion of *Wales* ſhall have, enjoy, and inherit all and ſingular Freedoms, Liberties, Rights, Privileges, and Laws within this Realm, and other the King's Dominions, as

as other the King's Subjects naturally born within the ſame have, enjoy, and inherit. And further then and there it was enacted and eſtabliſhed amongſt other Things, that for the ſame Parliament holden the ſame *twenty-ſeventh* Year, and all other Parliaments thenceforth to be held and kept for this Realm of *England*, one Knight ſhould be elected to the ſame Parliaments for every of the Shires of *Brecknock*, *Radnor*, *Montgomery*, and *Denbigh*, and for every other Shire within the ſaid Country or Dominion of *Wales*, and the Election to be in like Manner and Form as Knights of Parliament be elected in other Counties of this Realm, as in the ſame Statute made the ſame *twenty-ſeventh* Year amongſt other Things more fully appears. And alſo whereas in a Statute made in the Parliament of the ſaid late King *Henry* the *Eighth* holden at *Weſtminſter* upon Prorogation the 22d Day of *January* in the 34th Year of his Reign, and afterwards continued to and until the 12th Day of *May* in the 35th Year of the Reign of the ſame late King, and on the ſame 12th Day of *May* in the 35th Year aboveſaid there holden, amongſt other Things it is enacted by the royal Highneſs, and the Lords Spiritual and Temporal, and the Commons in the ſame Parliament then aſſembled, by Authority of the ſame Parliament, that all the King's Subjects and Reſiants in *Wales* ſhall find at all Parliaments thereafter to be holden in *England* Knights for the Shires, and Citizens and Burgeſſes for Cities and Towns, to be named and choſen by Authority of the King's Writ under the great Seal of *England*, according to the Act in that Caſe provided, as in the ſame Statute made the ſaid 34th and 35th Years amongſt other Things more fully appears. And whereas the Lady *Mary* now Queen of *England*, the 14th Day of *Auguſt* in the *firſt* Year of her Reign, by her Writ bearing Date the ſame 14th Day of *Auguſt*, iſſuing out of her Chancery then being at *Weſtminſter* in the County of *Middleſex* under her great Seal of *England*, directed to the then Sheriff of her County of *Angleſea*, reciting by the ſame Writ, Whereas the ſame Lady the Queen now, by the Advice and Aſſent of her Council, for certain urgent and important Buſineſs concerning the ſame Lady the Queen now, the State and Defence of her Kingdom of *England*, and of the Church of *England*, hath appointed and ordained a certain Parliament of the ſaid Lady the Queen now to be held at *Weſtminſter* in the County of *Middleſex* the *fifth* Day of *October* then next to come, and there to have Conference with the Prelates and Nobility of her ſaid Realm, commanded the ſame Sheriff of *Angleſea* by the ſame Writ firmly enjoining him, that having made Proclamation of the Day and Place aforeſaid in his next County to be holden after the Receipt of the ſame Writ, he ſhould cauſe one Knight wearing a Sword, the moſt fit and diſcreet of his County, and one Burgeſs of the moſt diſcreet and ſufficient Men of the Borough called *Shiretown* in the ſame County, to be freely and indifferently elected by thoſe that ſhould be intereſted in ſuch Proclamation, according to the Form of the Statute and Ordinances thereof made and provided, and the Names of the ſame Knight and Burgeſs ſo elected to be inſerted in certain Indentures thereof to be made between him the ſaid then Sheriff and thoſe who ſhould be intereſted in ſuch Election, although ſuch Knight and Burgeſs elected were preſent or abſent, and that he ſhould make them to come at the ſaid Day and Place; ſo that the ſame Knight for himſelf and the Commons of that County, and the ſaid Burgeſs for himſelf and the Commons of the Borough aforeſaid, ſeverally of themſelves ſhould have full and ſufficient Power to do and conſent to thoſe Things, which (by the Favour of God) might then there happen to be ordained, touching the Buſineſs aforeſaid, by the common Council of the Realm of the ſaid Lady Queen of *England:* to the End that her ſaid Buſineſs might not in any wiſe remain unfiniſhed by Reaſon of the Defect of ſuch Power, or of the haſty and imperfect Election of the Knight and Burgeſs aforeſaid. Alſo the ſame Lady the Queen now enjoined that neither the then Sheriff, nor any other Sheriff of her ſaid Realm of *England* ſhould be in any wiſe elected. And that the ſame Sheriff of the Lady the Queen ſhould without Delay diſtinctly and plainly under his Seal and the Seals of them who ſhould be preſent at that Election certify into her Chancery, at the ſaid Day and Place, the ſaid Election made in his full County, remitting to the ſame Lady the Queen the other Part of the Indentures aforeſaid annexed to the ſame Writ, together with the Writ itſelf, as in the ſame Writ is more fully contained. Which ſaid Writ the *tenth* Day of *September*, in the *firſt* Year of the Reign of the ſaid Lady the Queen now, at *Beaumaris* in the aforeſaid County of *Angleſea* was delivered to the aforeſaid *Rice* (the ſame *Rice* then being Sheriff of the aforeſaid County of *Angleſea*) by the Hands of one *William Banion*; and that the aforeſaid *Rice*, at his next County, within the ſame County of *Angleſea*, after the Receipt of the ſaid Writ, and by virtue of the ſame, *viz.* the 14th Day of *September* in the aforeſaid *firſt* Year of the Reign of the ſaid Lady the Queen now, in his full County then holden at *Beaumaris* in the aforeſaid County of *Angleſea*, in the Shire-houſe there, before the ſame *Rice* then Sheriff of the ſame County of *Angleſea*, cauſed the ſame Writ to be read, and alſo public Proclamation to be made of the ſaid Day and Place of the Parliament aforeſaid afterwards to be held, and of the chuſing according to the Form and Purport of the ſame Writ, one Knight, wearing a Sword, the moſt fit and diſcreet of the County aforeſaid, and one Burgeſs of the moſt diſcreet and ſufficient Men of the aforeſaid Borough called *Shiretown* in the ſame County, to come to the ſame Parliament, as he was commanded to do by the ſaid Writ, and according to the Form thereof, *viz.* between the Hours of eight and nine of the ſame 14th Day, whereupon they proceeded then there in that full County to the Election of one Knight for the ſame County of *Angleſea*, by the Men reſident in the ſaid County, and preſent at the ſaid Proclamation. And although the ſame *Richard Buckley*, who then and long before was a Knight wearing a Sword, abiding and dwelling at *Beaumaris* in the aforeſaid County of *Angleſea* in *Wales*, and born in the ſame County, was, in the ſame full County, the ſaid 14th Day between the Hours of eight and nine, then and there duly elected and nominated to be a Knight of the ſaid County for the ſaid Parliament, to come for the ſame County to the ſaid Parliament, by the * greater Number of Men then reſident within the ſaid County of *Angleſea*, and there preſent at the ſaid Time of the

* Raſt. Entr. 447. a.

the Proclamation aforeſaid made, and intereſted in the ſaid Proclamation there, each of whom could then diſpend 40*s.* of Freehold and more by the Year within the ſaid County, of which ſaid Election by proteſting that the aforeſaid *Rice* made no Indenture between him and the aforeſaid Electors, according to the Form and Effect of the Statute aforeſaid, nevertheleſs the ſame *Richard* in Fact ſays, that the aforeſaid *Rice* the Statutes aforeſaid not weighing, and the Penalties ordained in the ſame not fearing, at the aforeſaid *fifth* Day of *October* did not return to the ſaid Lady the Queen now, into her Chancery at *Weſtminſter* in the County of *Middleſex*, the ſaid *Richard* to be a Knight of the ſaid County of *Angleſea* for the ſame Parliament, according to the Form and Effect of the Election and the Statute aforeſaid, but returned the ſaid Writ, and a certain Indenture thereunto annexed, ſpecifying the ſame to be made between him the ſaid *Rice*, then Sheriff of the ſaid County of *Angleſea*, and *William Wood* Eſquire, *John Lewis* Eſquire, and other Gentlemen, intereſted in the ſaid Proclamation, and in the ſaid Indenture named, and containing that the ſaid *William* and *John* and other Freeholders of the County aforeſaid, in the ſaid full County of *Angleſea* holden before the ſaid Sheriff the aforeſaid 14th Day at the ſaid Town of *Beaumaris* elected one *William Lewis* Eſquire, between the Hours aforeſaid, to be a Knight for the ſaid Parliament, to come to the ſame Parliament for the ſaid County, contrary to the Form of the aforeſaid Statute made the ſaid 23d Year of the Reign of the aforeſaid late King *Henry* the *Sixth*, whereby an Action has accrued to the ſame *Richard* to demand and have of the aforeſaid *Rice* the aforeſaid 100 *l.* Nevertheleſs the ſaid *Rice* although often requeſted the aforeſaid 100 *l.* to the ſame *Richard* hath not yet rendered, but the ſame to render to him hath hitherto refuſed, and yet doth refuſe, wherefore he ſays that he is damaged, and hath damage to the Value of 40 *l.* And thereupon he produces Suit, *&c.* And the ſame *Richard* further ſays, that the aforeſaid County of *Angleſea* is and at the Time of the making the aforeſaid Statute in the ſaid 27th Year of King *Henry* the *Eighth*, and long before, was one of the Counties of the ſaid Country or Dominion of *Wales* aforeſaid. And this, *&c.*

Defendant demurs.

And the aforeſaid *Rice* by *Thomas Carpenter* his Attorney comes and defends the Force and Injury when, *&c.* And ſays that the aforeſaid Matter in the Declaration aforeſaid above ſpecified is inſufficient in Law for the aforeſaid *Richard* to have and maintain his Action aforeſaid againſt the ſaid *Rice*, and that he has no Neceſſity nor is by the Law of the Land bound to anſwer the ſaid Matter in Manner and Form aforeſaid declared; and this he is ready to verify, wherefore for Want of ſufficient Matter in the ſaid Declaration ſpecified the ſame *Rice* prays Judgment, and that the aforeſaid *Richard* may be precluded from having his action aforeſaid againſt him, *&c.*

Joinder in Demurrer.

And the aforeſaid *Richard*, for that he has above declared ſufficient Matter in Law in his Declaration aforeſaid to maintain his Action aforeſaid, which he is ready to verify, which ſaid Matter the aforeſaid *Rice* does not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſes to admit, prays Judgment, and his Debt aforeſaid together with his Damages, *&c.* to be adjudged to him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the *Octave* of *St. Hillary*, to hear their Judgment thereon, becauſe the Juſtices here not yet, *&c.* At which Day here came as well the aforeſaid *Richard* as the aforeſaid *Rice* by their Attornies aforeſaid. And becauſe the Juſtices here will further adviſe of and upon the Premiſſes before they give Judgment thereon, Day is therefore given to the Parties here until from the Day of *Eaſter* in *fifteen* Days to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.* At which Day here came as well the aforeſaid *Richard* as the aforeſaid *Rice* by their Attornies aforeſaid. And becauſe the Juſtices here will further adviſe of and upon the Premiſſes before they give Judgment thereon, Day is therefore given to the Parties aforeſaid here until on the Morrow of the *Holy Trinity*, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.*

Continuances.

The CASE. *Trin.* 1 & 2. *P.* & *M.* Debt upon the Statute of 23. *H.* 6. *cap.* 15. for not returning him a Knight of the County of *Angleſea* in *Wales* to the Parliament of *England*, and adjudged (1.) Count that *licet* he was elected, is a full and ſufficient Averment; (2) Count that he was elected *per majorem numerum*, *&c.* generally, without ſhewing the certain Number, is good. (3) that the Statute of 27. *H.* 8. *cap.* 27. which annexes *Wales* to *England*, enables a Perſon born in *Wales* to take Benefit of the Statute of 23. *H.* 6. *cap.* 15.

The Caſe was recited briefly as follows. Sir *Richard Buckley* Knight has brought an Action of Debt for 100 *l.* againſt *Rice Thomas*, and in his Declaration has recited a great Part of the Statute made in [a] 23. *H.* 6. concerning the Elections of Burgeſſes and Knights to come to Parliament, whereby (amongſt other Things) it is ordained, that every Sheriff, at every Time that he doth contrary to the ſame Statute, or any other Statute then before made for the Election of Knights, Citizens, and Burgeſſes to come to Parliament, ſhould incur the Penalty contained in the Statute of [b] 8. *H.* 6. and further ſhould forfeit and pay to every Perſon thence afterwards choſen Knight, Citizen, or Burgeſs in his County to come to any Parliament, and not duly returned, or to any other Perſon that in Default of ſuch Knight, Citizen, or Burgeſs will ſue, 100 *l.* and that every Knight, Citizen or Burgeſs ſo grieved, ſeverally, or any other Perſon that in their Default will ſue, ſhall have his Action of Debt againſt the ſaid Sheriff, or his Executors or Adminiſtrators, to demand and have the ſaid 100 *l.* with his Coſts expended in ſuch Caſe. And alſo in his Declaration has recited, that by the Statute of [c] 27. *H.* 8. it was enacted and eſtabliſhed, that the Country or Dominion of *Wales* ſhould be, ſtand, and continue from thenceforth for ever incorporated, united, and annexed to and with this Realm of *England*; and that every Perſon born, or thence afterwards to be born in the ſaid Country or Dominion of *Wales*, ſhould have and inherit all and every Liberties, Franchiſes, Rights, Privileges, and Laws within this Realm, and other the King's Dominions, as other the King's Subjects naturally born within the ſame have and inherit. And that it was then ordained, that for the ſame Parliament of 27. *H.* 8. and all other Parliaments thenceforth to be held for this Realm of *England*, one Knight ſhould be choſen

[a] 23. *H.* 6. *cap.* 15. [b] 8. *H.* 6. cap. 7. [c] 27. *H.* 8. cap. 27.

H. 6. *cap.* 15. for not returning him a Knight of a *Welſh* County to the Parliament of *England* S. C, Dy. 113. pl. 57.

for

for the ſame Parliaments for every of the Counties within the Country and Dominion of *Wales*, and the Election to be in ſuch Manner and Form as Knights of Parliament are elected in other Counties of this Realm. And alſo in his Declaration he has recited, that in the Act made in the 34 and 35 *H.* 8. (which was made concerning certain Ordinances in *Wales*) it is enacted, that all the King's Subjects and Reſiants in *Wales* ſhould find at all Parliaments thence afterwards to be holden in *England*, Knights for the Counties, and Citizens and Burgeſſes for Cities and Towns, to be named and choſen by Authority of the King's Writ under the Great Seal of *England*, according to the Act in ſuch Caſe provided. And he recites further in the ſaid Declaration, that the Queen the 14 Day of *Auguſt*, in the firſt Year of her Reign, had ſent her Writ to the Sheriff of *Angleſea*, to cauſe one Knight of the ſame County to be choſen to come to Parliament to be holden the *fifth* Day of *October* then next to come. And he ſhews by the ſame Declaration, that according to the Form and Purport of the ſame Writ the ſaid Sheriff in his full County proceeded to the Election of a Knight for the ſame County: and that the Plaintiff himſelf was choſen and nominated a Knight of the ſame County to come to Parliament for the ſame County, by the greater Number of Men then reſiant within the ſame County of *Angleſea*, proteſting that the ſaid *Rice* made no Indenture between him and the Electors concerned in the ſaid Election, yet the ſame Plaintiff ſays in Fact, that the ſaid *Rice* did not return the ſaid Plaintiff to be a Knight of the ſaid County, according to the Form and Effect of the ſaid Election and Statute, but returned the ſaid Writ, and an Indenture annexed to it, containing that one *William Lewis* was choſen Knight to come to Parliament for the ſame County, by which an Action has accrued to the Plaintiff to demand of the Defendant the ſaid 100 *l.* And further the Plaintiff avers that the ſaid County of *Angleſea* is, and at the Time of the making the ſaid Act of 27. *H.* 8. and long before was one of the Counties of the ſaid Country or Dominion of *Wales*. And upon this Declaration the Defendant has demurred in Judgment.

And three Exceptions were taken to the Declaration, and argued at the Bar. The firſt was, that it was not declared preciſely that the Plaintiff was choſen Knight for the County, but it is alledged that *altho'* he was choſen Knight, &c. and the Word in the Record is (*licet*) he was choſen, which (it is ſaid) is not an Allegation in Fact that he was choſen, but is only an argumentative Allegation, which is not ſufficient for the other Party to traverſe, or to take Iſſue upon, and therefore it was ſaid the Declaration is not good. Exception 1.

The ſecond Exception was, in that the Plaintiff ſaith, altho' he was choſen by the greater Number of Men then reſiant within the ſame County, yet the Defendant returned another, &c. which Allegation (it was ſaid) is not good, inaſmuch as he does not ſhew the Certainty of the Number, as to ſay, that he was choſen by 200, which was the greater Number, and thereupon a certain Iſſue might ariſe whether he was elected by ſo many or not; but as it is alledged (it was ſaid) there is no Certainty at all, for he ſhews the Election by a confuſed Multitude, the Number of which, if Iſſue ſhould be joined, the Jurors ought to take Notice of, which would be unreaſonable, and it is more fit to be ſhewn by the Plaintiff himſelf, ſince it lies in his Conuzance. For (it was ſaid) by his affirming that he was choſen by the greater Number, thereby he takes Conuſance of the Number; for he cannot take Notice of the greater without taking Notice of the leſs, for the greater is in reſpect of the leſs; wherefore in that he affirms his Knowledge of the greater Number, therein he affirms his Knowledge of the leſſer Number, and conſequently of the whole Number, and becauſe he has not ſhewn the certain Number in the Count, therefore (it was ſaid) the Count is not good. Exception 2.

The third Exception was to the Matter. For it was ſaid, that *Wales*, altho' it was a long Time under the Government of the Kings of *England*, yet it was not parcel of the Realm of *England*, nor were the People of it bound or ruled by the Laws of *England*, nor did they come to the Parliaments of *England* until the Statute of 27. *H.* 8. by which it was ordained that one Knight for every *Welſh* County ſhall come to the Parliament of *England*; and the Election of them is appointed to be in the ſame Manner, Form, and Order as Knights of Parliament are elected in other Counties of this Realm; and that they ſhall have like Dignity, Preheminence, and Privilege, and ſhall have ſuch Fees as other Knights of Parliament have and are allowed, and the Fees of the Knights to be levied of the Commons of the County where they are elected. But the Statute does not make Mention of the Return of the Sheriff, nor of the Penalty againſt the Sheriff for a falſe Return, but this (it was ſaid) remains as it was before the Statute of 23. *H.* 8. in which Caſe the Penalty of the Statute of 23. *H.* 6. does not extend to Officers of *Wales*, becauſe *Wales* was not then parcel of the Realm, as it is ſaid before. And for this Cauſe (it was ſaid) the Action of Debt for the 100 *l.* is not maintainable againſt the Defendant. And theſe Matters were argued at the Bar firſt by *Gawdy* and after by *Dalſon* Serjeants being of Counſel with the Defendant: And on the other Side firſt by *Dyer*, and afterwards by *Catline*, Serjeants. But I have omitted their Arguments, becauſe I did not hear the whole of them. And now on *Saturday* the 22 Day of *June*, in this preſent *Trinity* Term, it was argued by all the Juſtices, as follows. Exception 3.

Staunford puiſn Juſtice. It ſeems to me that the Plaintiff ſhall be barred. As to the firſt Exception, it appears to me that the Allegation of the Election, which comes under this Word (* *licet*) is not well nor effectually alledged. † For there is a Ground in Law, that in Declarations certainty *Staunford* J. * See the contrary reſolved, that the Word *licet* is a direct affirmative,

Yelv. 21. Cro. E. 75. Hardr. 3. 48. N. Bendl. 297. Comyns 633. Heath's Max. 164. 165. † See Ante 84. (e) and the Books there cited.

tainty ought to be alledged by apt Words of Affirmation, and if it is not, the Declaration is not good. And therefore if a Man will bring an Action of Debt upon an Obligation, and declare in this Form, viz. it appears by the Obligation that the Defendant ſtood bound to the Plaintiff in 20 *l.* which he has not paid the Plaintiff, this Declaration is not good, becauſe it is not alledged by Matter in Fact that he was bound to him in the 20 *l.* but the Bond is alledged by way of Recital only. And in 11. *H.* 6. a Man brought an Action of Debt againſt a Goaler who had let one at large that was in Execution in his Cuſtody for the Sum in Demand, and declared that he had let him at large, by which Means the Plaintiff *excluſus fuit de debito ſuo*, and this Declaration was held not good, becauſe he did not ſay expreſly that he was not ſatisfied when he let him go at large, for that was the Reaſon why he ſhould not maintain the Action againſt the Goaler, which he did not alledge but by Implication, and by Implication it was alledged, for if the Goaler let him go at large, by which the Plaintiff was barred of his Debt againſt the Priſoner, thereby it is implied that his Debt was then unpaid; but the Count was holden not good, becauſe it was not affirmed preciſely as it is ſaid before. [a] And in 38. *H.* 6. where in an Action of Debt the Plaintiff counted that the Defendant retained him in his Service by the Space of eight Years to ſerve him in all Occupations, paying him 20 *s.* yearly, and counted further that he ſerved him for the Time, and ſo an Action accrued for 8 *l.* being in Arrear for his Salary; and the Defendant waged his Law, and notwithſtanding that he ſhould not have had his Law if he had retained him in Huſbandry, and notwithſtanding that the Service of Huſbandry is contained in theſe Words *(all Occupations)*, yet it is there adjudged that the Defendant ſhould be received to his Law, becauſe it was not fully expreſſed, but implicatively only, that he was retained in Huſbandry, which Implication is not ſufficient. And ſo in Counts if the effectual Point of them is not fully alledged by Words in the affirmative, they are not good, altho' it is contained by way of Recital or Implication. Then it is to be ſeen how the Plaintiff has here alledged that he was choſen a Knight to come to Parliament. And it ſeems to me that he has not alledged it by a full Affirmation; and thereupon the Meaning of this Word *(licet)* ought to be weighed and diſcuſſed. And in order to underſtand it truly, being a Latin Word, we ought to follow the Steps of our Predeceſſors Judges of the Law, who when they were in Doubt about the Meaning of any Latin Words enquired how thoſe that were ſkilled in the Study thereof took them, and purſued their Conſtruction. [b] As in 9. *H.* 6. where the Defendant in Replevin avowed for *Damage feaſant* in Land let to him by an Abbot and Convent, and the Plaintiff made Title to Common in the Land by Grant; the Defendant pleaded in Bar a Deed indented, wherein it was contained that the Father of the Plaintiff, by whom he claims Common, *renunciavit toti Communiæ, quam habere conſuevit averiorum ſuorum cum averiis* of the Tenant of the Land, and Exception was taken to the Deed, becauſe the Words had no Meaning, *et non allocatur*, for that this Word and Verb *renunciavit* requires a dative Caſe, and not an Accuſative after it, wherefore it is there held that it had a ſufficient Meaning. And ſo it appears there that they purſued the Senſe of the Grammar in the Conſtruction of the ſaid Word, being a Latin Word. [c] So in 7. *H.* 6. where an Indictment was found for a Treſpaſs done *die Jovis proximo poſt diem Pentecoſtes*, and there Error was aſſigned for the Incertainty of the Day, becauſe *dies Pentecoſtes* is every Day of the Week, and the *Pentecoſt* is thus defined, viz. *Pentecoſte, dicitur a penta, (quod eſt quinque), et coſte, (quod eſt decem), et hoc eſt quinquies decem dies poſt Paſcha*, and that is, *dies Dominicus*. And therefore we may ſee that our Predeceſſors have enquired and followed the Senſe of the Latiniſts in Latin Words. [d] And ſo in 11. *H.* 6. in Forgery of falſe Deeds the Writ was, *quod falſa conſpiratione habita imaginavit*, &c. and Exception was taken to the Writ, becauſe there is no ſuch Latin Word: for it is not *imagino, -as*, but it is *imaginor, -aris*, and therefore the Writ ſhould be *imaginatus fuit*: and there foraſmuch as by the Grammar the Latin was not good, the Writ was holden bad, and therefore it was amended. [e] So in 9. *H.* 7. it appears that one was bound in an Obligation upon this Condition, that if he paid 5 *l.* of fine Gold, that then, &c. and the Obligation was *puri auri*, and there the Judges were in Doubt what was Latin for *fine* Gold, and (as it appears by the Book) the Maſters of Grammar were put to give their Opinion what was Latin for *fine*, and they could not tell. So that our Predeceſſors have always conſulted about the Meaning of Latin Words with Grammarians and others that beſt underſtand them, and ſuch Senſe as the Grammar warrants and allows they have admitted; wherefore I apprehend that the Grammar is the moſt proper Judge of the Meaning of this Word *(licet)*, being a Latin Word. And as I take it, *licet* by the Rules of Grammar is a Conjunction adverſative, and it is rarely uſed but where there are two Matters alledged together, and neither of them is a perfect Sentence by itſelf without the other: and the firſt Matter comes under the Word *(licet)*, and the laſt under this Word *(tamen)*, for the *tamen* is the Relative, and the *licet* is its Antecedent; and the *licet* is ſeldom put in the firſt Part, but where the *tamen* is in the laſt Part, for it is ſubſequent to the *licet*. And the Cauſe why it is called a Conjunction adverſative is, becauſe that which is contained in the firſt Part is contrary to that which is contained in the ſecond Part, or in other Words, that which comes under the *licet* is contrary to that which comes under the *tamen*, and therefore it is called adverſative, *quià quod contrariatur, adverſatur*. And that which is preciſely affirmed is the laſt Part, *viz.* that which comes under the *tamen*, for that is the Allegation in Fact. And the firſt Part is not a preciſe Affirmation in Fact, but is an Affirmation contained by Implication under

[a] M. 38. H. 6. 13. 14. Fitz. Ley. 19. Bro. 66.

[b] M. 9. H. 6. 35. pl. 8. Fitz. Feoffment 5. 2. Rol. Abr. 403. L. pl. 2.

[c] T. 7. H. 6. 39. pl. 4. Fitz. Error 17. Bro. 69. Jours 27. See 2. Hawk. P. C. 236. § 78. that an Indictment ſo found is good.

[d] M. 11. H. 6. 2. pl. 5 H. 11. H. 6. 14. pl. 2. Fitz. Amendment 24. Bro. 81.

[e] H. 9. H. 7. 16 pl. 8.

der the *licet*, and is alſo an Affirmation in Anſwer to the Adverſative, that is, the *tamen*, which has after it the Negation, viz. that he did not return the Plaintiff, *&c.* which Affirmations are only argumentative Affirmations, and therefore the Defendant may not traverſe it. And for another Cauſe alſo he may not traverſe it, for if he ſhould traverſe it, then would he traverſe an imperfect Sentence; for, as I have ſaid, altho' that which comes under the *licet* is one Matter, and that which comes under the *tamen*, another Matter, yet neither of them by themſelves is a perfect Sentence, but both of them make the Sentence, and it is not compleat until both the Parts are put, and if he ſhould traverſe the firſt Part, then ſhould he traverſe half the Sentence, and join Iſſue upon it, which would be inconvenient. * But if it was the uſual Form to alledge it by *licet*, then I would hold with it. As in Debt upon Obligations the Form is to recite the ſame by this Word (*cum*) viz. *Cum Johannes Stile per ſcriptum ſuum &c. conceſſit ſe teneri, &c.* as may be ſeen by all the Records of Debt remaining in this Court, and therefore the Recital of it by *cum* is there good. [a] And ſo the Book is in Forger of falſe Deeds brought againſt one only, the Writ was *quòd falſa conſpiratione habita, &c.* and Judgment was demanded of the Writ, becauſe he could not conſpire with himſelf, but for that the Writ was according to the Statute, (which ſaith, *if any conſpire to make any falſe Deed*), and according to the uſual Form, the Writ was holden good. Wherefore we ought to keep to the uſual Form. But in this Caſe it is not the uſual Form to alledge the Election under the Word (*licet*) as you may ſee in the *Book of Entries*. And then ſince he was not tied down to any uſual Form, but was at Liberty to take ſuch Words as were proper for the Matter, and he has not done ſo, we ought not to hold with the Words more than they will warrant. And they will not prove an Election in Fact, as I have ſaid before. Therefore it ſeems to me that the Election is not preciſely alledged ſo as it may be traverſed, and alſo it cannot be traverſed, becauſe it is but half a Sentence. For which Reaſons the Declaration is not good.

* Hardr. 3.

[a] M. 11. H. 6. 2. pl. 5. Fitz. Forger de faita 18.

As to the ſecond Point, it ſeems to me that he ſhall not be compelled to ſhew the certain [b] Number of the Electors. [c] For ſince he cannot be intended to have certain Knowledge thereof, he ſhall not therefore be compelled to ſhew the Certainty. And perhaps he was elected by Voices, or by holding up of Hands, and not by the Number of Perſons in certain, in which Caſe it is eaſy to determine who hath the Majority of Voices or Hands by hearing or ſeeing, and yet very difficult to know the certain Number or the Names of them. And by the Indenture he could not know the Number, for the Sheriff made no Indenture between him and the Electors of the Plaintiff, but he made the Indenture between him and the Electors of the ſaid *William Lewis*. And ſo the Plaintiff could not have Knowledge of the Number of the Electors by the Indenture, nor by any other Means, according to common Intendment, and ſince he may not be intended to have Knowledge of the Certainty, he ſhall not be compelled to ſhew it. [d] As in Debt againſt an Executor, if he ſays that *he never was Executor, nor ever adminiſtred as Executor*, the Plaintiff ſhall ſay that he adminiſtred at ſuch a Place, and he needs not ſhew what Things he adminiſtred, becauſe he cannot have Knowledge of the Things, nor of the Number of them which the other has adminiſtred, whereunto he is not privy. And ſo it is in Things that are of an infinite Number, [e] as if a Man is bound to diſcharge the Sheriff of all Things touching his Office, he ſhall ſay generally that he has diſcharged him, without ſhewing the Things in particular, becauſe they are of ſuch an infinite Number that he cannot be intended to remember or know the Certainty of them. And ſo it is held in one Book, that if a Man is bound to ſheer annually the Sheep of the Obligee going in ſuch a Paſture, he ſhall ſay that he has ſhorn them annually, without mentioning the Number, for perhaps ſome Years there are more, and ſome leſs, and ſo he can not be intended to remember the certain Number annually. So here the Plaintiff could not come at the Knowledge of the Number of the Electors, for which Reaſon he ſhall ſay generally that he was elected by the greater Number, and therefore the Count is good enough notwithſtanding this Exception.

[b] S. P. Davis 48. a. Godb. 436. T. Raym. 9. 1. Finch. 34. 2. Finch 48. Heath's Max. 164. 4. Bac. Abr. 90.

[c] *Regula.* 1. Finch 34. 2. Finch 48. Heath's Max. 65. Noy's Max. 13. Ante 47. (f)

[d] M. 21. H. 6. 19. b. Fitz. Executors 41. Bro. 62. H. 9 H. 7. 15. a. *Per Kingsmil et Glanvil.* Bro. General Iſſue 87. Wing. Max. reg. 151. pl. 24.

[e] M. 5. Ed. 4. 8. pl. 21. Fitz. Bar. 88. Bro. Condition 143. L. P. M. 6. Ed. 4. 2. b. *per Danby.*

And as to the principal Matter, it ſeems to me that the Sheriff, who is now Defendant, is not within the Penalty of the Statute of 23. *H.* 6. [f] For it is to be obſerved, that *Wales* was not parcel of the Realm of *England* until the Statute of 27. *H.* 8. was made, by which Statute it is united and annexed to the Realm of *England*, and made parcel of it. And altho' by that Statute it is made parcel of this Realm, yet (if the Statute had ſtop'd there) it does not follow that Knights or Burgeſſes ſhould by virtue thereof come out of *Wales* to Parliament; for the County of *Cheſter* was always parcel of the Realm of *England*, and yet by the Common Law [g] Burgeſſes or Knights ſhould not come from thence to Parliament, nor ſhould the Laws made concerning the Election or Return of Knights to Parliament take Effect there by the Common Law. So in our Caſe, altho' the Statute makes *Wales* parcel of this Realm, if it had not gone further it would not have followed thereby that Burgeſſes or Knights ſhould come from thence to Parliament, nor that the Laws made before Time touching Burgeſſes or Knights of Parliament ſhould extend to them of *Wales*. And therefore the Makers of the Statute perceiving this ordained further, that one Knight ſhould be choſen for every County of *Wales*, and appointed the Manner of Election of ſuch Knight, and his Dignity, Preheminence, and Privilege, and that his Fees ſhould be levied and collected as they are in this Realm of *England*, but the Statute ſays nothing of the Return of the Sheriff, nor of any Penalty concerning the ſame. And the Election is one Thing, and the Return and Penalty another Thing. And the Statute of 23. *H.* 6. makes them ſeveral, wherefore ſince they are ſeveral, and the Statute of 27. *H.* 8. does not ſpeak of the Return nor of

[f] See 1. Freem. 147.

[g] But now by the Statute of 34. & 35. *H.* 8. *cap.* 13. Knights and Burgeſſes have Seats in Parliament for the County Palatine of *Cheſter*.

any Penalty thereupon, then (as I apprehend) it ſtands as it was before the Statute of 27. *H.* 8. for the Words of the Statute which concern only the Election, Dignity, and the Fees of Knights of *Wales* for the Parliament ſhall not be extended further. For it is a new Ordinance touching certain Points, beyond which the Words ſhall not extend, and eſpecially to the Pain or Puniſhment of others. [a] As the Statute which inflicts a Penalty *malefactoribus in parcis* ſhall not extend *malefactoribus in foreſtis.* [b] And the Statute which makes it penal for the Sheriff to leaſe out his County ſhall not extend to him if he leaſes but a Hundred parcel of his County. In like Manner the Statute of 8. *H.* 6. which upon a forcible Entry gives treble Damages to the Party that ſues an Aſſize, or Action of Treſpaſs, ſhall not be extended to give treble Damages in a Writ of Entry in nature of an Aſſize. And ſo penal Laws ſhall not be extended beyond the Words. Thus in the Caſe here the Statute of 27. *H.* 8. concerning the Election, Dignity, and Fees of the Knights of *Wales*, ſhall not extend to a falſe Return after the Election, for that is another Thing, and not mentioned in the Statute. For when the Statute of 7. *H.* 4. was made, which limits the Order of the Election of Knights to Parliament, yet it did not extend to the falſe Return of the Sheriff, until the Statute of 11. *H.* 4. was made. And then what Reaſon is there that the Statute of 27. *H.* 8. which limits the Order of Election of Knights to Parliament, ſhould be extended to a falſe Return, any more than the Statute of 7. *H.* 4.? none certainly, for the Caſes are alike. But it may be objected againſt me, that now ſince *Wales* is annexed and united to *England*, and become Part of it, the Statutes which have been made for *England* ſhall extend to *Wales*, being now a Member of it; ſo that the Statute of 8. *H.* 6. which ſays, that *the Electors of Knights for the Parliament ſhall diſpend* 40 s. *a Year, and that every Sheriff of* England *ſhall have Power to examine upon the Evangeliſts every Elector how much Land he may diſpend by the Year*, ſhall now extend to the Sheriffs of *Wales*, becauſe *Wales* is Part of *England*, and ſo the Sheriffs of *Wales* are included in the Name of the Sheriffs of *England*. Sir, as to this I anſwer, that altho' *England* is now enlarged, yet the Statutes don't extend beyond that which was *England* at the Time ſuch Statute was made. [c] As in 7. *H.* 6. it is ſaid, that *London* was ancient Demeſn, and had a Privilege that every Villain who tarried there a Year and a Day ſhould be privileged, ſo that the Lord might not ſeize him afterwards: And there it is ſaid, that *London* was enlarged further than it was in ancient Time, and became more extenſive than it was when it was firſt ancient Demeſn, and it appears there that the ancient Privilege aforeſaid ſhould not extend to the new Enlargement. So here, the ancient Statutes of *England* ſhall not extend to the Land newly added to *England*. And the Clauſe of 27. *H.* 8. recited in the Pleading, viz. *every Perſon or Perſons born in the Country or Dominion of* Wales *ſhall have and inherit all and every Laws within this Realm, and other the King's Dominions, as other the King's Subjects naturally born within the ſame have and inherit*, ſhall not aid the Plaintiff, nor make for him. For the Clauſe ſaith, *(ſhall inherit all Laws)* and does not ſhew any Law in particular, and therefore it reſts in the Conſtruction of the Law, what Laws the Words will enable them to have and inherit. And it ſeems to me that the Laws which this Clauſe enables them to have and inherit are ſuch as were in being before the Statute of 27. *H.* 8. and not thoſe which were made by that Statute. For ſince the Statute makes them as it were Purchaſers of thoſe Laws, it behoveth that the Laws, whereof they were Purchaſers, be in being at the Time. So that the ſaid Clauſe has Relation to ſuch Laws as were in being before the Statute, and not to ſuch as were made by the Statute. For thoſe which were made by the Statute were not Laws at the Time of making the Statute, but they were Laws after the Statute, made by the Statute. And then foraſmuch as this Clauſe reaches only to Laws in being before the Statute, it cannot be of any Service to the Plaintiff here, for before the Statute there was not any Law in *England* that Knights ſhould come from *Wales* to the Parliament of *England*; but that is ordained by the Statute of 27. *H.* 8. as is ſhewn before, for which Reaſon the ſaid Clauſe will not extend to charge the Sheriff of a *Welſh* County with a Penalty. But yet there is a Caſe where it is taken, that the general Words of a Statute ſhall extend to another Thing made at the ſame Parliament: As the Statute of *Weſtminſter* 2. *cap.* 12. ordains, *that in an Appeal of Homicide and other Felonies, if the Defendant be acquitted, it ſhall be inquired who were the Abettors, if the Plaintiff be not ſufficient*; before which Statute Rape was not Felony, but is made Felony by the ſame Statute of *Weſtminſter* 2. *cap.* 34. [d] and yet if the Defendant in an Appeal of Rape be acquitted, the Abettors ſhall be inquired of if the Plaintiff is not ſufficient to render Damages; which is ſomewhat ſtrange, for when the Statute ſaith *procure falſe Appeals to be made of Homicides and other Felonies*, &c. it ſeems to be intended of Felonies before made, and not of Felonies made by the ſame Statute; however it is taken as I have ſaid before. But I have not ſeen the like Conſtruction of Words in any other Caſe, and eſpecially where it is penal. Wherefore it ſeems to me, that for the Cauſes before ſhewn the Plaintiff ſhall be barred.

Saunders Juſtice. I am of a contrary Opinion. And firſt I grant that if Matters ariſe in our Law which concern other Sciences or Faculties, we commonly apply for the Aid of that Science or Faculty which it concerns. Which is an honourable and commendable Thing in our Law. For thereby it appears that we don't deſpiſe all other Sciences but our own, but we approve of them and encourage them as Things worthy of Commendation. [e] And therefore in 7. *H.* 6. in a Caſe that came before the Judges, which was determinable in our Law, and alſo touched upon the Civil Law, they were well content to hear *Huls*, who was a Batchelor of both Laws, argue and diſcourſe

[a] P. 21. H. 7. 21. pl. 8. Bro. Action ſur l'eſtatute 16. Parliament 72. 2. Inſt. 199. 4. Bac. Abr. 647. See 2. Hawk. P. C. 96. § 38.

[b] S. P. debated M. 21. H. 7. 36. 37. S. C. M. 20. H. 7. 12. 13 Contra *per Fineux.* 2. Brownl. 112. Accord. Ante 87. (b) Contra.

[c] P. 7. H. 6. 32. 33. Bro. Cuſtom 23.

[d] H. 12. Ed. 2. Fitz. Corone 381. H. 22. Ed. 3. Fitz. Ibid. 275. 2. Hawk. P. C. 159. § 141.

Saunders J.

[e] M. 7. H. 6. 11. a. Bro. Forfeiture de Mariage 9.

diſcourſe upon Logic, and upon the Difference between *compulſione præciſa et cauſativa*, as Men that were not above being inſtructed and made wiſer by him. [a] And in an Appeal of Maihem the Judges of our Law have uſed to be informed by Surjeons whether it be a Maihem or not, becauſe their Knowledge and Skill can beſt diſcern it. [b] And in a Caſe where Excommengement was pleaded againſt one, and the Party ſaid that he ought not to be diſabled thereby, becauſe there was an Appeal pending thereof, there the Judges enquired of them that were well verſed in the Canon Law touching the Force thereof. [c] And ſo they did in Caſes which concern Grammar, as appears in the ſaid Caſe in 9. *H.* 7. as is ſaid before. And foraſmuch a *licet* is a Latin Word, and the Senſe of it is to be tried by the Grammar, I admit that we ought to enquire of the Grammar for the meaning of it, and purſue the ſame. And, Sir, by the Grammar it is taken to be a Conjunction adverſative, as hath been ſaid, but it is not always ſo. For it is alſo an Adverb affirmative, and put antecedently, and it has its Relatives *tamen et attamen*. And where it and its Relatives are put, there are two Matters, as hath been ſaid, the one coming under the *licet*, and the other under the *tamen*. And altho' there is no perfect Sentence until both the Matters are put, yet when they are both put, there are two full Sentences, both of which are Affirmatives, and preciſe Allegations. For the Election here under the *licet* is preciſely affirmed, whereof the one or the other may well be traverſed, for all that comes under the Adverb affirmative (as *licet* is put by way of an Adverb affirmative) is an Affirmation; and it may be here well tranſlated into *Engliſh*, viz. that he was elected, and that the Defendant did not return him. And therefore by the Rule of the Grammar the Senſe of *licet* is a full Affirmation, as I have ſaid. And ſo it is uſed by all the good Writers in the Latin Tongue. [d] And therefore *Polidore Virgil*, who wrote the Hiſtory of this Kingdom, making mention of the Wars of *Edward* the third againſt the *French*, and ſpeaking of *Robert de Artois* ſaith of him, that he finds amongſt the *Engliſh* Chronicles, that he ruſhed upon the *French* with great Violence, and at laſt put them to Flight, and made great Slaughter of them, *licet beneficio noctis Francis fugiendi ſpatium datum fuiſſet*, by which Words he affirms preciſely that the Night was come, for elſe it had been to no Purpoſe to have ſpoken of the Night. [e] And *Forteſcue* in his Book *de laudibus legum Angliæ*, ſpeaking to the Prince concerning the Law of *England* with Regard to the Iſſue begotten by a Villain upon a free Woman, ſays, *et licet jura illa judicent eum ſervum, quem ſervus in conjugio ex libera procreavit, non tamen per hoc jura illa rigida crudeliave ſentiri poterunt*; by which Sentence *Forteſcue* affirms preciſely the Law of *England* to be, that ſuch Iſſue is a Villain, as every one who hears the Sentence will ſay. [f] So in another Place, where after that *Forteſcue* and the Prince had debated the Matter, whether the Trial by 12 Men according to the Law of *England* be better than the Trial by Witneſſes in the Civil Law, the Prince ſaith, *ſed licet non infime (Cancellarie) nos delectet forma qua leges Angliæ in contentionibus revelant veritatem, tamen an modus ille ſacræ repugnet ſcripturæ, vel non, paululum agitamur*; in which Speech the Prince declares preciſely and fully that he had taken Delight in the Method of Trial after the Laws of *England* in Matters of Diſpute. But why need we alledge theſe to find out the Meaning of *licet*, ſince our *Calapine*, that is, the *Regiſter* is a ſufficient Proof hereof. [g] For in the Writ of *Cautione admittenda*, where the Biſhop refuſes to take ſufficient Surety or Caution of him who is taken by Writ of *Excommunicato capiendo* to obey the Ordinances of holy Church, the Words are thus, viz. *licet idem A. vobis frequenter obtulerit idoneam cautionem de parendo mandatis Eccleſiæ in forma juris, ut per hoc abſolutionis beneficium conſequi poſſet, vos nihilominus cautionem hujuſmodi ab eo admittere hactenus recuſatis, &c.* which Offer of Caution alledged under the *licet* is preciſely affirmed there, for without Caution firſt offered the Writ does not lie: So that that is the Effect for which the Writ is awarded, which Effect ought to be fully recited by the Writ; and ſince it is recited under the *licet*, it is thereby proved that *licet* is a Word of full Affirmation, which draws after it Matter of Subſtance and Effect. [h] And ſo it appears in the *Regiſter*, that where one holds four Oxgangs of Land of the King by the Rent of 13 *s.* to be paid to the King by the Hands of the Sheriff, and theſe Oxgangs come afterwards to divers Hands by Purchaſe, and the Sheriff diſtrains two or three of them for the whole Rent, omitting another who holds Part of it, there the Writ *de deonerando pro rata portione*, which lies for them in ſuch Caſe, has theſe Words, viz. *licet* they who ſue the Writ *duas bovatas terræ inde tantummodo teneant, tu tamen prædictos* 13 *s. annuos a præfatis, viz.* thoſe that ſue the Writ, *omiſſo præfato T. qui dictas duas bovatas terræ reſiduas tenet, exigis, &c.* [i] And ſo where four Hides of Land are held to repair a Bridge, and one purchaſes 20 Acres of them, and it is preſented before Juſtices aſſigned that he has all the four Hides, the Writ *de deonerando pro rata portione*, which lies for him in ſuch Caſe, has the like Words as the other Writ has, viz. *licet ipſi niſi tantum viginti acras terræ de dictis quatuor hidis terræ, et quidam alii totum reſiduum earundem quatuor hidarum teneant, vos tamen occaſione præſentationis prædictæ ſeptem libras, ad quas dictæ quatuor hidæ terræ pro reparatione pontis prædictæ apportionatæ ſunt, de eodem, viz.* him that ſues the Writ, &c. *omiſſis aliis tenementis prædictis, levari nitimini*, &c. in both which Writs the *licet* and that which comes under it is the Ground and Cauſe of the Writ, which may not be ſaid to be argumentatively alledged in the Writ, but effectually and preciſely, it being the Cauſe for which the Writ is awarded. [k] And the Words of the Writ *de Idemptitate nominis* are, *Ac jam ex parte J. de R. de London Baker intellexi-mus, quod licet ipſe non ſit idem J. de R. qui ad ſectam de, &c.* viz. the Plaintiff, *utlagatus fuit*, that the Sheriff intends to trouble him, &c. which Word *(licet)* is there a preciſe Affirmation that he is not the ſame Perſon who was outlawed, or elſe he ſhould not have the Writ. † From all which Books it appears, that by the Rule of Grammar, and by the Uſage of thoſe that are acquainted with the Latin Tongue, and by the *Regiſter*, this Word *(licet)* is a Word of preciſe Affirmation

[a] M. 21. H. 7. 31. pl. 30. Bro. Appeal 46. Trial 57. Peremptory 26. 28. Aſs. pl. 5. Fitz. Corone 209. Bro. Trial 135. 2. Rol. Abr. 578. pl. 3. Raſt. Entr. 46. a. pl. 5. 2. Hawk. P. C. 160. Vin. Abr. tit. Trial. F. pl. 3, 4.

[b] P. 20. H. 6. 25. pl. 12. Fitz. Excommengement 12. Bro. 3.

[c] H 9. H. 7. 16. pl. 8. Ante 122.

[d] Polid. Virg. lib. 19. fo. 376.

[e] Forteſcue de laudibus legum Angl. cap. 42.

[f] Ibid. cap. 31.

[g] Regiſt. 66. F. N. B. 63. c.

[h] Regiſt. 268. F. N. B. 234. h.

[i] Regiſt. 268. F. N. B. 235. b.

[k] Regiſt. 194. 267. c.

† That *licet* is a direct Affirmative, See Yelv. 121. Cro. E. 75. N. Bendl. 297. Hardr. 3. 48. Comyns 633. Heath's Max. 164, 165.

mation, and that the Sentence coming after it as an Allegation in Fact. And ſo it is uſed in the Civil Law, for I got the Queſtion to be propoſed to the Doctors of the Arches at their Table, and it was agreed by them all to be a full Affirmation, and that they frequently uſe it in the Civil Law in ſuch Senſe, and that the Matter which comes after the *licet* is as fully and preciſely alledged as it could be by any other Words. And therefore it ſeems to me that the Election of the Plaintiff under the Word *(licet)* is ſufficiently alledged in Fact, and may be well enough traverſed. [a] And it is not like the Caſe in 21. *Ed.* 4. where an Abbot was appointed Collector of a Tithe granted to the King, and in Diſcharge thereof the Abbot pleaded in the Exchequer, that *inter recorda de termino P. &c. continetur*, that King *Richard* 2. had granted to the Predeceſſors of the Abbot, that neither he nor his Succeſſors ſhould be Collectors when any Tithe ſhould be granted, &c. for that was not well pleaded: [b] No more is it, if in a *Præcipe quod reddat* he ſays, *quod inter recorda continetur* that he recovered, for it may be contained amongſt the Records, and yet not be a Record: and therefore he ought to ſay preciſely that the King granted that he ſhould be diſcharged, or that he recovered, &c. and the Allegation by way of Recital is not ſufficient. But in our Caſe it is alledged in Fact, for that which comes after the *licet* is a preciſe Allegation. So it ſeems to me that the Count is good enough notwithſtanding the ſaid Exception.

[a] M. 21. Ed. 4. 49. Bro. Pleadings 110. Vin. Abr. tit. Inter alia A. pl. 1. Poſt. 143.

[b] M. 21. Ed. 4. 49. a. b.

As to the ſecond Exception, it ſeems to me [c] that the Plaintiff ſhall not be forced to ſhew the certain Number of the Electors; for perhaps he was elected by Voices or Hands, as hath been ſaid, in which Caſe he could have no certain Knowledge of the Number, altho' by ſeeing the Hands or hearing the Voices it might be eaſily told who had the Majority. But if the Caſe was of an Election of an Abbot or Biſhop, there the certain Number may be known well enough, for the Monks who chuſe the Abbot, or the Chapter that chuſes the Biſhop are ſeverally numbered. As in Parliament the Majority of Voices in the Upper Houſe may be eaſily known, becauſe they are demanded ſeverally, and the [d] Clerk of the Houſe reckons them; but in the lower Houſe of Parliament it is otherwiſe, for there the Aſſent is tried by the Voices ſounding all at one Time, and therefore if the Aſſent there was iſſuable, the Party ſhould ſay generally by the greater Number. And ſo it ſhall be in the Election of a Coroner, who is choſen by Voices or Hands, as is ſhewn before: and ſo likewiſe in the Caſe here. [e] And for the greater Proof hereof there is a Caſe in the *Book of Entries*, where *Richard Corbet* ſued an Action of Debt againſt Sir *Gilbert Talbot* Knight for 100 *l.* and declared that the Defendant, being Sheriff of *Salop*, returned *Richard Ludlow* and *Thomas Leighton* Knights for the Parliament of King *Henry* the Seventh holden the *firſt* Year of his Reign, whereas the ſaid *Corbet* was elected and named to be one Knight, and the ſaid *Thomas Leighton* the other, *per majorem numerum Gentium tunc reſidentium infra dictum comitatum Salop*, and there it appears that the Defendant ſaid, *quod idem Richardus non fuit electus et nominatus per majorem numerum Gentium &c. reſidentium infra dictum comitatum Salop*; and thereupon Iſſue was joined. Which Iſſue being accepted, and appearing in manner and form aforeſaid proves that the Declaration here is good notwithſtanding the ſecond Exception. And ſo it ſeems to me that as to this Point the Declaration is ſufficient.

[c] L. P. Davis 48. a. Godb. 436. T. Raym. 9. 2. Finch 34. 2. Finch. 48. Heath's Max. 164. 4. Bac. Abr. 90.

[d] See 4. Inſt. 35.

[e] Vet. Lib. Intr. 249. b. Raſt. Entr. 446. a. pl. 1. Poſt. 129.

As to the Matter in Law, it ſeems that the Action lies well for the Plaintiff againſt the Defendant being a *Welſh* Sheriff. And firſt [f] the Dominion of *Wales* of ancient Time has belonged to the Crown of *England*, [g] and Eſcuage was firſt invented by them and by the *Scots*, againſt whom the Kings of *England* made War as againſt Rebels, and not as againſt Enemies, becauſe they were ſubject to *England*. [h] And King *Henry* 3. made *Edward* 1. his eldeſt Son Prince of *Wales*, and gave him the Dominion and Dignity thereof; and the eldeſt Sons of the Kings of *England* have ever ſince been Princes of *Wales*. Which Act of *Henry* 3. was the firſt Alteration of *Wales* that had been made for a long Time, for thereby *Wales*, which before was under the Order and Government of the King of *England*, became ſubject to the Order and Government of the Prince of *England*. And the ſaid King *Edward* the firſt made the Statute of *Snowden*, by which it appears that he conſidered and peruſed all the Laws of *Wales*, and ſome of them he utterly repealed, ſome he permitted to ſtand, ſome he corrected, and ſome he made anew, and to others he made Additions, as he well might, for thoſe under whom the Government of *Wales* was had always Authority to make Laws among them, whether he were Prince or King. Which Statute was the ſecond Alteration of *Wales*. The third was the Statute of 27. *H.* 8. which ordains, that *the Country or Dominion of* Wales *ſhall from thenceforth for ever be and continue incorporated, united, and annexed to and with this Realm of* England: and further ordains that *the People of* Wales *ſhall have, enjoy, and inherit all and ſingular Rights, Privileges, and Laws within this Realm, as other the King's Subjects naturally born within the ſame have and inherit*; and from thence it follows that the Plaintiff ſhall take Benefit of the Statute of 23. *H.* 6. for a Man born in *England* ſhall take Advantage of it. And ſo ſhall every Man born in *Wales*, by the Words of the Statute, for the general Words thereof briefly ſpoken do make all the Laws of *England*, as well Common as Statute Laws, to take Place and Effect in *Wales*, and that a *Welſhman* ſhall have like Benefit of the *Engliſh* Laws in Things done in *Wales*, as an *Engliſhman* ſhall have in Things done in *England*. And by their *Quod ei deforceat* the *Welſhmen* ſhall take Advantage of all Actions real given as well by the Common Law as by the Statutes of this Realm. And this is by Reaſon of the Words of the ſaid Statute of 27. *H.* 8. which Statute extends to enable the Plaintiff to an Action for the Penalty given by the Statute of 23. *H.* 6. for not returning him Knight of a *Welſh* County, altho' the ſame Statute of 23. *H.* 6. did not extend to *Wales* when it was made. And whereas it has been laſt argued, that if the Statute of 27. *H.* 8. had not expreſsly ordained that one Knight ſhould be choſen for every *Welſh* County, the other Words of the Statute would not have extended

[f] See 7. Co. 21. b. *Calvin's* Caſe. Vaugh. 414.

[g] Old Tenures ad V. *Eſcheat.* Poſt. 129.

[h] Polidore Virgil lib. 16. fo. 311.

tended to it, Sir, it is quite the contrary, for the ſaid former Words (if the ſaid laſt Branch had not been made) had been ſufficient to make two Knights to be choſen for every County of *Wales*. For (as I have ſaid) they were ſufficient to make all Laws as well Statute as Common Laws to take Effect in *Wales*, and if all Laws ſhould take Effect there, then this Law concerning the Election of two Knights ſhould have taken Effect there. And therefore as the Makers of the Act intended that there ſhould be only one Knight there, for that Reaſon they made the ſaid Clauſe, which was not ſo neceſſary to be made that without it one Knight of every *Welſh* County could not come to Parliament, for the former Words in the Statute were ſufficient to do that, as it has been ſaid before, and therefore the ſaid Clauſe is no more than an Affirmation of the firſt Words. As it is commonly uſed to put a Clauſe of Diſtreſs for Rent reſerved; and as the Statute of *Merton cap.* 2. which provides that *all Widows may from henceforth bequeath the Corn of their Land, as well of their Dowers, as of their other Lands and Tenements &c.* is but an Explanation [a] of the Common Law. But there was a Neceſſity to lay a Reſtraint that there ſhould be only one Knight for every County; ſo that it had been ſufficient if the Statute had ſaid, *Provided* that there ſhall be but one Knight for every County; and to ſuch Purpoſe only the ſaid Clauſe ſerves, for thereby the Minds of the Makers of the Statute are known. And therefore it enures as a Reſtraint, that there ſhall come no more than one Knight for every County, as I have ſaid before. And as to that which was laſt ſaid, that a Statute made touching a certain Thing cannot extend to another Thing in the ſame Degree, and made at the ſame Parliament; Sir, [b] a lineal Warranty ſhall not be a Bar to the Iſſue in Tail without Aſſets, by Equity of the Statute of † *Glouceſter* made a long Time before. And ſo the Statute of *Acton Burnel cap.* 2. ordains, that *if the Appraizers of the Goods of him that is bound in a Statute Merchant appraize them too high in Favour of the Debtor, and to the Damage of the Creditor, the Thing appraized ſhall be delivered to them at the Price they put upon it, and they ſhall preſently anſwer the Creditor his Debt*; at which Time the Conuſees ſhould not have Execution of the Land of the Conuſor, but that was ordained by a Statute afterwards, viz. *Statutum de Mercatoribus*, which ordains, *that the Lands of the Conuſor ſhall be delivered to the Merchant by reaſonable Extent*, and does not ſay that if they be extended too high, they ſhall be delivered to the Extenders, [c] yet it is taken by Equity of the Statute of *Acton Burnel*, notwithſtanding it is a penal Statute, that they ſhall be delivered to the Extenders, if they extend them too high. Whereupon I ſay, that if it is taken that the Intent of thoſe who made the Statute of *Glouceſter*, and of thoſe that made the Statute of *Acton Burnel*, was to aid Things in like Degree, which were not in Being at that Time, but were made ſeveral Years after, as Eſtates Tail were, and as the Execution of the Land to the Creditors was; then *a fortiore* may it may be taken in our Caſe, that the Intent of the Makers of the Statute of 27. *H.* 8. which ordains that *the People of* Wales *ſhall have and enjoy the Laws of* England, was that they ſhould have that Benefit which the Law of *England* gives for the falſe Return of a Knight to Parliament, who is ordained to be elected by a Statute made not a long Time after, but at the ſame Seſſion, not by another Bill, but by the ſame Bill and Chapter. And ſo if I ſhould admit that the general Words were not ſufficient to make Knights come out of *Wales* to Parliament, but that it was ordained by the Clauſe after, yet it cannot be otherwiſe intended but that the Intent of the Makers of the Statute was, that the Penalty of the Law before that Time ſhould extend to a Sheriff who makes a falſe Return upon the Election of a Knight choſen for a *Welſh* County purſuant to the Ordinance of that Statute. But, as I ſaid before, the firſt Words are ſufficient to cauſe ſuch Knights to come to Parliament, and to make the Penalty alſo extend to a falſe Return of them. Therefore it ſeems to me that the Plaintiff ſhall recover.

[a] S. P. T. 4. H. 3. Fitz. Deviſe 26. 2. Inſt. 81. Perk. § 522. Vin. Abr. tit. Deviſe J. 5. pl. 16. Sed contra Bract. lib. 2. fo. 96. Fleta lib. 2. cap. 57. pl. 4.

[b] H. 14. H. 7. 17. b. *per Mordant.* M. 21. Ed. 3. 28. pl. 4. 4. Co. 4. b. 8. Co. 52. b. Co. Litt. 374. b. Dal. 57. Moor 54. pl. 159. 2. Brownl. 307. Palm. 248. Latch 74. W. Jones 188. 1. Freem. 57. Poſt. 178.

† Stat. Glouc. cap. 3.

[c] See Ante 82. (i) and the Books there cited.

Brown Juſtice to the ſame Purpoſe. And he ſaid, in Things concerning Grammar their Predeceſſors had conſulted with Grammarians, and had followed their Rules, as it appears in our Books where the Judges ſay, [d] *proximo antecedenti fiat relatio*, which Sentence they took out of Grammar. And he argued that *licet* was a full Affirmative, and that the Matter which is contained under the *licet* is affirmed with greater Vehemency than it could be without the *licet*, and that the *licet* encreaſes the Affirmation. As *licet* I gave him 20 Oaks, *tamen* he cut down 100. And *licet* I required him not to do the Thing, *tamen* he has done it. And *licet tangat regem, &c.* And he argued further, that the Plaintiff need not ſhew the certain Number of the Electors. And further he argued, that the general Words of the Statute of 27. *H.* 8. enabled the Plaintiff to take Benefit of the Penalty. And he argued to the ſame Effect with *Saunders*.

Brown J.

[d] T. 9. H. 6. 28. a. 1. Finch. 7. 2. Finch. 8. Wing. Max. reg. 10. Noy's Max. 2.

Brook Chief Juſtice. I am of the ſame Opinion. And as to the firſt Point, Declarations ought to contain a certain Affirmation in the material Part. And therefore I agree, that in the ſaid Caſe of Debt upon an Obligation if the Plaintiff declare in this Form, viz. it appears by the Obligation that the Defendant was bound, &c. the Count is not good, becauſe it is not actually alledged that he was bound, for the ſaying that *it appears* is but a putting in Mind of a Thing apparent, for which Reaſon the Count is not good, becauſe he does not affirm that he was bound. But in our Caſe it ſeems to me that the Matter coming after the *licet* is fully and preciſely affirmed. And this Word *(licet)* of itſelf without more Matter is neither an Affirmative nor a Negative, but the Matter governs it, and it does not govern the Matter. As *licet* he be, is an Affirmative, and *licet* he be not is a Negative. And ſo it is a Negative or an Affirmative according as the Matter which comes after it is. But nevertheleſs the Matter which follows the *licet*, whether the ſame be affirmatively or negatively put, is preciſely alledged to be or not to be; which is the Point we are now to conſider. And as a preciſe Allegation or Affirmation of a Thing to be or not to be, it is uſed by Writers. And the Sentence having the *licet* and the *tamen* is more eloquent than

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than two ſingle Affirmatives without them, which is the Reaſon that they are ſo much uſed. And Sir, our Law does not neceſſarily require Things to be alledged by one only preciſe Order of Words of Affirmation, but there are Inſtances where the Law allows Sentences to be preciſe and affirmative, which come under other Words as ſtrange as *licet* is, and not unlike *licet*, as this Word († *cum*). [a] And therefore it appears in the *Book of Entries*, *viz. Quod cum* the Defendant had aſſumed upon himſelf to carry the Tithes of the Plaintiff to his Parſonage, he did not carry them, &c. which Matter coming under the Word *(cum)* is there preciſely alledged; and it may well be traverſed, for it is the Subſtance of the Declaration. [b] And there is a Writ in the *Regiſter* as follows, *viz.* *Cum* the Plaintiff had Waif and Eſtrays within his Manor, the Defendant took two Horſes being eſtrayed: which Matter there following the *Cum* may be traverſed. And the Writ of Eſcheat is, "*tanquam eſchaeta ſua reverti debet*, which Word (*tanquam*) is there a Word of Affirmation in fact. And ſo where one is vouched as Heir, he ſhall enter into the Warranty *tanquam* he that has nothing by Deſcent; this is there effectually alledged as a full Denial that he has nothing by Deſcent." [c] And ſo the *Formedon* in Deſcender is, "which to the "Plaintiff *deſcendere debet ut filio et hæredi, &c.*" which is an Affirmation in Deed. And in like Manner are *tam* and *quam* uſed as effectual Affirmations. And if the Words *cum*, *tanquam*, *ut*, and *tam*, are Words of Effect, and traverſable, having after them Matter of Subſtance, what Reaſon is there why *licet* [d] ſhould not be judged as full an Affirmation here, and that the Matter after it is as preciſely alledged as after the ſaid other Words? none certainly, but we may adjudge it ſo well enough, and the Nature and Uſe of the Word will warrant it. And to quit Examples of Words of the like Nature, I ſhall prove it by the Word itſelf. And there is a Writ in the *Regiſter* as follows, "*licet* the Defendant aſſumed upon himſelf to cure the Plaintiff of his Diſorder, yet he has not cured him," &c. there the Subſtance of the Matter, viz. the Aſſumption, which is traverſable, comes under the *licet*. [e] Alſo there is in the *Regiſter* an Action upon the Caſe, wherein *cum* and *licet* are as follows, viz. "*Cum* the Plaintiff had pledged certain Goods to "the Defendant for a certain Sum, the ſame Defendant, *licet* the Plaintiff *eidem*, viz. the De- "fendant, *de prediƈtæ pecuniæ ſummis ſe ſepius obtulerit ſatisfacere, ſatisfaƈtionem tamen hujuſmodi ab* "*eodem, viz.* the Plaintiff, *recipere, et bona prædiƈta ei reddere contradicit, &c.*" there the Matter coming after the *cum*, and the Matter coming under the *licet* are both traverſable and iſſuable. [f] And there is alſo another Writ in the *Regiſter* thus, "Whereas the Plaintiff and Defendant ſub- "mitted themſelves to ſtand to the Award of ſuch Arbitrators, *licet* they awarded that the De- "fendant ſhould pay the Plaintiff 10 *l.* at ſuch a Day not yet come, *tamen* the Plaintiff hath ſued "him for the 10 *l.*" in which Caſe none can deny but the Award is traverſable. [g] Alſo it appears in the *Book of Entries*, that one who was robbed at *New-Market*, and had levied Hue and Cry according to the Statute of *Wincheſter*, brought an Action upon the Statute of *Wincheſter* againſt the Inhabitants of the Hundred of *Chiveley* for the Recovery of 50 *l.* whereof he was robbed, within which Hundred the ſaid Town of *New-Market* was: And there after ſhewing the Robbery he declared that *licet* the Plaintiff immediately after the Robbery committed at *New-Market* aforeſaid levied Hue and Cry, and gave Notice there and elſewhere through the whole Hundred to the then Inhabitants, &c. *tamen* the Inhabitants have not yet made him amends for the ſaid Robbery, nor have anſwered for the Body of the Felon, &c. which Declaration ſo made, and being in the ſaid Book as a good Precedent ſettled by learned Counſel, proves that the Matter after the *licet* is of Subſtance and Effect, for it is traverſable and iſſuable. And ſo in this Caſe, and in all the other Caſes before, the Matter following the *licet* is preciſely alledged, and is traverſable as Matter of Subſtance. [h] But in Debt the Reaſon why the *licet ſepius requiſitus* is not traverſable, is not becauſe it is not preciſely alledged, but becauſe it is not the Effect nor Subſtance of the Matter, nor is it traverſable altho' it were preciſely alledged by other Words of preciſe Allegation, for there the Defendant ought to anſwer to the *debet*, and not to the Requeſt, which is alledged only in order to have Recompence for the Damages; but here the *licet* and the Sequel of it is Matter of Subſtance and Effect, which (as it ſeems to me) is well enough ſhewn in the Declaration. Wherefore the Declaration is good notwithſtanding the ſaid Exception.

As to the ſecond Exception, it ſeems to me that the Declaration is good enough without ſhewing the [i] Number of the Electors. For the Election might be made by Voices, or by Hands, or ſuch other Way, wherein it is eaſy to tell who has the Majority, and yet very difficult to know the certain Number of them. And in ſuch Manner there are divers Elections in *London*. And I myſelf was elected in *London* by holding up of Hands, but I could not tell how many there were that held up their Hands. And ſo if the Election was in any ſuch Manner (as we have no Reaſon to take it otherwiſe) the Plaintiff could not poſſibly be intended to know the certain Number of them. [k] And to put him to declare a Certainty where he cannot by any Poſſibility be preſumed to know or remember the Certainty, is not reaſonable nor requiſite in our Law. [l] And therefore in 2. *Ed.* 4. in falſe Impriſonment the Plaintiff declared that the Defendant impriſoned him until he made an Obligation by dures to the Defendant *et aliis ignotis*, and notwithſtanding he alledged the making of the Obligation in order to recover Damages in Proportion to the Sum thereof, yet the Declaration was good without ſhewing the Names of the others, becauſe it might be that he could not know their Names, in which Caſe the Law will not force him to ſhew that which he cannot, and therefore the Declaration ſeems by the Book to be good in this Point. [m] And in 10. *Ed.* 4. in Debt upon an Obligation which was endorſed upon Condition that one *J. P.* ſhould ſerve the Plaintiff for a Year, and ſo for ſeven Years following *in all his lawful Commands, &c.* the Defendant ſaid that the ſaid *J. P.* ſerved the Plaintiff lawfully

† Vide Hardr. 3. 104. 2. Bulſt. 215. Cro. E. 507. 3. Keb. 748.

[a] Raſt. Entr. 2. b.

[b] Regiſt. 100. b.

[c] Co. Litt. 17. b. Hardr. 3.

[d] That *licet* is a full Affirmative, See N. Bendl. 297. Yelv. 121. Cro. E. 75. Hardr. 3. 48. Comyns 633. Heath's Max. 164, 165.

[e] Regiſt. 92.

[f] Regiſt. 111.

[g] Vet. Lib. Intrat. 218. a. b.

[h] Hardr. 38. 41. 79.

[i] S. P. Davis 48. 2. Godb. 436. T. Raym. 9. 1. Finch 34. 2. Finch. 47. Heath's Max. 164. 4. Bac. Abr. 90.

[k] *Regula* 1. Finch 34. 2. Finch 48. Heath's Max. 65. Noy's Max. 13. Ante 46. (f)

[l] M. 2. Ed. 4. 21. pl. 16. Fitz. Faux Impriſonment 1. Bro. 20.

[m] T. 10. Ed. 4. 15. pl. 17. Fitz. Replication 33. Bro. Condition 152. Godb. 436. 1. Finch. 34. 2. Finch. 48. Noy's Max. 13.

lawfully until ſuch a Day, on which he was diſcharged, and there the Plea is admitted good without ſhewing what Service he did, or in what Commands he obeyed him, for no Servant can remember every Thing he did, or that his Maſter required him to do, and therefore the Law will not compel him to ſhew the Certainty of that which he cannot certainly know or remember. [a] And ſo in 12. *H.* 7. in Debt upon an Obligation endorſed upon Condition that if he found *J. S.* Meat and Drink and ſufficient Apparel until he arrived at the Age of 21 Years, that then the Obligation ſhould be void, and the Defendant ſaid that he had found him ſufficient Meat and Drink and Apparel all the Time aforeſaid; and the Plea was held good, notwithſtanding he did not alledge what Bread, Meat, Drink, and Apparel he found him, for to ſay particularly what Bread, what Meat, and what Drink he gave him ſuch and ſuch a Day, and ſo from Time to Time, would be too much for any one to remember, and for this Reaſon the Law will not compel him to ſhew the Certainty where he cannot be preſumed to know it. [b] And the Writ of *Monſtraverunt* is *monſtraverunt nobis homines*, &c. without ſhewing their Names, becauſe there are a great Number of them, and if the Manor be large and extenſive, it would be a difficult Matter to reckon them. [c] And in the *Regiſter* there is an Action upon the Caſe for him who is robbed againſt the Hoſtler out of whoſe Inn his Goods were taken, and the Words of the Writ are, *quidam Malefactores* took and carried away the Goods, without naming their Names, becauſe he cannot poſſibly be intended to know them. [d] And ſo an Indictment for ſtealing the Goods *cujuſdam ignoti*, or for killing *quendam ignotum*, is good enough, *cauſa qua ſupra*. And ſo in the Caſe here it ſeems to me, that ſince the Plaintiff cannot be intended to have any certain Knowledge of the Number, he ſhall not be forced to ſhew the Certainty of it. [e] And for Proof hereof, ſee the *Book of Entries* before cited, where *Richard Corbet*, in the Time of King *Henry* 7th, brought an Action of Debt upon the ſaid Statute of 23. *H.* 6. againſt Sir *Gilbert Talbot* Knight, who was Sheriff of the County of *Salop*, becauſe he was elected Knight to Parliament, and notwithſtanding this the ſaid Sheriff had returned *Richard Ludlow* as elected, and there the Plaintiff declared as the Plaintiff here has done, *viz.* that he was elected *per majorem numerum*, *&c.* and the Defendant ſaid that he was not elected *per majorem numerum*, *&c.* and upon this Iſſue was joined. Which Caſe I take to be worthy of particular Obſervation. For the Perſons concerned in it were ſuch Sort of Men (for I was born in the ſame Country, and have heard of their Tempers) that if there had been any Defect in the Pleadings on one Side or other, they would not have paſſed it over to ſave any Expence, as every one that knew the Parties would affirm, and at that Time there were very good Lawyers; and therefore the Iſſue being taken as it is in that Caſe, it is greatly to be regarded, and is a great Proof that the Declaration here is good notwithſtanding the ſaid ſecond Exception.

[a] M. 12. H. 7. 14. pl. 8. Bro. Condition 138.

[b] Bro. Monſtraverunt 4. F. N. B. 15. d.

[c] Regiſt. 104.

[d] See ante 89. (k) and (l) and the Books there cited.

[e] Vet. Lib. Intrat. 149. b. Raſt. Entr. 416. a. pl. 1. Ante 126.

As to the Matter in Law, firſt of all it is to be obſerved, that [f] *Wales* was not Parcel of the Body of *England* until the Statute of 27. *H.* 8. made it ſo, nor was it governed by the Laws of *England*; for (as it is contained in the Annals of this Realm) *Brute* the firſt King of *England* had Iſſue three Sons, and held this Realm, *Wales*, and *Scotland*, as one entire Realm undivided, being one main Land encompaſſed by the Sea. And after the Death of *Brute*, the three Sons made Partition of the Realm amongſt them, and after their Deaths the Law of dividing the Inheritance deſcended was introduced amongſt the *Britons*, as it appears by the Annals that *Bellinus* and *Brennus* his Brother did, for they divided the Realm between them, and ſo did *Ferrex* and *Porrex* being brothers, as did alſo the other *Britons* who were Subjects. But afterwards the *Saxons* came into this Realm and conquered the *Britons*, and ſuch of the latter as were not killed fled into *Wales*. And becauſe it was a mountainous country, the *Saxons* having got the Heart of the Land did not purſue them there, nor conquer them whilſt they were there, but permitted them to ſettle there peaceably. And amongſt the *Saxons* the Law was that the eldeſt only ſhould inherit, which Law they obſerved afterwards, and it continued from that Time until this Day amongſt us their Deſcendants. But in *Wales* the Law amongſt the *Britons* continued otherwiſe, for *Gavelkind* remained amongſt them until the Time of King *Henry* 8. From whence it appears that *England* and *Wales* were ſeveral, and poſſeſſed by ſeveral People, and had ſeveral Laws. But afterwards the *Welſhmen* became ſubject to the Kings of *England*, who had the Sovereignty and Government of them. [g] And becauſe they were often rebellious, Eſcuage was invented when the King made a Voyage Royal againſt them, as it was when he made a Voyage Royal againſt the *Scots*. For being within the Sea they were accounted as Rebels. And ſo the People of *Wales* were ſubject to the King of *England*, although *Wales* was not Parcel of the Body of the Realm of *England*; and an Action lay here in the Common Pleas for any Thing in *Wales*, but the Proceſs ſhould not be directed into *Wales*. [h] And therefore in 35. *H.* 6. it appears that for an Advowſon in *Wales* a Man ſhall have a *Quare impedit* in the Common Pleas here, but the Writ ſhall not be directed to the Officers of *Wales*, but to the Sheriff of the adjoining County. And foraſmuch as *Wales* was ſevered from the Body of *England*, and the *Welſhmen* were ruled by different Laws from the *Engliſh*, although the Statute unites *Wales* to *England*, [i] yet the Laws uſed in *England* before ſhall not extend to *Wales* which is newly added to it. For Rights or Privileges within a certain Precinct or Dominion ſhall not be extended further, although the Precinct or Dominion itſelf is enlarged. [k] And therefore it is holden in one Book, that where the Biſhop of *Durham* had many Lands between the Rivers of *Tine* and *Teſe*, and many Liberties were

[f] See 7. Co. 21. b. *Calvin's* Caſe. Vaugh 414.

[g] Old Tenures ad V. *Eſcuage*. Ante 126.

[h] M. 35. H. 6. 30. pl. 35. Fitz. Quare imped. 90. Bro. 16. Lieu 68.

[i] Vaugh 415.

[k] M. 38. H. 6. 10. Fitz. Grants 14. Bro. Patents 28. 81. H. 16. 4 Ed. 3. *Per Parn.* Fitz. Livery 29. Bro. Parlement. 83.

were granted to him in the ſame, and afterwards he purchaſed other Lands between the ſame *Tine* and *Teſe*, it is there held that he ſhould not have the Liberties in the Lands newly purchaſed, for the Uſage or the Grant of Liberties ſhall not go beyond what the Uſage has been, or further than the Grant extended at the Time it was made. And ſo it is held in 21. *H.* 6. that if a Warren is granted to one in all his Lands in *Dale*, if he purchaſes Lands in *Dale* afterwards, he ſhall not have a Warren in them, *cauſa qua ſupra*. So if Conuſance of Pleas is granted to one of every Parcel of the Manor of *Dale*, there if a Tenancy afterwards eſcheats he ſhall not have Conuſance thereof, becauſe the Grant extended but to his precinct and Circuit at the Time of the making of it, which was not beyond that which was then Parcel of the Manor, at which Time Services were Parcel of the Manor, and not the Demeſn now eſcheated. And there is a Book, that where Wreck of the Sea was granted to a Man in all his Lands, this Grant ſhall not extend to the Land whereof he was then diſſeized, and into which he afterwards re-enters, becauſe at the Time of the Grant he had only a Right in the Land, and the Grant at the Time of the making of it could not extend to the Land which then was not his own but another's, *viz.* the Diſſeizor's. And ſo although *England* is now enlarged by the Addition and Union of *Wales* thereunto, yet the Laws, Cuſtoms, and Statutes uſed therein ſhould not extend to *Wales* which is newly annexed to it, if there was no other Matter to effect it. But the ſaid Words of the Statute of 27. *H.* 8. (which are alſo recited in the Record) will put the Matter out of Doubt, and will make the Statute of 23. *H.* 6. to extend to *Wales*, the Words being *that every Perſon or Perſons born in* Wales *ſhall have and inherit all and every Liberties, Freedoms, Rights, Privileges, and Laws within this Realm, and other the King's Dominions, as other the King's Subjects naturally born within the ſame have and inherit.* Each of which Words will ſerve the Plaintiff, for to be a Knight to come from *Wales* to the Parliament of *England*, and to have the Penalty for the undue Execution of it, may be ſaid to be a Liberty, and a Freedom, and a Right, and a Privilege, and alſo a Law. So that every Word would ſerve very fitly (as it ſeems to me) tho' the reſt were omitted, if it was uſed in *England*. For theſe Words, *viz. (as other the King's Subjects naturally born within the ſame have and inherit)* are Words to which all the reſt are referred. So that when they are acquainted and appriſed what thoſe Liberties are, they may uſe and enjoy the ſame. And ſo always where one Thing is referred to another, it ſhall be as the Thing whereunto it is referred. [a] As if one makes a Leaſe for ſo many Years as *J. S.* hath in the Manor of *Dale*, there he ſhall have as many Years as *J. S.* hath, and ſhall aver that *J. S.* has ſo many. And ſo if one grants to another *tale corrodium quale J. S. nuper habuit*, he ſhall aver that *J. S.* had a Corody of ſuch Things, and he ſhall have the ſame. [b] And it appears in 11. *H.* 4. where the King granted to one ſuch an Office, taking in the ſame Office the like that *R. S.* (who occupied the ſame Office before) took, there the Grant is good, with an Averment that *R. S.* had ſuch Things in Certainty, which by Force of the Grant with the Averment he ſhall have. [c] And in 20. *Ed.* 3. it appears that the King had granted to the Bailiff and Commonalty of *L.* all the Franchiſes which the Burgeſſes of *N.* had, and there it ſeems that if they ſhould aver that the Burgeſſes of *N.* had ſuch particular Franchiſes, the Charter and the Averment would enable them to uſe the ſame. And when the Court of Augmentation ſtood, it was the common Courſe of Letters-Patent by the King to grant [d] *tot, tanta, talia, hujuſmodi & conſimilia privilegia, libertates, &c. quanta, qualia, & quæ ultimus Prior, aut Abbas, aut aliquis alius Predeceſſorum ſuorum, in jure dicti Prioratus aut Abbathiæ, unquam habuit, tenuit, vel gaviſus fuit, &c.* which Grant was good with an Averment that they had or uſed ſuch particular Liberties, and ſuch the Patentees might uſe. [e] And in 9. *Ed.* 4. in the Aſſize of *Swirenden* and *Bagot* it appears that where the King made one a Denizen by his Letters-Patent (as there he had made *Bagot)* the Words were, *quod ille in omnibus tractetur, reputetur, habeatur, teneatur, & gubernetur tanquam ligius noſter infra dictum regnum noſtrum Angliæ oriundus, & non aliter, nec alio modo*; which Words of Grant, that he ſhall be treated as a Liege of the King, are, by Relation of the Grantee to a Liege Subject of the King, effectual to make him as a Liege of the King; and whereas before he might not take Benefit of the Laws of *England* in *England*, now this incorporates him, and makes him able to take Benefit of them in *England*. So in the principal Caſe, the Statute of 27. *H.* 8. which ordains, *that every Perſon born in Wales ſhall have and inherit all Liberties and Laws within this Realm, as other the King's Subjects naturally born within the ſame have and inherit*, by Relation of thoſe born in *Wales* to them that are born in *England*, makes the People of *Wales* to be as the People of *England*, and incorporates them therewith, and enables them to have and inherit in *Wales* the Laws uſed in *England*, in which Caſe they ſhall take Benefit of the Penalty of the ſaid Statute of 23. *H.* 6. as a Law in *England*. Wherefore it ſeems to me, that although the uniting and annexing of *Wales* to *England* does not make the Laws of *England* to extend to *Wales*, yet the ſaid other Words ſhall enable the People of *Wales* to take Benefit in *Wales* of the Laws of *England*. And ſo I am of Opinion that the Action is maintainable.

[a] Co. Litt. 45. b. 6. Co. 35. b. 3. Rol. Abr. 849 pl. 13. 1. Bulſt. 219.

[b] T. 11. H. 4. 86. b. Bro. Contempt. 4. M. 20. H. 7. 8. b. *Per Fineux.* in Fine.

[c] P. 20. Ed. 3. Fitz. Avowry 129 Bro. Patents 31. 91. Moor 379. 9. Co. 30. a.

[d] S. P. Moor 379.

[e] T. 9. Ed. 4. 8. Bro. Patents 81.

The reſt of the Record.

At which Day here came as well the aforeſaid *Richard Buckley* as the aforeſaid *Rice Thomas* by their Attornies aforeſaid. And thereupon the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it is conſidered that the aforeſaid *Richard Buckley* do recover againſt the aforeſaid *Rice Thomas* his Debt aforeſaid, and his Damages by Reaſon of the Detention of the ſaid Debt to 6 *l.* 13 *s.* 4 *d.* to the ſame *Richard Buckley* with his Aſſent by the Court here adjudged. And the aforeſaid *Rice Thomas* in Mercy, *&c.*

Judgment.

See (Reader) * Hill. 10. H. 4. 6. pl. 1. *where the King ſent his Writ to the Biſhop of* St. David's, *to have a Clerk maintained until he was advanced to a Benefice, and there it is touched whether the King ſhall have ſuch Prerogative in the Caſe of a Biſhopric in* Wales, *as he ſhall have in a Biſhopric in* England *of his own Foundation, and* Tirwith *ſaid,* "*Before the Conqueſt the Principality of* "Wales *was held of the Kings of* England, *as of the Crown, and when by Rebellion of the Prince* "*the Principality was forfeited and came to the King of* England, *after that Time all the Biſhop-*"*rics of* Wales *were of the Patronage of the King of* England, *as annexed to the Crown.*" *And afterwards, foraſmuch as the Biſhop had ſued his Livery out of the Chancery, and the King ought by virtue of his Prerogative to have ſuch Suſtenance for his Clerk, a Writ was awarded to the Biſhop to receive him. And ſo note the Saying of* Tirwith *touching the Manner in which the Principality came to the King. And ſee in* Hill. 6. H. 5. Fitz. Juriſdiction. 34. *that the Lands in* Wales, *which are holden of the King immediately, are pleadable in* England, *by the Opinion of* Hank. *And the like appears by the Book in* M. 13. Ed. 3. Fitz. Juriſdiction 23. *in a Writ of Couſinage; from which Caſes, and the ſaid Caſe of the Corody it may be ſeen that for any Thing in* Wales *a Man may ſue his Writ here. And ſee* Trin. 47. Ed. 3. 5, 6. pl. 13. Fitz. Brief. 621. *a Writ of Dower for Lands in* Wales.

Nota bene by the Reporter.

* Fitz. Corody 7.

A Report of a Caſe adjudged in the King's Bench *by the Judges thereof in* Michaelmas *Term in the* ſecond *and* third *Years of the Reign of King* Philip *and Queen* Mary, *between* John Browning *Plaintiff and* William Beſton *Defendant, in a Bill of* Treſpaſs *ſued by the ſaid Plaintiff againſt the ſaid Defendant; which was argued many Times before.*

IT appears amongſt the Records of the King's Bench of *Eaſter* Term 6. *Edw.* 6. *Rot.* 66. that *John Browning* ſued a Bill of Treſpaſs in the King's Bench againſt *William Beſton*, for entring into his Cloſes and Houſes at *Southwark* in *Barmſey-Street* and *Horſingdown-Lane* in the County of *Surry* the 3d Day of *July* in the *firſt* Year of the Reign of the ſaid King *Edward* 6. *&c.* The Defendant ſaith, that the Place where, *&c.* was one Garden and thirteen Meſſuages in *Barmſey-Street* aforeſaid, of which, long before the Time of the Treſpaſs ſuppoſed, *Owen Ogletborp* Preſident of the College of *St. Mary Magdalen* in the Univerſity of *Oxford*, and the Scholars of the ſame College, were ſeized in their Demeſn as of Fee: And being ſo ſeized, leaſed the ſame, the 24th Day of *July* in the 38th Year of the Reign of King *Henry* 8. by Deed bearing the ſame Date, to one *John Burges* for the Term of 20 Years next following the Feaſt of the *Annunciation* of our Lady then laſt paſt, by Force whereof he entered, and died; and ſhews that *Catharine* the Wife of the ſaid *John Burges* and his Executrix took to Huſband one *John Maynard*, who leaſed the Premiſſes to the Defendant for 18 of the Years, and gives Colour to the Plaintiff, and ſo juſtifies. The Plaintiff by his Replication ſaith, that long before the ſaid Leaſe one *Thomas Knolls* Preſident of the ſaid College, and Predeceſſor of the ſaid *Ogletborp*, and the then Scholars of the ſame College, *viz.* the 10th Day of *September* in the 24th Year of the Reign of King *Henry* 8. by Indenture bearing the ſame Date, leaſed the Premiſſes to the Plaintiff, to have and to hold from the Feaſt of *St. Michael* the Archangel then laſt paſt, for the Term of 20 Years then next to come, by Force whereof he entered and was poſſeſſed until the Defendant did the Treſpaſs, and confeſſes the ſaid Demiſe made by *Ogletborp* and the then Scholars, and all the reſt of the Bar. The Defendant by Rejoinder confeſſes the ſaid Demiſe made by Indenture to the Plaintiff in Manner and Form as the Plaintiff has alledged in the Replication. And further he ſaith, that the ſaid Plaintiff had covenanted and granted by the ſaid Indenture to render and pay for the ſaid Tenements every Year during the ſaid Term to the ſaid Preſident and Scholars and their Succeſſors or Aſſigns 37 *l.* 3 *s.* 4 *d. Sterling*, by equal Portions at the two Feaſts of the Year, *viz.* at the Feaſt of the *Annunciation* of our Lady the Virgin, or within two Months next after the ſaid Feaſt every Year, 18 *l.* 11 *s.* 8 *d.* at their Meſſuage in *Chancery-Lane*, and at the Feaſt of *St. Michael*, or within ſix Weeks next after the ſame Feaſt, 18 *l.* 11 *s.* 8 *d.* to be paid at *Oxford*, in the ſaid College of *St. Mary Magdalen*. And further in the ſaid Indenture made to the Plaintiff it is contained, that if it ſhould happen the ſaid annual Rent and Farm of 37 *l.* 3 *s.* 4 *d.* or any Part thereof be in Arrear and unpaid in Part or in Whole, according to

Eaſter Term 6. *Edw.* 6. Leaſe for 20 Years by Indenture, by which the Leſſee covenants and grants to pay annually for the Tenements, during the Term, a Rent at another Place, and that if the Rent or Farm be in Arrear, altho' it be not demanded, the Leaſe ſhall be void, and the Leſſor may reenter; the Leſſor after Default of Payment, and before Entry, leaſes the ſame to another. If this Covenant and Grant amounts to a Reſervation of Rent, and a Condition. And if the Leaſe before Entry be good. S. C. Vin. Abr. tit. Rent P. pl. 2. S. P. held to be a good Reſervation of Rent *Althow v. Hemming* 1. Rol. R. 81. Ow. 151. 1. Leon 318 *arguendo*. 4. Bac. Abr. 342. Vide Dy. 275. pl. 49. *Ld. Dacre's* Caſe.

to the Times aforeſaid, that is to ſay, if the one Moiety of the ſaid annual Rent be unpaid after two Months next following the ſaid Feaſt of *St. Mary* the Virgin, and the other Moiety of the ſaid annual Rent be unpaid after ſix Weeks next following the ſaid Feaſt of *St. Michael* the Archangel, any Year within the ſaid Term, to the ſaid Preſident and Scholars and their Succeſſors, in Manner and Form aforeſaid, altho' it be not required or demanded at ſuch Time as it ought to be paid, as is aforeſaid, then the ſaid *John Browning* covenanted and granted for himſelf his Executors and Aſſigns, that the ſaid Demiſe ſhould be utterly extinct and void, and of no Effect, and that then and at all times afterwards it ſhould be lawful for the ſaid Preſident and Scholars and their Succeſſors again to enjoy and poſſeſs and have back the ſaid Tenements with the Appurtenances, and every Parcel thereof, as in their former Eſtate, the ſaid Indenture or Demiſe in any wiſe notwithſtanding. And he ſhews further that *Knolls* died, and that *Oglethorp* was made Preſident. And further ſays, that becauſe 18 *l.* 11 *s.* 8 d. of the Rent or Farm aforeſaid for the ſaid Tenements to the ſaid *Owen* and Scholars were in Arrear at the Feaſt of *St. Michael*, in the 37th Year of the Reign of the ſaid late King *Henry* 8. and by the Space of ſix Weeks next after the ſame Feaſt of *St. Michael*, and to the ſaid *Owen* and Scholars, according to the Form of the ſaid Indenture ſo made to the ſaid Plaintiff, unpaid, the Intereſt and Term of Years which the ſaid Plaintiff had by Reaſon of the ſaid Indenture became void, determined, and of no Effect in Law; by Means whereof the ſame *Owen* and the Scholars of the ſaid College afterwards and before the Time when, *&c.* of the Lands aforeſaid were ſeized in their Demeſn as of Fee, in Right of their College, according to the Purport of the Indenture; and they being ſo ſeized made the Leaſe to the ſaid *John Burges*, as in the Bar was alledged. Wherefore, *&c.* And upon this Rejoinder the Plaintiff demurred in Judgment. And in *Trinity* Term in the *ſixth* Year of the Reign of King *Edward* 6. this Demurrer was argued by *Ramſey* of Counſel with the Plaintiff: And then *Staunford* Serjeant argued againſt him for the Defendant. And in *Michaelmas Term* next following *Ramſey* argued again, and *Walſh* anſwered him. And the Subſtance of both the Arguments of *Ramſey* was as follows.

Trin. & Mich. Terms 6. Edw. 6.

For the Plaintiff. It ſeems to me that the Plaintiff ſhall recover. And firſt it is to be conſidered, when the Preſident and Scholars made the Leaſe to the Plaintiff by Indenture, and the Plaintiff covenanted and granted by the ſame Indenture to render and pay annually for the ſaid Tenements to the Leſſors 37 *l.* 3 *s.* 4 *d.* whether this ſhall be a Rent or Farm, or not. And ſecondly whether or no, when the Plaintiff covenanted and granted that for Nonpayment of the Rent the Leaſe ſhould be void, this be a good Condition: and if it be, then whether or no the new leaſe made to the Defendant be good before Entry by the Leſſors. And as to the firſt Point, it ſeems to me to be no Rent. For if it ſhould be a Rent, then it muſt be either a Rent-Charge, Rent-Seck, or Rent-Service. [a] For there are no more than three Sorts of Rents. And a Rent-Charge it is not, for there is no Clauſe of Diſtreſs, nor any Land charged with it: And a Rent-Seck it is not, for it is not iſſuing out of any Land: And a Rent-Service it is not for the ſame Cauſe, [b] for a Rent cannot be but where it iſſues out of Land. And here it is granted *for* the Land, and not *out of* the Land, and ſo this Word *(for)* implies the Cauſe or Conſideration of the Grant, and is not a proper Word to charge Land. And therefore foraſmuch as it does not iſſue out of Land, it cannot be called a Rent. And if it ſhould be any Rent at all, it muſt be a Rent-Service, which it cannot be for another Cauſe; for there can be no Rent-Service but ſuch as is reſerved by the Donor or Leſſor, and by apt Words for the ſame, as *reddendo*, *reſervando*, or *tenendo*, &c. But here there is not any Word ſpoken by the Leſſors, but by the Leſſee, [c] for the Leſſee covenanted and granted to pay ſuch a Sum annually for the Land, which Words can amount to no other Effect than to the Grant of a Sum in Groſs, which is not annexed to the Reverſion, nor ſhall it deſcend with the Reverſion. For if a Man has Land by Deſcent on the Part of his Mother, and he makes ſuch a Leaſe *ut ſupra*, and the Leſſee covenants and grants to pay to the Leſſor and his Heirs ſuch a Sum *ut ſupra*, if the Leſſor dies without Iſſue, the Reverſion ſhall deſcend to the Heir on the Part of the Mother, but the Sum ſhall be paid to the Heirs on the Part of the Father, becauſe it is not a Rent, nor conjoined or incident to the Reverſion, but a Sum in Groſs not iſſuing out of any Land, and therefore it is no Rent. And alſo it ſeems to me that it is not any Farm, for a Farm and Rent are all one in Effect; and that is proved by the Statute of *Glouceſter cap.* 4. which ſaith, *that if a Man let his Land to farm, or to find Eſtovers in Meat, &c. and he that has the Land lets it lie freſh, &c. it is eſtabliſhed that after two Years paſſed the Leſſor ſhall have an Action to demand the Land, &c.* ſo that by that Statute a *Ceſſavit* is given for the Farm unpaid, which Action ſhall not be given without a Tenure, and ſo if a Tenure is annexed to ſuch a Farm, *ergo* the Farm is a Rent, and therefore this Statute proves that a Rent and Farm are all one. And a Gift of Land before the Statute of *quia emptores terrarum* rendering 20 *s.* annual Rent, or 20 *s.* annual Farm, had been all one. So that in our Caſe it is neither a Rent nor a Farm for the Cauſes aforeſaid, wherefore when the Plaintiff covenanted and granted that if the ſaid annual Rent or Farm ſhould be behind, that then the Demiſe ſhould be void, this is a void Grant and Covenant, or a void Condition, (if it be a Condition), becauſe it is referred to a Rent and Farm, where there is not any Rent and Farm. As if a Feoffment is made upon Condition that the Feoffee ſhall make a Feoffment to the Mayor and Commonalty of *S.* where there is no ſuch Mayor and Commonalty, this is a void Condition, becauſe it is referred to a Thing which is not in Being. And therefore it is impoſſible to be per-

[a] Littlet. § 213.

[b] Co. Litt. 142. a. 144. a. 1. Finch 109.

[c] L. P. T. 8. Ed. 3. 47. pl. 28. M. 8. Ed. 3. 65. a. b.

performed, [a] and Conditions impoſſible or againſt Law are void. [b] As if the Condition be that I ſhall go to *Paris* within two Hours, [c] or that I ſhall enfeoff my Wife, the firſt of theſe Conditions is impoſſible, and the other againſt Law, and therefore they are void. And ſo it is in the principal Caſe. And then I ſay, that where an Eſtate is made, and ſuch Condition impoſſible or againſt Law is made in Defeaſance of it, the Eſtate ſhall ſtand good for ever, and ſhall never be defeated by ſuch Condition or Grant; for which Reaſon the Eſtate ſhall not be avoided, nor is the Entry lawful by Reaſon of this Condition, if it is a Condition. But as to this (being the ſecond Point) it ſeems to me that it is not a Condition; for as a Rent may not be reſerved without Words of the Leſſor or Donor, no more may a Condition, [d] for a Condition ought to be reſerved by the Words of him who parts with the Eſtate, and who ſhall take Advantage of it by Re-entry, if it be broken, which is the Leſſor here, and therefore it ought to be reſerved by his Words. [e] For which Reaſon if two make a Leaſe or Gift upon Condition that if the Leſſee or Donee does not ſuch an Act, that then the one of the Leſſors or Donors ſhall enter, there if the Condition is broken, he ſhall enter but into the one Moiety, becauſe he did not part with more than a Moiety, and the Words make a Condition to him only that ſpoke them, and he ſpoke the Words for a Moiety only, as the Law ſaith, and the other for the other Moiety, and his own ſpeaking cannot make his Companion to re-enter or avoid the Eſtate. So here the Words are ſpoken by the Leſſee who did not give the Eſtate, but took the Eſtate, which Words cannot make a Condition to another who did not ſpeak them, viz. the Leſſor, nor enable him to enter; for which Reaſon it ſeems to me that the Eſtate ſhall not ceaſe by Force of the Words. And alſo it is to be obſerved here, that the Words of the Covenant and Grant of the Leſſee, *that if it ſhould happen the Rent be in Arrear the Leaſe ſhould be utterly extinct and void*, come after the Leaſe made. For by the Demiſe and the *habendum* the Leaſe is made. And then theſe Words of the Leſſee are ſpoken after the Leaſe is made, and ſo altho' the Words are contained in one Indenture, yet in Conſideration of Law there are two different Times therein, that is to ſay, a firſt Time, viz. the Time of making the Leaſe, and a laſt Time, viz. the Time of ſpeaking the Words, which are ſpoken after the Leaſe. [f] And therefore it is held in divers Books, that an Eſtate firſt made ſhall not be defeated by a Defeaſance after the Eſtate. As in 5. *Ed.* 3. it is held that if a Feoffment is made, and afterwards the Feoffee at another Time makes a Defeaſance, viz. that if the Feoffor does ſuch an Act, that then the Livery and Seizin and his Eſtate ſhall be void, this ſhall not defeat the Eſtate firſt veſted. [g] And ſo in 42. *Ed.* 3. the Caſe is, that W. borrowed 40 *l.* of R. and in Surety of Payment he enfeoffed R. of his Land in Fee upon Condition that if he paid the ſaid Sum at a Day limited, the Feoffment ſhould loſe its Force, at the Day W. did not pay the Money, but afterwards died, and his Wife took to Huſband one B. who by Agreement between him and R. paid the Money to R. by Means whereof B. had the Land, and afterwards R. died, and his Wife brought a Writ of Dower; and it was adjudged that ſhe ſhould have Dower, becauſe the Eſtate of R. was not avoided and defeated by the Agreement made after the Condition broken. So that Agreements concerning the avoiding of Eſtates, made after the ſame Eſtates, are of no Effect in Law. Wherefore in our Caſe inaſmuch as the Eſtate was firſt made, and the Condition afterwards, and ſo they were made at divers Times in the Eye of the Law, it ſeems to me that for this Cauſe the Eſtate ſhall never be defeated or avoided. But admitting that the Leſſors might enter, yet the Leaſe made to *Burges* is not good [h] before Entry made by the Leſſors. For before Entry the firſt Leaſe is not made void, but a Title of avoiding it only is given to the Leſſors, for the Leaſe continues until Re-entry in Deed is made, and before Entry the Poſſeſſion continues in the Leſſee. [i] And for Proof hereof there is a Caſe in 22. *Ed.* 4. where a Man made a Leaſe for ſix Years, the Term expired, and the Leſſee kept himſelf in after the Term, and took the Profits, and the Leſſor before any Entry brought an Action of Treſpaſs for the Treſpaſs meſne done, viz. after the Term ended, and before the Action brought; and the Opinion of the Juſtices was that the Action of Treſpaſs did not lie, for altho' the Leſſor might enter, yet before Entry the Poſſeſſion was not in him. So in our Caſe, altho' the Leſſors might enter, yet before Entry the Poſſeſſion continues in the Leſſee, and his Term alſo continues. [k] For if the Leſſors had made an Acquittance to the Leſſee for Rent in Arrear after the Time when the Condition is ſuppoſed to be broken, they ſhould never have re-entered. [l] So in 14. *Aſs.* it is adjudged that if a Leaſe is made rendering Rent, with a Clauſe of Re-entry for Default of Payment, if the Rent is in Arrear, and a Title of Re-entry given, and afterwards he in the Reverſion diſtrains for it, there he ſhall not enter after, becauſe by the Diſtreſs he has affirmed the Continuance of the Term. So here, if the Leſſors had diſtrained for the Rent, they ſhould never have entered afterwards. From whence it ſeems to me, that if an Acquittance or Diſtreſs ſhall affirm the Leaſe, *ergo* it was not determined before. [m] And if a Reverſion be granted upon Condition, if the Condition be broken it ſhall not be in the Grantor before Claim, for when there cannot be an Entry, then a Claim ſhall ſerve. [n] But if I grant a Rent Charge out of my Land upon Condition, there if the Condition is broken the Rent ſhall be extinct in my Land without Claim, for there cannot be any Claim in that Caſe. [o] And theſe are Principles of Law, that if there may be an Entry into the Thing, then it ſhall not be in the Party before Entry; and if there cannot be any Entry, but a Claim, then it ſhall not be in him before Claim; and if neither Entry nor Claim may be had, then it ſhall be in him by Act of the Law without any Act done by the Party. But in the Caſe here an Entry might have been made, for which Reaſon it ſeems to me that before Entry the Leaſe and the Poſſeſſion continue in the Leſſee; and ſo the Leaſe made to *Burges* by the Preſident and Scholars before their Re-entry upon *Browning* is not good. Wherefore the Rejoinder is not good, and conſequently the Plaintiff ſhall recover.

[a] M. 2. H. 4. 9. b. *per Thirn.* P. 2. Ed. 4. 2. 3. *per Choke et Neaham.* Fitz. Obligation 5. Bro. 4. M. 8. Ed. 4. 12. b. Bro. Condition 150. H. 4. H. 7. 4. b. *per Brian.* P. 10. H. 7. 22. a. P. 14. H. 8. 28. a. b. *per Pollard.* Perk. § 727. Co. Litt. 206. b. See Vin. Abr. tit. Condition X. and E. a. *per totum.* 1. Bac. Abr. 408. 412. 413.

[b] Perk. § 735. Co. Litt. 206. b.

[c] Co. Litt. 206. b. 2. Danv. Abr. 20. pl. 8. 1. Bac. Abr. 410. Vin. Abr. tit. Condition X. pl. 9.

[d] Dy. 6. b. pl. 2. ſaid to be a Principle. Palm. 496. 503. Poſt. 138. (b)

[e] Co. Litt. 185. a. Wing. Max. reg. 24. pl. 20. Vin. Abr. tit. Condition A. pl. 1.

[f] Perk. § 717. Co. Litt. 236. b. Vin. Abr. tit. Deſeaſance D. pl. 5.

[g] H. 42. Ed. 3. 1. pl. 3. Fitz. Dower 40. Bro. 11. Verdict 85.

[h] See Dy. 7. pl. 6. in Margine.

[i] P. 22. Ed. 4. 13, 14. Bro. Treſpaſs 365. 5. Mod. 384. See Poſt. 136.

[k] S. P. Co. Litt. 211. b. Cro. E. 3.

[l] 14. Aſs. pl. 10. Fitz. Entry congeable 43. Bro. 16. 53. Aſſize 191. Co. Litt. 211. b. 3. Co. 64. b. Cro. E. 3. 1. Rol. Abr. 475. B. pl. 1. See Poſt. 136.

[m] S. P. Co. Litt. 218. a.

[n] S. P. Co. Litt. 218. a. Vin. Abr. tit. Condition. R. d. pl. 6.

[o] S. P. Co. Litt. 218. a. 379. a.

E contra for the Defendant.

Staunford and *Walſh* argued to the contrary, as it is ſhewn before, and the Subſtance of both their Arguments was as follows. As to the firſt Point, it ſeems that the Covenant and Grant to render and pay the Sum ſhall be a Reſervation * of a Rent. For firſt it is to be conſidered that the Leaſe and alſo the Covenant and Grant to pay the Sum is made by Indenture, [a] and the Words in an Indenture are the Words of both Parties; and altho' they are ſpoken as the Words of one Party only, yet they are not his Words alone, for there is the Aſſent of the other Party to each others Words; and therefore when they are written they ſhall be taken in ſuch Manner as the Intent of the Parties may be ſuppoſed to be. And they ſhall not be taken moſt ſtrongly againſt one and beneficially for another, as the Words of a Deed Poll ſhall, [b] for there the Words ſhall be taken moſt ſtrongly againſt the Grantor, and moſt available to the Grantee. But it is not ſo in a Deed indented, becauſe the Law makes each Party privy to the Speech of the other: And therefore we ought not to make ſuch Conſtruction of Words in an Indenture as in a Deed Poll. But if an Indenture contains Matter of Subſtance, the Law will make ſuch Reference thereof as is moſt fit and reaſonable, and will ſay that the Words are ſpoken by him who could moſt properly ſpeak them; and therefore where the Plaintiff here has covenanted and granted to render and pay the ſaid Sum for the Lands, the Words are in fact the Words of the Leſſee, but in Conſtruction of Law they ſhall be taken the Words of Reſervation of the Leſſors, inaſmuch as they have the Senſe and Effect of a Reſervation. For Words of Covenant and Grant to render and pay ſuch a Sum for the Land have the Effect of reſerving or paying Rent for the Land; and ſo the Law will take them to be ſpoken by the Leſſors. [c] As if a Man makes a Feoffment in Fee by Deed indented rendring ſuch Rent, there it ought to be conſidered that it cannot be reſerved as a Rent may upon an Eſtate for Years, for Life, or in Tail, becauſe the Reverſion is not in the Feoffor, and yet the Feoffor ſhall have it as a Rent granted by the Feoffee. And by the ſame Reaſon that the Law there takes the Words of the Feoffor as the Words of the Feoffee, by the like Reaſon in our Caſe it will take the Words of the Leſſee as the Words of the Leſſor, for they ſerve moſt properly that Way. And if the Deed indented had ſpecified that the Plaintiff ſhould have the Land, and ſhould pay 20 *s.* yearly, that would be a Rent. For the Law refers the Words in any Writing indented to be ſpoken by him that can beſt ſpeak them, and that ſhould be the Leſſor there. And, Sir, it is frequently to be ſeen that one Word ſhall enure as another. [d] As if a Leaſe be made for Life, the Reverſion to *J. S.* in Fee, this ſhall enure as a Remainder, as it is held in our Books. And if one Word ſhall be taken in the Senſe of another, by like Reaſon it ſeems that the Words ſpoken by one ſhall be taken in Law to be ſpoken by another, eſpecially where it is in a Deed indented. And therefore in the Caſe here it ſhall be a Reſervation of a Rent. And as to what has been ſaid, viz. that it cannot be a Rent, becauſe he hath covenanted and granted to render and pay the ſaid Sum *for* the Lands, and it is not covenanted nor granted to be paid *out of* the Lands, and no Rent may be but what is iſſuing out of Land; as to this it ſeems clearly that the Law ſhall take and conſtrue it to be iſſuing out of the Land as ſtrongly as if it had been expreſſed in plain Terms. For it is to be obſerved that the Sum is to be paid for the Land as it is expreſſed, and that is agreed at the Time of the Demiſe of the Land. And ſo the one, viz. the Rent, comes for the other, viz. the Land, and at one ſame Time, and by one ſame Contract, and the one is executory for the other. [e] For if the Land is recovered upon *eign* Title he ſhall be diſcharged of Payment, becauſe he cannot have the Thing for which he is to pay the Money. [f] As in the Caſe in 15. *Ed.* 4. where it is ſaid, if A. grants to B. all the ancient Pale, and in Return for the ſame B. grants that he would make a new Pale to the aforeſaid A. there if B. cannot have the ancient Pale he ſhall be excuſed from making the new Pale, becauſe he cannot have the one Thing for which he is to do the other. [g] And if one grants to another an Annuity *pro conſilio impendendo*, if he will not give Counſel the other may detain the Annuity, becauſe he cannot have the Thing for which he granted the Annuity. So in the principal Caſe, if the Land was recovered he ſhould be diſcharged of Payment. Wherefore inaſmuch as the one is executory for the other, and the one comes in Return for the other at one ſame Time, and by one ſame Contract, the Law adjudges that it is iſſuing out of the Land as ſtrongly as if it had been reſerved by expreſs Words. [h] And therefore in 29. *Aſs. pl.* 23. there is this Caſe, viz. the Tenor of a Purparty made in the Chancery between three Coparceners of an Inheritance, two of whom were Covert-Barons, was brought into the King's Bench, and by the Record it was ſuppoſed that one Huſband and his Wife had more in Purparty than they ought to have, and it was ſuppoſed by the ſame Record that the Huſband and his Wife *pro prædicto reſiduo* had granted to the other Parceners 100 *s.* Rent, and by the Purparty it was not ſuppoſed that this Rent was to be taken out of any certain Land, but that the two Coparceners had bound themſelves and their Heirs in the ſaid Rent, and thereupon a *Scire Facias* iſſued againſt the ſaid Huſband and Wife who had the moſt in Purparty, and they came and demanded Judgment of the Writ, becauſe this Suit was brought againſt them as Ter-tenants, and by the Writ it was not ſuppoſed that any Land was charged with the Rent, but only the Perſon that granted it, and his Heirs, but yet the Writ was awarded good, and the Defendants put to anſwer over: For ſince the Rent was granted for the Land, and was executory for the Land, the Law adjudges it to iſſue out of the Land; and ſo the Law has Reſpect to the Ground of the Matter, and to the Conſideration upon which Things are done. [i] For upon Partition between Coparceners, if the one grants a Rent to the other, this ſhall deſcend to the Heirs of the Grantee, altho' it was not granted to her and her Heirs, becauſe it came to her in reſpect of the Land which ſhould deſcend to the Heir. And therefore when the Ground of a Thing appears, the Law ſupplies the Deficiency in the Words. So in our Caſe inaſmuch as the Cauſe of the Payment of the Sum appears to be

* S. P. Accord. *Althow v. Hemming* Owen 151. 1. Rol. R. 81, where *Coke* C. J. wondered it could be any Doubt in the Caſe here, and thought it clearly a Rent, *Sed cæteri nil dixerunt.* 1. Leon. 318. *arguendo.* 4. Bac. Abr. 342.

[a] S. P. Dy. 6. b. pl. 2. Dal. 8. pl. 7. 11. pl. 15. 1. Rol. R. 69. 1. Leon. 318. Cro. E. 657. 1. Finch 89.

[b] S. P. 1. Leon. 318. 1. Finch 90.

[c] Litt. § 217. 1. Bac. Abr. 114, 115. 4. Bac. Abr. 336. in this Caſe it is a Rent-ſeck only.

[d] H. 10. Ed. 3. 1. pl. 6. Fitz. Feoffments 76. M. 21 Ed. 3. 49. pl. 79. Bro. Faits 26. Formedon 33. Grants 35. M. 21. Ed. 4. 39. b. *per Fairfax et* 57 a. *per Pigot.* T. 1. H. 5. 8. b. *per Hull et Horton.* Fitz. Scire Facias 57. Bro. Done 36. M. 2. H. 6. 4 b. *per Relf.* M. 19. H. 6. 27. a. *per Godred.* M. 14. H. 8. 2. a. *per Brudnel.* T. 27. H. 8. 15. a. *per Chomley.* Dy. 22. pl. 140. 125. pl. 44. 4. Leon. 76. *per Fenner.* 1. Rol. R. 319. 4. Bac. Abr. 293. Poſt. 141. 157. 170.

[e] See Ante 71. (†) and the Books there cited.

[f] M. 15. Ed. 4. a. put by *Cateſby*, and affirmed by *Littleton.* T. 9. Ed. 4. 2. b. *per Choke.* Bro. Condition 61. Hob. 42. Poph. 198. Gouldſb. 156. Godb. 8.

[g] T. 9. Ed. 4. 20. b. *per Choke* Bro. Bar. 31. Condition 61. M. 15. Ed. 4. 4. a. *per Choke et Littleton.* H. 41. Ed. 3. 6. Bro. Extinguiſhment 36. 1. Rol. Abr. 435. pl. 9. Co. Litt. 204. a. Davis 1. b. 1. Rol. R. 122. Hob. 41. 1. Bulſt. 167. 4. Leon. 70. Hardr. 360. Forteſc. Rep. 193. 1. Finch 43. 2. Finch 60. Poſt. 141. 456.

[h] Fitz. Partition 12. Bro. Charge 26.

[i] M. 2. H. 7. 5. a. Bro. Eſtates 39. Co. Litt. 10. a. 1. Finch 25. 2. Finch 36.

be for the Land, and it is to be paid annually, it ſhall be adjudged in Law a Rent, and to iſſue out of the Land. And then when it is ſaid in the Indenture, *if it ſhall happen the ſaid annual Rent or Farm be in Arrear, that then the Demiſe ſhall be extinct and void*, the Words are proper enough, and ſhall make the Leaſe to ceaſe. But admitting it is neither a Rent nor Farm, but a Sum in groſs, yet the Leaſe ſhall be determined. For when it is ſaid, *if it ſhould happen the ſaid Rent be in Arrear*, and the Sum is recited certainly, it is of the ſame Subſtance and Effect in Law as if it was ſaid, *if it ſhould happen the ſaid Sum in groſs be in Arrear*. [a] And that the Law is ſo it is proved by *Littleton* in his Book in the Chapter of *Eſtates upon Condition*: For there he ſays, "If a Man enfeoffs another in Fee upon Condition that he and his Heirs ſhall render to a Stranger and his Heirs an annual Rent of 20 *s.* and if he or his Heirs fail of Payment thereof, that then it ſhall be lawful for the Feoffor and his Heirs to enter, this is a good Condition, and yet in this Caſe altho' ſuch annual Payment is called in the Indenture an annual Rent, it is not properly a Rent, for if it was a Rent it muſt be either a Rent-ſervice, or a Rent-charge, or a Rent-ſeck, and it is not any of them. For if the Stranger was ſeized thereof, and afterwards it was denied him, he ſhould never have an Aſſize for it, becauſe it is not iſſuing out of any Tenements, and ſo the Stranger has no Remedy if ſuch Annual rent be in Arrear in this Caſe, but the Feoffor or his Heirs may enter. And yet if the Feoffor or his Heirs enter for Default of Payment, then ſuch Rent is gone for ever. And ſo ſuch Rent is but as a Pain ſet upon the Tenant and his Heirs, that if he will not pay it according to the Form of the Indenture, then they ſhall loſe their Land by Entry of the Feoffor or his Heirs for Default of Payment." These are the Words of *Littleton* in his ſaid Book, which prove that the calling a Sum in groſs a Rent is of the ſame Effect as if it had been called a Sum in groſs. So that miſnaming Words in Indentures is no great Matter if ſo be there are Words of Subſtance put for them, as it is in our Caſe. And therefore it ſeems that if it be a Sum in groſs, yet the calling it a Rent and reciting the Sum in certain ſhall be as available to the Leſſors here as it ſhould be to the Feoffor in *Littleton*'s Caſe. Wherefore it ſeems clearly, whether this be a Rent or a Sum in groſs, that yet the Eſtate for Years ſhall be determined, notwithſtanding this Exception, if ſo be the other Words are effectual to determine it. And as to that, the Words ſeem to be effectual enough to make the Leaſe void. For it is not requiſite that the Leſſor ſhould ſpeak the Words which ſhall defeat the Eſtate, but if it be by Indenture, and the Words bear an Intendment to avoid or determine the Leaſe, it is ſufficient. As if the Words were, *proviſo* that the Leſſee do ſuch an Act, or *ſi contingat* that he does not ſuch an Act, that then, &c. there the Words *proviſo* or *ſi contingat* are not ſpoken by one more than the other, but they are put indifferently, and the Law conſtrues them in the beſt Senſe, and therefore the Words ſhall be taken as a mutual Agreement of the Parties that the Leaſe ſhould be void, for which Reaſon the Leſſor may enter, inaſmuch as ſuch Agreement was at the Time of the making the Eſtate. [b] So in 10. *Aſs. pl.* 15. a Leaſe was made by Deed for eleven Years, and in Surety of his Term the Leſſor made him a Charter upon Condition that if he was diſturbed of his Term, he ſhould hold the Tenements in Fee for ever, and Livery and Seizin was made upon the one Charter and upon the other, and afterwards the Leſſee was diſturbed, and there it is adjudged that he ſhould have the Fee; for the Charters were delivered at one ſame Time, and ſo the Agreement had between them at the Time of the firſt Eſtate made ſhall make the Eſtate conditional, ſo that the Fee ſhall paſs afterwards. And by the ſame Reaſon an Agreement between the Parties at the Time of the Eſtate made ſhall be ſufficient to defeat the Eſtate. [c] And in 9. *H.* 6. a Man made a Leaſe *abſque impetitione vaſti, proviſo quod non proſterneret domus voluntariè*, and the Leſſor brought an Action of Waſt for Waſt done in Houſes, and the Leſſee ſaid *quod non proſtravit domus voluntariè*, and Exception was taken to it, and it was ſaid that an Action of Waſt would not lie for voluntary Waſt in Houſes, for the Clauſe *abſque impetitione vaſti* ſhall be abſolute, and upon the *Proviſo* the Leſſor ſhall be put to his Writ of Covenant, which was denied, for that it was all by one Deed, and the Clauſe was [d] conditional, ſo that he ought to take the Clauſe in ſuch Form as it was made, and yet there the *Proviſo* was not ſpoken by the Leſſor more than by the Leſſee, but as it is put it ſhall be taken as an Agreement of both Parties. So in our Caſe, when the Leaſe was made by Indenture with the ſaid Clauſe contained in it, then the Leaſe paſſed in ſuch Form, and it was parcel of the Contract, and made with the Aſſent of both the Parties, and at one ſame Time, ſo that whatever Way it be taken, whether a Condition, or a Limitation of the Eſtate, or a Grant on the Part of the Leſſee, it is ſuch a Thing as will determine the Leaſe without Queſtion. And as to what has been ſaid, that in Intendment of Law the ſaid Clauſe ſhall be taken to be made after the Leaſe, and ſo, as it were, at a different Time, Sir, this cannot be, ſince the whole is made by one Deed indented, ſo that no Word of it takes Effect before the Delivery of the Deed, and the Deed is delivered all at one Inſtant, and therefore all the Words ſhall take Effect at one ſame Inſtant, and there is no Diſtinction of Time therein. And this is proved by the ſaid Caſes of 10. *Aſs. pl.* 15. and 9 *H.* 6. For in the one it was by ſeveral Deeds, but delivered at one ſame Time, and in the other Caſe it was all by one ſame Deed, and there it is taken to be in Law at one ſame Inſtant without any meſne Time; and ſo in the Caſe here. Wherefore it ſeems clearly that notwithſtanding any of the Exceptions, the Clauſe will determine the Leaſe. Then as to the laſt Matter, viz. whether or no the Leaſe ſhall be determined and void before Entry; it ſeems that it ſhall, for the Leaſe commenced by Contract, that is, by Words without other Circumſtance, and was a good Leaſe by the Words before Entry, and that which commences by Words and without Entry may be determined by Words without Entry. [e] But if the Leaſe had been for Life, then ſuch Clauſe *ut ſupra* might not determine it before Entry, for a Leaſe for Life

[a] Littlet. § 345.

[b] Fitz. Aſſize 161. Bro. Conditions 101. Co. Litt. 217. a, 8. Co. 91. b. Ante 34. (h) Poſt. 482.

[c] M. 9. H. 6. 35. pl. 6. Fitz. Waſt. 39. Dal. 55. *per Dyer.*

[d] But ſee *Contra* S. P. 2. Co. 72. a. 2. Leon. 128. 129 3. Leon. 225. 4. Leon. 71. 72. where it is ſaid, this Clauſe does not make a Condition.

[e] 2 M. *per Bromley.* Bro. Condition 245. B. N. C. § 465. Co. Litt. 214. b. 218. a. 3. Co. 65. a. 8. Co. 95. b. 10. Co. 48. b. Moor 345. 346. 1. Rol. R. 360. 2. Leon. 134. Hetl. 23. 1. Rol. Abr. 408. pl. 1. Poſt. 142. Vide Contra H. 21. H. 7. 12. a. *per Frowick.* Poſt. 413. 4. Leon. 119.

Life cannot commence by Words without other Circumſtance, viz. Livery and Seizin, and therefore it ſhall not be determined by ſuch Clauſe *ut ſupra* without Entry. For the Livery and Seizin which gives Perfection to the Eſtate and Entry ought to be avoided by Entry. [a] But a Leaſe for Years commences by Words without Entry, and may be determined by Words without Entry. And ſo is the Diverſity. And as to the Caſes put, viz. in [b] 14. *Aſs.* where a Leaſe is made for Years reſerving Rent, or a Re-entry for Default of Payment, if the Rent be behind, and a Title of Re-entry given, and afterwards he in the Reverſion diſtrains for it, that he ſhall never enter, or if he makes an Acquittance for it, that he ſhall never enter afterwards, Sir, theſe Caſes are not like our Caſe here. For when a Man makes a Leaſe rendring Rent, and if the Rent is behind that he ſhall enter, there he has expreſſed how the Leaſe ſhall be avoided, viz. by Entry. So that if he will not enter, or if he does ſuch an Act as excludes him from his Entry, there the Leaſe is good for ever, becauſe it continues good until an Entry be made. [c] But in our Caſe the Words are, that the ſaid Leaſe *ſhall be utterly extinct, void, and of no Effect*, which Words diſſolve the Leaſe without Entry or other Circumſtance, and then if it be utterly void it cannot be made good by any Matter *ex poſt facto*; and ſo is the Difference between the ſaid Caſes and our own Caſe here. And altho' in the Caſe here it goes beyond the ſaid Words, and ſaith *that it ſhall be lawful for the Preſident and Scholars again to enjoy, poſſeſs, and have the ſaid Tenements, &c.* yet theſe don't take away the Effect of the firſt Words, but the latter Words are Surpluſage, for if the Leaſe was determined by the firſt Words, then was it in vain to put the latter Words. And as to the Caſe put in [d] 22. *Ed.* 4. it is good Law, for when the Leaſe was ended the Leſſee then became Tenant at Sufferance to the Leſſor, and the Leſſor could not puniſh him by Writ of Treſpaſs, inaſmuch as his firſt Entry was with his Aſſent, and afterwards he was Tenant by his Sufferance and Aſſent, as the Law ſaith, and then he cannot impeach him for a Thing whereunto he has firſt aſſented; but in the ſaid Caſe the Leſſor might there make a Leaſe for Years to another, and that Leaſe ſhould be good, for thereby he had determined his Will and Pleaſure. Wherefore the ſaid Caſe does not prove any Thing againſt the ſecond Leaſe here, and ſo the Rejoinder is good notwithſtanding any of the ſaid Exceptions to the contrary; and conſequently the Plaintiff ſhall be barred.

[a] Moor 292. 2. Leon. 139. Poſt. 142.

[b] Ante 133. (l)

[c] Same Diverſity Co. Litt. 215. a.

[d] Ante 133. (i)

E Contra for the Plaintiff.

Gawdy Serjeant to the contrary. It ſeems to me that it ſhall not be a Rent, becauſe it is not reſerved by the Words of the Leſſors. And it is utterly againſt Reaſon to take the Words of one Perſon as the Words of another, for the Law will not make ſuch Conſtruction, nor will it refer what is ſpoken by one Man to that which is ſpoken by another, or take them to be of the like Effect. [e] And therefore in 35 *H.* 6. the Caſe is, that *John Croke* was ſeized of the Manor of B. in Fee, and a Deed indented was made between the ſaid *Croke* and the Prior of B. as follows, *Cum* Johannes Croke *teneat de nobis, ut de jure Eccleſiæ noſtræ prædictæ, manerium de B. per homagium, fidelitatem, ſcutagium, et redditum quatuordecim librarum ad Feſtum, &c. Noveritis nos Priorem et Conventum ratificaſſe et confirmaſſe dicto* Johanni *ſtatum ſuum, &c. ſalvo ſemper nobis et ſucceſſoribus noſtris noſtro antiquo dominio, ſimul cum reddit. et ſervic. de manerio, &c. In cujus rei, &c. uni parti ejuſdem indenturæ penes prædictum* Johannem *remanenti prædicti Prior et Conventus ſigillum ſuum commune appoſuerunt, alteri vero parti penes prædictos Priorem et Conventum remanenti prædictus* Johannes *ſigillum ſuum appoſuit*, and the ſaid *Croke* had Iſſue H. who had Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and the Daughter as Heir of the whole Blood to her Brother had the Manor by Deſcent after the Death of the ſaid *Croke*, and of H. and of her Brother, and the Succeſſor of the Prior avowed upon her, and ſhe pleaded *hors de ſon Fee*; and the Opinion of the Court there was, that ſhe ſhould not be eſtopped by the Indenture, but that ſhe might well have the Plea for two Reaſons, one was, becauſe the Deed was no Eſtoppel, for that [f] all the Words in the Deed are the Words of the Prior and Convent, and not the Words of the ſaid *John Croke*; the other Reaſon was, for that if it was an Eſtoppel, [g] yet the Daughter is not Heir to it, but the youngeſt Son. And therefore if one Reaſon there was, becauſe all the words were the Words of the Prior and Convent, and were ſo accounted in Law notwithſtanding it was by Deed indented, from thence we may ſee that the Words of one Perſon in an Indenture ſhall not be taken as the Words of another, nor ſhall the other be eſtopped thereby, notwithſtanding he is Party to the ſame Indenture. And ſo *a fortiore* in our Caſe the Law ſhall not ſay that they are the Words of the Leſſors, nor conſtrue them to amount to a Reſervation of Rent, inaſmuch as they may otherwiſe have a reaſonable Conſtruction and Effect. And as to what has been ſaid, that the Leſſors are Parties to the Words, and agreed to them, it being by Indenture, Sir, true it is that they agreed to have the Sum, but it was not agreed to have it as a Rent. So that the Effect of the Agreement is to have it, but how they ſhall have it, viz. as a Rent or not, is not Part of their Agreement. Wherefore it ſeems to me that ſince the Words are ſpoken by the Leſſee it may not be a Rent, as I have ſaid before. And alſo (as it has been ſaid) it may not be a Rent, becauſe it is not iſſuing out of any Land. And as to what is ſaid, that by the Intent and Agreement of the Parties the Law ſhall adjudge it to be iſſuing out of the Land, Sir, it cannot poſſibly be ſo taken without expreſs Words. [h] And this will be proved by the Caſe of the Prior of *Martin* and the Prior of *Bingham* in 22. *Ed.* 4. for there the Caſe is that a Fine was levied between the Prior of *Martin* Complainant, and the Prior of *Bingham* Deforceant, *de quinque Marcis et quinque ſolidis redditus cum pertinentiis in S. et K. unde placitum conventionis ſumm. fuit inter eos*, and the Fine was, *Hæc eſt finalis concordia, &c. inter Priorem de Martin querentem, et Priorem de Bingham deforc. de quinque Marcis, et quinque ſolidis redditus cum pertinentiis in S. et K. unde placitum conventionis ſumm. fuit inter eos; ſcilicet, quod Prior de Bingham recognovit et conceſſit pro ſe et ſucceſſoribus ſuis, quod ipſi de cætero reddant ſingulis annis prædicto Priori de Martin et ſucceſſoribus ſuis, pro tenementis quæ de eodem Priore tenet,*

[e] M. 35. H. 6. 33. b. Fitz. Eſtoppel 57. Bro. 23.

[f] 9. Co. 10. b.

[g] 8. Co. 54. a. Hob. 31. Co. Litt. 12. a.

[h] Fitz. Scire Facias 52.

tenet, et quæ tenementa W. de W. de eodem Priore de Martin aliquando tenuit in prædictis villis &c. quinque marcas et quinque ſolidos ad duos anni terminos pro omnibus ſervitiis, ſectis, &c. Et pro hac conceſſione &c. idem Prior de Martin conceſſit pro ſe et ſucceſſoribus ſuis quod ipſi warrantizabunt præ dictis Priori de B. et ſucceſſoribus ſuis prædicta tenementa contra omnes Gentes. And afterwards the Succeſſor of the Prior of *Martin* brought a *Scire Facias* againſt the Succeſſor of the ſaid Prior of *Bingham*, to have Execution of the Arrears for 14 Years, and there it was ſaid that the *Scire Facias* was not maintainable, for the Fine proves the Rent granted to the Predeceſſor of the Plaintiff to be a Rent-Service, or other Rent iſſuing out of Land, and not an Annuity, where- Vide B. N. C. § 28. fore inaſmuch as he has acknowledged it to be executed, he ought to have had an Aſſize or Diſtreſs, and not this Writ which is in Nature of a Writ of Annuity; but yet the *Scire Facias* was adjudged maintainable, and that he ſhould have Execution, becauſe the Fine was levied of a different Thing from the Original: For the Original, that is to ſay, the Writ of Covenant, was of a Rent, which ſhall be intended a Rent-Service, and the Fine does not ſay, *prædictum redditum*, but it was *de quinque Marcis et quinque ſolidis*, which is of a Thing that was not in *eſſe* before the Fine, *viz.* of an Annuity, for the Prior of *Bingham* was Tenant of the Land, who could not grant the Seigniory to another, wherefore it is but an Annuity, and no Rent. And then, I ſay, if this is there holden an Annuity, and not a Rent iſſuing out of Land, by the ſame Reaſon in our Caſe it is a Sum in groſs, and not a Rent iſſuing out of the Land; for in the Fine it was granted to be paid for the Land, and ſo in our Caſe it is granted to be paid for the Land, which Land is nothing more than a Conſideration in the one Caſe and in the other, and is not charged with the Payment, and every Word in the Fine is as ſtrongly the Word of both the Parties, as the Words in an Indenture are, *et ubi eadem eſt ratio, ibi idem jus.* And therefore it is not a Rent in our Caſe, but a Sum in groſs, and then the Grant that the Leaſe ſhall be void for the Nonpayment of the Rent and Farm is void, becauſe there is no ſuch Rent or Farm. As if a Man makes a Leaſe of Land, upon Condition that if the Leſſee does Waſt in the Houſes upon the Land leaſed, that then the Leaſe ſhall be void, where in Fact there is no Houſe at all on the Land leaſed, this is a void Condition, becauſe it is referred to a Thing which is not in being. And if it was a Rent and no Farm, then alſo the Term ſhould not be void, for it is in the Copulative, *viz.* if the Rent and Farm be behind, but it is neither the one nor the other, for which Reaſon it ſeems to me that the Clauſe is not ſufficient to make the Leaſe void. Further, it ſeems that inaſmuch as it is but the Grant of the other Party, the Leaſe ſhall not be void becauſe it was executed. [a] But an Obligation, Recognizance, or Warranty, or ſuch Things as are executory may be defeated by a Defeazance, but not Things executed. And here it is to be conſidered that the Grant of Defeazance came after the Leaſe, for if the Leſſee firſt deliver his Part to the Leſſor, then is the Defeazance void, for at that Inſtant he was not Leſſee, and therefore we ought to take it according to Order, and as it may ſtand together, and that is, that the Leſſors firſt delivered their Part of the Indenture, whereby the Leaſe was executed, and that afterwards the Leſſee delivered his Part of the Indenture, and ſo there is a meſne Time, and the Leaſe was firſt executed, and the Defeazance came after, which may not defeat Things executed. [b] And therefore in 43. *Aſſ.* a Releaſe of Right made by the Diſſeizee to the Tenant of the Land may not be defeated by a Defeazance afterwards, becauſe the Right was extinct before, and the Releaſe executed. And ſo was the Leaſe here, which may not be defeated by the Defeazance after. Further, admitting the Defeazance good, it ſeems that although the Words are, *that the Leaſe ſhall be utterly extinct, void, and of no Effect*, yet the Law will make an Expoſition hereof in what Manner it ſhall be void. [c] As the Statute of *Weſtminſter* 2. *cap.* 1. which ſays, that if a Fine be levied, *ipſo jure ſit nullus*, yet the Law makes an Expoſition thereof, *viz.* that it ſhall be void as to binding the Right, but yet that it is a Diſcontinuance. [d] And ſo the Statute of 8. *H.* 6. *cap.* 10. which makes Outlawries void upon Indictments or Appeals, if a *Capias* is not awarded againſt the Party in the County wherein by the Indictment or Appeal he is expreſſed to be dwelling, is expounded by the common Law, *viz.* that it ſhall be void by Writ of Error. So here the Words which grant that the Leaſe ſhall be void ſhall be expounded to be void by Entry, and not otherwiſe. [e] And if a Man makes a Leaſe for Years of his Wife's Land, and dies, the Leaſe is not void before Entry made by the Wife, for Poſſeſſion ought to be avoided by Poſſeſſion, and ſuch Poſſeſſion ought to be gained by Entry. [f] But if my Father dies, and his Land deſcends to me, a Leaſe for Years made by me before my Entry is good, becauſe I had Poſſeſſion in Law, and none had Poſſeſſion in Deed. But if a Stranger abates, a Leaſe made by me after is void, for the Stranger had the Poſſeſſion in Deed before my Entry. So here the Poſſeſſion in Deed is in the firſt Leſſee until Entry be made; and then the ſecond Leaſe is void, for he has not pleaded an Entry in Deed made by the Leſſors, which ſhall not be intended without it be ſhewn. And therefore upon the whole Matter it ſeems to me that the Plaintiff ſhall recover.

[a] 43. Aſſ. pl. 44. *Per Wich et Penros.* Fitz. Condition 18. Bro. Defeazance 11. *in fine.* Perk. § 717. Co. Litt. 236. b. 237. a. 1. Co. 113. a. 2. Saund. 48. Moor 573. pl. 787. 811. pl. 1097. Vin. Abr. tit. Defeaſance D. pl. 10.

[b] 43. Aſſ. pl. 12. Bro. Condition 103. *in fine.* 120. Defeaſance 11. Releaſes 39. Perk. § 718. Co. Litt. 236. b. 1. Rol. Abr. 590. C. pl. 2.

[c] See ante 57. (o) and the Books there cited. 1. P. Wms. 252. 4. Bac. Abr. 647.

[d] M. 19. H. 6. 2. a. Fitz. Error 26. Bro. 106. 199.

[e] S. P. 1. Rol. R. 402. See 1. Bac. Abr. 3 2.

[f] S. P. Poſt 142. L. P. 9. Ed. 4. 29. a. b. *Per Danby.*

And afterwards in *Eaſter* Term 7. *Ed.* 6. *Ramſey* argued again. And becauſe his Argument was much to the ſame Effect with his former Arguments, I have here omitted the Report of it. And *Morgan* Serjeant then anſwered him. And he argued that it was a Rent. For, he ſaid, it is not only to be conſidered, who ſpeaks the Words of Reſervation of the Rent, but the chief Matter to be conſidered is the Aſſent of the Parties, *viz.* the Leſſor and the Leſſee. And therefore in the common Words of Reſervation, *viz. tenendo* by ſuch a Rent, or *ſolvendo*, or *reddendo* ſuch a Rent, although the Words are taken to be ſpoken by the Leſſors, yet they are not ſuffici-

Eaſter Term 7. *Edw.* 6.

E contra for the Defendant.

ent to make a Rent, without having the Aſſent of the Leſſee thereunto. For the Leſſor ſhall not have an Action of Debt for Rent reſerved by ſuch Words, except it be adjudged a Contract in Law, and a Contract cannot be without an Aſſent between two or more, wherefore the Aſſent of both Parties is the Perfection of the Contract, and then the Law ſaith, that although the Words come out of the Mouth of the one only, yet they are the Words of both in Effect and Operation of Law. And by the ſame Reaſon that the ſaid Words, *viz. reddendo*, *ſolvendo*, and the like, ſhall be taken to come out of the Mouth of the Leſſor, and ſhall be in Effect the Words of the Leſſee and of the Leſſor alſo, ſo in our Caſe the Words which ſhall be taken to come out of the Mouth of the Leſſee ſhall in Effect be the Words of the Leſſors and the Leſſee. And ſo inaſmuch as the Subſtance of the Matter is, that the Leſſors ſhall have ſo much Money annually for the Land, the Law will ſay that the Words are properly ſpoken for the Purpoſe, and that they will make it a Rent. And if it was not a Rent, but a Sum in groſs, yet the Words which call it a Rent may and ſhall be taken for a Sum in groſs, inaſmuch as it is to continue, and to be paid yearly. And further, the Covenant and Grant that the Demiſe ſhall be void ſhall determine the Leaſe. For it cannot enure to any other Effect, for the Leſſors might not have an Action of Covenant upon this Covenant and Grant, for ſuch Action does not lie but where the Thing, for which the Covenant is made, is to be done at a Time to come by the Perſon of ſome one. And here the Covenant and Grant refers to a Thing which is not to be done by the Perſon of any one, but to a Thing which is to be executed in itſelf. And if the Words ſhould not enure to a Determination of the Leaſe, they would be utterly void, for they cannot enure to any other Effect, and to make them void would be too difficult a Matter to be proved; and therefore the Leaſe was diſſolved *ipſo facto* when the Rent was in Arrear. And he argued further, [a] that although the Leſſors might not have an Action of Treſpaſs before Entry here made after the Rent was in Arrear, yet they might well enough make a Leaſe, foraſmuch as the firſt Leaſe was diſſolved preſently by the Rent being in Arrear, and the firſt Leſſee became Tenant at Sufferance, in which Caſe the Leaſe is good, and therefore the Plaintiff ſhall be barred. And further he ſaid, that there was a Defect in the Pleading which could not be cured, and that is, the Plaintiff hath alledged the Treſpaſs at *Southwark* in two Places, *viz.* in *Barmſey-Street*, and in *Horſingdown-Lane*, and the Defendant ſaith that the Place where *&c.* was one Garden, and thirteen Meſſuages at *Barmſey-Street*, and as to that juſtifies, and ſays nothing as to the other Place, for which Reaſon it ſeemed to him that the Defendant's Bar was bad upon that Account, but that the Rejoinder was good, as it is ſaid before *&c.* And afterwards for this Fault in the Pleading it was held bad, and therefore the Parties * repleaded. And the Pleading was altered in ſeveral Points (as appears in the new Roll thereof made, which is to be ſeen in *Mich.* 1. *Mary Rot.* 158.) *viz.* in theſe Points, whereas the Treſpaſs in the firſt Pleading was aſſigned the *third* Day of *July* in the *firſt* Year of the Reign of King *Edward* 6. and the detaining the Plaintiff out of Poſſeſſion until the 17th Day of *November* in the *ſecond* Year of the Reign of King *Edward* 6. now the Treſpaſs was aſſigned the ſaid *third* Day of *July*, and the detaining the Plaintiff out of Poſſeſſion was alledged until the *ſecond* Day of *June* in the *ſeventh* Year of the ſame King. And alſo the Defendant pleaded the Plea in Bar to both the Places aſſigned, and juſtified in both Places; and whereas in the firſt Pleading the Defendant in the Rejoinder had ſhewn that the Cauſe why the Leaſe became void was for the Rent in Arrear at one Day, *viz.* at the Feaſt of *St. Michael* the Archangel in the 37th Year of the Reign of King *Henry* 8. and by the Space of ſix Weeks thence next following, now in the new Pleading he ſhewed that the Rent was behind at two days, that is to ſay, 18*l.* 11*s.* 8*d.* was in Arrear at the Feaſt of the *Annunciation* of our Lady *anno* 36. *H.* 8. and by the Space of two Months next following the ſame Feaſt, and other 18*l.* 11*s.* 8*d.* was in Arrear at the ſaid Feaſt of *St. Michael* in the ſaid 37th Year of King *Henry* 8. and by the Space of ſix Weeks next following the ſame Feaſt, by which Means the Leaſe became void: And whereas in the firſt Record the Matter of the Rent being in Arrear was alledged by the Words *(for that)* viz. *for that the Rent was in Arrear, the Leaſe became void*, now in the new Record it was pleaded that the Rent was in Arrear, and ſo it was alledged in Fact to be in Arrear *ut ſupra*. And the new Record varies from the old one in few or none other material Points except theſe.

[a] S. P. 1. Finch 309. 310. Poſt 142. (E).

Repleader *Mich. Term* 1. *Mary*. * *Note* Here a Repleader after Demurrer, which has been *multum vexata quæſtio*, as appears M. 9. H. 6. 35. pl. 8. Bro. Repleader 39. Dy. 118. pl. 77. in margine. 3. Co. 52. b. Dal. 76. pl. 2. Moor 867. pl. 1198. Sav. 89. 1. Leon. 79. 80. 2. Bulſt. 37. Cro. E. 318. pl. 4. Latch 147. 3. Lev. 410. 6. Mod. 4. 102. all which and other Authorities ſee cited *pro & con* Vin. Abr. tit. Repleader A. pl. 11.

Trin. Term 1. *Mary*. *E contra* for the Plaintiff.

And afterwards in *Trinity* Term 1. *Mary*. *Robert Brook* Serjeant Recorder of *London* recited the Caſe, as it was in the new Record, and as it is ſhewn above, and ſaid, it ſeems to me that the Plaintiff ſhall recover. Four Queſtions ariſe upon the Rejoinder; firſt, whether there is a Condition here or not: ſecondly, whether there is a Rent or not; thirdly, if there is neither a Condition nor Rent, whether the Covenant will make the Leaſe void without Entry or not; fourthly, whether or no the Rejoinder be double. And as to the firſt Point, there is not any Condition here, [b] for no Condition can be made but by him that parts with the Eſtate, and by his Words. And here if there ſhould be a Condition, it would be made by him that takes the Eſtate, and by his Words, which is contrary to the Nature of a Condition. And beſides the Words here are not conditional, nor equivalent to Words conditional, for conditional Words are reſtrictive, as *ita quod*, or *if the Leſſee do ſuch an Act*, or *ſi contingat*, or *proviſo ſemper*, theſe are conditional Words, and reſtrain or compel the Perſon to do or not to do ſuch a Thing, on Pain of Forfeiture of the Eſtate or Thing given. And yet *proviſo ſemper* does not always make a Condition, as in *Dockray*'s Caſe in [c] 27. *H.* 8. where a Leaſe was made by the Prior of *St. John*'s to *Dockray* by Indenture, in which it was contained, *proviſo* that if the Prior or any of his Brethren

[b] Palm. 496. 503. Dy. 6. pl. 2. Ante 133. (d).

[c] T. 27. H. 8. 14. 15. Bro. Condition 7.

thren will inhabit thereupon, that then the ſaid *Dockray* and his Aſſigns bound themſelves by the ſame Indenture upon one Year's Warning to remove and give Place to the ſaid Prior, there the Caſe is not adjudged, but as I take it, it is not a Condition, for the Words after the *proviſo* are not proper to make a Condition, for they don't force the Party to do or not to do any Thing, but the Leſſee without compulſatory Words of the Leſſor covenants and grants that he will remove. So in our Caſe, neither in the Premiſſes of the Clauſe, nor in the Words following are there any Words conditional, or equivalent to ſuch, but ſimply a Grant or Covenant made by the Leſſee, which does not contain any Condition of the Leſſors; for which Reaſon it ſeems to me that the Words are not conditional, nor ſufficient to determine the Leaſe. Further, admitting the Words to be conditional, yet they are referred to a Determination of the Leaſe for Rent in Arrear, where there is no ſuch Rent. For in the ſame Manner as a Condition ought to be made by the Words of the Leſſor, ſo ought Rent to be reſerved by Words of the Leſſor, or be granted out of the Land by the other Party; and here there is no Rent reſerved by the Leſſor, for the Words of Reſervation are, *reddendo*, *ſolvendo*, or the like, but here there is not any ſuch Word, or Words of the like Senſe, but only a Covenant and Grant to pay ſuch a Sum, and he does not charge the Land with it, for which Reaſon there cannot be a Rent reſerved, nor a Rent granted, becauſe it is not granted out of the Land, and no Rent may be but what is granted out of Land. [a] And therefore the Caſe in 10. *Aſſ. pl.* 4. may be well agreed, which is, that in an Aſſize of Rent a Specialty was ſhewn forth, which proved that the Rent was not granted to be taken of the Tenements, but certain Tenements were bound to Diſtreſs, and out of theſe Tenements was the Rent iſſuing, as it was there adjudged; and I will readily agree that it is a Rent, becauſe the Party may diſtrain in Land for it, and ſo the Land is charged. But here no Land is charged with it, and therefore it cannot be a Rent, and then the Covenant and Grant that if the Rent be in Arrear the Leaſe ſhall be extinct, is utterly void, for it is referred to a Thing where there is none ſuch, and it is as if the Leſſee had granted that if his Homage ſhould be in Arrear to the Leſſor by the Space of a Month, the Leaſe ſhould be void, which Clauſe had been of no Effect, becauſe the Leſſee ſhall not do Homage to the Leſſor, and therefore the Clauſe had been void; and ſo ſhall it be in our Caſe. But admitting it to be a Rent and a Condition, yet the Leaſe continues until Entry is made. For when a Man has an Eſtate, or is in Poſſeſſion, he ſhall be ſaid in Law to have the Eſtate, or to be in Poſſeſſion until another has taken the Eſtate or Poſſeſſion from him. And ſuch Eſtate or Poſſeſſion ought to be taken away by Entry. As if a Man makes a Feoffment in Fee, and the Feoffee at the ſame Time makes a Defeazance, which is afterwards performed, yet the Feoffee remains Tenant in Fee-Simple until Entry is made upon him; and ſo ſhall it be of a particular Eſtate in Tail, for Life, or for Years, for the Caſes are all one, and are founded upon the ſame Reaſon. [b] And therefore in 18. *Ed.* 4. where a *Formedon* was brought againſt Tenant *pur auter vie*, and pending the Writ *ceſtuy que vie* died, and the Tenant continued in Poſſeſſion, and he in the Reverſion prayed to be received, yet there the better Opinion is, that the Writ is not abated until the Leſſor hath entered, nor is the Intereſt of the Tenant *pur auter vie* determined by the Death of *ceſtuy que vie*; which proves that until Entry is made [c] neither the Eſtate nor the Poſſeſſion is taken away. [d] And in *Wheeler*'s Caſe in 14. *H.* 8. in ſecond Deliverance, where *Wheeler* Leſſee for Years granted his Eſtate to the Plaintiff, upon Condition that he could obtain the Favour and good will of the firſt Leſſor, and the firſt Leſſor afterwards told the Defendant that he would rather caſt away the Tiles of the Houſe than that the Defendant ſhould have the Leaſe, there it is held, that upon this Diſagreement the Intereſt of the Plaintiff was not void, for it appears there that the Plaintiff granted it to the Defendant, and the grant to the Defendant was there holden void, becauſe the firſt Eſtate was not void before Entry. [e] And, Sir, in the *Regiſter* there is a Writ called a Writ of Entry *ad terminum qui præteriit*, which lies in Caſe where the Termor holds over his Term, and this proves that the Poſſeſſion and Intereſt remains in him until an Entry is made, for if he had no Eſtate in the Land but at Will or at Sufferance, then the Writ would not lie againſt him. Which Caſes argue ſtrongly that in our Caſe although the Covenant and Grant had been ſufficient to give Title of Re-entry to the Leſſors, yet until Entry in Deed is made the Term is not avoided or determined, and conſequently the ſecond Leaſe made during the firſt Leaſe is void. Further, as to the Form of the Pleading, it ſeems that the Rejoinder is double, for in the Rejoinder it is ſhewn that the Rent was in Arrear at two Days, *viz.* at the Feaſt of the *Annunciation* of our Lady, and at the Feaſt of *St. Michael*, and it would have been ſufficient to have ſhewn that it was in Arrear at one of the Days only, for that avoids the Leaſe as well as if it was in Arrear at two Days, and then the ſhewing it to be in Arrear at two Days makes it double, for each of the Days is iſſuable; for if we ſhould ſay that it was not in Arrear at the Feaſt of *St. Michael*, then he may demand Judgment, becauſe we don't anſwer to the Rent in Arrear at the Feaſt of the *Annunciation*, for that makes the Term void, and if we ſhould anſwer to both, then we ſhould join two Iſſues, one of which might be found for us, and the other againſt us, in which Caſe the Court would be greatly inveigled and at a Loſs what to do; wherefore ſince he has offered us two [f] Iſſues, one whereof had been ſufficient, the Rejoinder in this Point is double. [g] As in 3. *H.* 6. where in a Writ of Ward brought by the Lord, a Feoffment of the Anceſtor of the Infant was pleaded in Bar, and the Lord (being Plaintiff) averred it to be upon Condition that whereas the Wife of the Tenant was *enſeint*, if ſhe was delivered of an Iſſue Male, that then he ſhould enfeoff him, and afterwards ſhe was delivered of an Iſſue Male, the Wardſhip of whom is now demanded; and by the Opinion of the whole Court the Plea was double, for the Feoffment upon Condition was Colluſion apparent, and was one Matter, and the Averment

[a] Bro. Aſſize 150. Rents 22. P. 10. Ed. 3. 18. pl. 11. Fitz. Aſſiz 157. Bro. 426. 26. Aſſ. pl. 38. *Per Skip.* Bro. Rent 14. 3. Aſſ. pl. 7. Fitz Aſſize 184. Bro. 103. 41. Aſſ. pl. 3. *Per Perſey.* H. 8. H. 4. 19. b. P. 9. H. 6. 9. a. *Per Cand.* Fitz. Grant 6. Bro. Rent 1. M. 21. H. 6. 11. b. *Per Markham.* Dyer 22. pl. 141. 2. Rol. Abr. 424. pl. 5. 7. Co. 24. a. Co. Litt. 147. a. Litt. § 221.

[b] H. 18. Ed. 4. 25. pl. 16. Bro. Brief 197. 231. 384.

[c] Vide Co. Litt. 57. b.

[d] H. 14. H. 8. pl 6. Bro. Condition 67. But *Note* that this Diſagreement was not to the Plaintiff himſelf, and that is not a ſufficient Diſagreement, for the firſt Leſſor agreed when the Plaintiff came to him, and then *Wheeler* might never enter, but the Grant was good thereby, and not defeaſible. So that this Caſe reſted upon another Point.

[e] Regiſt. 227. Co. Litt. 57. b.

[f] M. 19. Ed. 4. 4 pl. 12. *Per Collow.* 1. Finch 181. 2. Finch 393.

[g] H. 3. H. 6. 32. pl. 23. Fitz. Double Plea 32. Bro. 5. Vin. Abr. tit. Double Plea. A. pl. 120.

ment of the Colluſion was another Matter, and then the ſhewing of both (both being effectual and anſwerable) makes the Plea double. [a] So in 20. *H.* 6. in Avowry, the Avowant alledged one Seizin of the Services in his Grandfather, and another Seizin in himſelf, and that is there clearly held to be double, becauſe each of them is traverſable, and one only would have been ſufficient. [b] So in 22. *H.* 6. a Man alledged two continual Claims to avoid a Deſcent *viz.* that his Predeceſſor and himſelf made continual Claim, and that is there held to be double, becauſe his own continual Claim would have been ſufficient to avoid the Deſcent, if the dying ſeized was in his own Time, and then the other was unneceſſary. [c] So if one will plead in Bar two Deſcents in Fee, this makes the Plea double, *cauſâ qua ſupra:* But to alledge two Deſcents in Tail does not make the Plea double, for one Anſwer, *viz. ne dona pas*, makes an End of the whole, ſo that the Deſcents there are not the moſt [d] ſubſtantial Part of the Matter, but the Gift, and in ſhewing of the Gift he muſt ſhew how it came to the laſt Iſſue, [e] and foraſmuch as he is neceſſarily compelled to do that, it is not double. [f] And ſo in Debt againſt an Executor, to plead *fully adminiſtered, and ſo nothing in his Hands*, does not make the Plea double although they are two Things, for the one is purſuant to the other, and the laſt is but a Concluſion from the firſt, and one Anſwer, *viz. Aſſets in his Hands*, makes an End of the whole, and foraſmuch as the Law compels him to take that Concluſion, it ſhall not be double. But here he is not compelled to ſhew that the Rents were behind at both Days, but the ſame Advantage is given for the Rent behind at one Day as for the Rent behind at both Days, and then the ſhewing that the Rent was behind at two Days makes the Plea double, inaſmuch as each of them is anſwerable, as it is ſaid before. For which Reaſon it ſeems to me that the Plaintiff ſhall recover.

[a] M. 20. H. 6. 7. Fitz. Avowry 11. Bro. Double Plea 14. Vin. Abr. tit. Double Plea A. pl. 35.

[b] H. 22. H. 6. 37. pl. 3. Fitz. Continual Claim 2. Bro. Double Plea 51. P. 15. Ed. 4. 22. a. *Per Littleton.* Bro. Ibid. 54. M. 9. H. 4. 5. a. Bro. Ibid. 29. Vin. Abr. tit. Double Plea A. pl. 25. 75. 110.

[c] Same Diverſity M. 19. Ed. 4. 4. pl. 12. *Per Vaviſor et Brian.* Doc. Pla. 140. 1. Finch 181. 2. Finch 393. 394.

[d] M. 33. H. 6. 33. Bro. Double Plea 16.

Catline Serjeant. It ſeems to me to the contrary. And firſt, as I take it in our Caſe, there is a good Reſervation of a Rent. For although there are not here the uſual Words of Reſervation, yet there are Words equivalent in Law thereunto. [g] For in our Law if any Perſons are agreed upon a Thing, and Words are expreſſed or written to make the Agreement, although they are not apt and uſual Words, yet if they have Subſtance in them tending to the Effect propoſed, the Law will take them to be of the ſame Effect as uſual Words; for the Law always regards the Intention of the Parties, and will apply the Words to that which in common Preſumption may be taken to be their Intent. And ſuch Laws are very commendable. For if the Law ſhould be ſo preciſe as always to inſiſt upon a peculiar Form and Order of Words in Agreements, and would not regard the Intention of the Parties when it was expreſſed in other Words of Subſtance, but would rather apply the Intention of the Parties to the Order and Form of Words, than the Words to the Intention of the Parties, ſuch Law would be more full of Form than of Subſtance. But our Law, which is the moſt reaſonable Law upon Earth, regards the Effect and Subſtance of Words more than the Form of them, and takes the Subſtance of Words to imply the Form thereof, rather than that the Intent of the Parties ſhould be void. And the Law takes Words of Subſtance that are rarely uſed to be equivalent to Words of Subſtance that are uſual. [h] And therefore if Tenant for Life and his Leſſor make a Feoffment in Fee by Deed, this is the Feoffment of the Tenant for Life, and the Confirmation of the Leſſor, although there is no Word of Confirmation in the Deed, and this is wrought by the reaſonable Conſtruction of the Law which inclines the Words to the Intention of the Parties, as it may beſt ſtand with Reaſon. Wherefore the Words having Subſtance in them ſhall be there taken to enure as a Confirmation of the Leſſor. And ſo if Tenant for Years and the Leſſor make a Feoffment in Fee, this ſhall be taken for the Livery and Feoffment of the Leſſor, and the Surrender of the Leſſee, and yet there is no Word of a Surrender, but it ſhall be ſo taken in Judgment of Law for the Reaſon above given. [i] So if two Tenants in common grant a Rent-Charge of 20*s.* to a Man out of their Land, this ſhall enure as ſeveral Grants of 20*s.* *viz.* as a Grant of 20*s.* by each of them, ſo that the Grantee ſhall have 40*s.* and yet the Words of the Grant were joint and not ſeveral, but becauſe the Rent iſſues out of their Eſtate which is ſeveral, it ſhall enure accordingly *cauſâ qua ſupra.* So that always where there are Words of Subſtance, the Law appoints how they ſhall enure. [k] And in 9. *H.* 6. it is held, that if a Commoner makes a Deed to the Tenant of the Land, by which he *renounces* his Common to him, this ſhall enure as a *Releaſe* of the Common, and ſo there is a Releaſe without Words of Releaſe, but becauſe the Words are equivalent in Subſtance to Words of Releaſe, therefore the Law takes them as a Releaſe. And ſo in our Caſe here, there are Words of Subſtance of Reſervation of a Rent; for the Land is leaſed by Indenture, and at the ſame time and by the ſame Indenture the Leſſee covenants and grants to render and pay for the Tenements ſuch a Sum, which Words have the Effect and Subſtance of a Reſervation of Rent. For what is the Effect of a Reſervation of Rent upon a Term of Years? As I apprehend it is nothing more than an Agreement between the Leſſor and the Leſſee that the Leſſor ſhall have an annual Sum for the Land, and that the Leſſee ſhall pay it during the Term for the Land. And that is the Effect and Subſtance of a Reſervation, and alſo the Intent of the Parties, and there is no other Effect or Subſtance in the Reſervation; and then if that be the Subſtance of the Matter, what Difference is there when the Leſſor ſaith, "I will have 20*s.* yearly for the Land," and the Leſſee agrees to it, and when the Leſſee ſays, "I will give you 20*s.* yearly for the Land," and the Leſſor agrees to it? Certainly there is no Difference at all. For in Contracts it is not material which of the Parties ſpeaks the Words, if the other agrees to them, for the Agreement of the minds of the Parties is the only Thing the Law

E contra for the Defendant.

[e] Doc. Pla. 136. Poſt 194. (2).

[f] M. 3. H. 6. 4. b. Fitz. Double Plea 23. Bro. 3. P. 1. H. 7. 15. a. *Per Jay.* M. 18. H. 8. 4. a. Kelw. 37. a. *Per Kingſmil.* Doc. Pla. 136. 1. Finch 182. 2. Finch 394. Vin. Abr. tit. Double Plea A. pl. 45.

[g] S. P. Poph. 182. Latch 272. 273.

[h] See ante 59(d) and the Books there cited. Cro. E. 56. 2. Bac. Abr. 282. 661.

[i] Co. Litt. 197. a. 5. Co. 7. b. 10. Co. 106. b. Poph. 204. 2. And. 2. Latch 99. 265. Perk. § 106. 1. Finch 46. 2. Finch 63.

[k] M. 9. H. 6. 35. pl. 8. Fitz. Feoffm. et Faits 5.

Law reſpects in Contracts, and ſuch Words as expreſs the Aſſent of the Parties, and have Subſtance in them, are ſufficient. [a] And therefore in 21. *H.* 6. a Man was bound in an Obligation, which was endorſed that the Obligee *vult et concedit quod ſi infra obligatus ſteterit arbitrio, ordinationi, et judicio A. et B.* that then the Obligation ſhould be void, and there Exception was taken to the Condition, becauſe the Words are the Words of the Obligee and not of the Obligor, but it is there held by the better Opinion to be a good Condition, for there is the Subſtance of a Condition, and the Intent of the Parties appears; and yet the Words there are not the uſual Words of Conditions, for the Words of Conditions are the Words of the Obligor. From whence it appears that Words ſpoken by one ſhall enure as if ſpoken by another, and that one Sort of Expreſſion ſhall enure for another. [b] So a Grant of an Annuity to one *pro conſilio impendendo* is a Grant conditional, for if the Grantee will not give Counſel the Annuity ſhall ceaſe; and altho' there is not any Word of Condition in that Caſe, yet it is all one as if the Grant of the Annuity had been upon Condition that he ſhould give him Counſel. [c] So is the Caſe in 9. *Ed.* 4. where there was a Debate about Tithes between a Prior and another, and a Compoſition was made between them that the Prior ſhould have the Tithes without Challenge or Contradiction of the other, and the Prior granted to the other 40 *s.* yearly, and there by the better Opinion this Grant ſhall enure conditionally, ſo that if the other diſturb the Prior in taking the Tithes, the 40 *s.* ſhall ceaſe for the Reaſon I have ſhewn before. And as in the Caſes recited Words of Covenant or Grant ſhall enure as Words of Condition, ſo in our Caſe Words of Covenant and Grant may enure as a Reſervation, and eſpecially as they are made at one ſame Time, and by Deed indented. [d] And in one Book it is ſaid if a Man makes a Leaſe for Years by Deed, and by the ſame Deed covenants that the Leſſee ſhall not be impeached of Waſt, this Word *(covenant)* made at the ſame Time amounts to as much as if he had ſaid, *habendum* for Years without Impeachment of Waſt. [e] And it ſeems by the Book of 17. *Ed.* 3. that if a Guardian by Deed indented aſſigns to a Woman that is dowable, and to her ſecond Huſband Land of greater Value than the Dower amounts to, and if the Deed recites the ſame, and in reſpect thereof the Huſband and Wife by the ſame Deed grant an annual Sum to the Value of the Overplus to the Guardian with Clauſe of Diſtreſs, there the Wife after the Death of the Huſband ſhall be bound by it, becauſe the Grant to pay the Rent for the Overplus of the Land, being made at the ſame Time that the Dower is aſſigned, ſhall be a good Reſervation of Rent, for otherwiſe the Wife ſhould not be bound by it after the Death of her Huſband. So by like Reaſon in our Caſe the Covenant and Grant to pay the Sum yearly, being made at the Time of the Leaſe, ſhall be a Reſervation of Rent. But in the ſaid Caſe of 17. *Ed.* 3. before alledged, the Deed was that the Guardian aſſigned the ſaid Land to the ſaid Huſband and Wife as the reaſonable Dower of the Wife, and did not make Mention that the Land was of greater Value than the Dower, and for this Reaſon it is there adjudged that the ſaid Grant ſhall not bind the Wife, becauſe the Grant is a collateral Thing not granted upon any Conſideration, for the Deed expreſſed that the Land was aſſigned as the reaſonable Dower, and therefore the Grant is there collateral; and ſo ſhould it be in our Caſe if the Sum was to be paid to a Stranger, or if it was to be paid for another Thing than for the Land. Wherefore there ſeems to me to be a good Diverſity between Words enuring upon Acts between the Parties concerning the principal Matter, and concerning a Matter collateral. And ſo (as I ſaid) the Clauſe of the Covenant and Grant of the Leſſee to pay the Sum for the Land contains in itſelf the Subſtance of a Reſervation, and being by Indenture between the ſame Parties, and at the ſame Time with the Leaſe itſelf, it ſhall be adjudged in Law a good Reſervation of Rent, and to iſſue out of the Land, and then it ſhall be a good Condition. But admitting it is not a Rent but a Sum in groſs, yet the Condition ſhall be good, for theſe Words, viz. *if it ſhall happen the ſaid annual Rent and Farm of 37 l. 3. s. 4 d. be in Arrear &c.* ſhall be taken in Judgment of Law to be of the ſame Effect as if it had been ſaid, *if the ſaid annual Sum of 37 l. 3 s. 4. d.* be in Arrear, for the Certainty of the Sum is expreſſed, and then to call a Sum certainly recited a Rent, when it is no Rent but a Sum in groſs, ſhall not make the Matter bad in itſelf, but this Word *(Rent)* ſhall be taken according as it was intended, and that is a Sum, for if the Words *(Rent and Farm)* had been omitted, and the reſt of the Sentence had ſtood, viz. *if it ſhall happen the ſaid 37 l. 3 s. 4 d. be in Arrear, that then, &c.* this Clauſe would have been good and perfect. And then when the Certainty itſelf is expreſſed, and it is called a Rent where it is none in Fact, the Law will adjudge the Word *(Rent)* to be void, rather than the Certainty expreſſed ſhould be void, or it will conſtrue the Word (*Rent*) to be intended for (*the ſaid Sum*), and ſo will have Regard to the Intent of the Parties, and adjudge according to it. [f] And therefore in 4. *Ed.* 4. *J. S.* bound himſelf to the Obligee in 20 *l.* and the Obligation was thus, *Noverint univerſi per præſentes me J. S. teneri et obligari W. B. in* 20 *l. ſolvendum eidem J. &c.* yet the Obligation was there taken to be good, and the Court held that the Plaintiff ſhould declare on a *ſolvendum* to himſelf; for the Intent of the Parties appears, and the Certainty of the Bond before ſhall not be taken away by the *ſolvendum* after. [g] So if one has a Remainder of Land in him, and he grants it to another by the Name of a Reverſion, this ſhall be a good Grant, for there the Certainty of the Land appears, and then notwithſtanding the *Miſnomer* of the Thing, the Law regards the Intent of the Parties, and adjudges according to it. [h] So if I am bound to pay you 20 *s.* at the Feaſt of *St. Michael* which ſhall be in the Year of our Lord 1755, and at the ſame Feaſt of *St. Michael* next following

[a] T. 21. H. 6. 51. Fitz. Bar. 157. Bro. Condition 58. 1. Leon. 246. *per Haughton J.*

[b] See Ante 134. (g) and the Books there cited.

[c] T. 9. Ed. 4. 19. 22. a. Fitz. Aſſize 30. Bro. Condition 61. Co. Litt. 204. a. 1. Rol R. 121. Sed Contra Dy. 336. pl. 34. Hob. 42.

[d] P. 21. H. 6. 47. Bro. Bar. 30. Waſt 89. in fine Vide M. 4. Ed. 4. 35. 36.

[e] H 17. Ed. 3. 9, 10. pl. 33. Fitz. Avowry 95.

[f] M. 9. Ed. 4. 29. pl. 9. Fitz. Debt 77. Obligation 7. Bro. Obligation 47. P. 21. Ed. 4. 36. b. *per Vavaſor.* Bro. Ibid. 58. Condition 172. 4. Leon. 248. Godb. 198. 1. Rol. R. 58. 1. Sid. 295. 2. Sid. 70. 6. Mod. 228. Ld. Raym. 1043. 1. Finch. 36. 2. Finch 52. Vin. Abr. tit. Obligation N. pl. 2, 3.

[g] See Ante 134. (d) and the Books there cited. Poſt 157 (h) 170 (f).

[h] See like Matter Plowd. Quær. § 174.

following other 20 *s.* there the Law will adjudge the *ſame* Feaſt to be intended the *like* Feaſt, for it cannot be the *ſame* Feaſt if it comes afterwards, but it ſhall be taken for the *like* Feaſt. Wherefore the Law will take one Word for another to ſupply the Intent of the Parties. And ſo in our Caſe where the Words are, *if it ſhall happen that the ſaid annual Rent and Farm of* 37 *l.* 3 *s.* 4 *d. be in Arrear*, it ſhall be taken for the ſaid *Sum* of 37 *l.* 3 *s.* 4 *d.* if it is not a Rent in Fact.

[a] Littlet. § 345. Ante 135 (a).

[a] And ſo *Littleton* ſays, as it is before cited; which Caſe and our Caſe are all one in Effect. And it cannot be taken in any other Manner, for the Certainty of the Sum is expreſſed, and then if it be not a Rent in Deed, either the Clauſe muſt of Neceſſity be void, or the one Word ſhall enure for the other; and to make it void would be unreaſonable where there is ſuch a Certainty of every Penny of the Sum. But where the Words are ſpoken generally, and don't particularly ſpecify the Matter, the Law will enure otherwiſe. As in the Caſe before put where one has a Remainder of Land in him, and he grants to another the Reverſions of all his Lands, there the Remainder ſhall not paſs, becauſe the Grant is in general Terms, and therefore it cannot be taken that it was his Intent to grant the Remainder of the Land, and alſo there the Grant may take Effect otherwiſe, viz. as to the Remainder only, and therefore it ſhall not make the Remainder to paſs. And ſo in our Caſe if it had been contained in the Deed thus, viz. *if it ſhall happen that all or any of the Rents which the Leſſee ought to pay to the Leſſor be in Arrear at the Day of Payment, that then the Leaſe ſhall be void*, there (admitting it is not a Rent in Fact) I would agree that the Clauſe might not enure to make the Leaſe void for the Sum in groſs, for there is not any Specialty or Certainty, but *all or any of the Rents*. But here the Words are, *if it ſhall happen that the ſaid annual Rent and Farm of* 37 *l.* 3 *s.* 4 *d. be in Arrear*, &c. ſo that it expreſſes the Certainty of the Sum, and therefore of Neceſſity it ought to enure as if it had been ſaid, *if it ſhall happen that the ſaid Sum of* 37 *l.* 3 *s.* 4 *d. be in Arrear*, and in no other Manner can it enure. Wherefore there ſeems to me to be a good Diverſity between general Words which comprehend no Sort of Certainty, and Words that recite the Specialty and Certainty of the Matter. And ſo in our Caſe the Clauſe being ſpecial and containing Certainty is good, and makes the Leaſe void notwithſtanding the ſaid Exception.

[b] Vide 1. Leon. 246. S. P. cited *per Haughton* J. to be a Condition.

[b] Further, it ſeems to me to be a Condition here, notwithſtanding it is not made by the Words of the Leſſors. For (as I have ſaid before) the Words ſhall be conſtrued according to the Intention of the Parties, where it is directed to a ſpecial Purpoſe. And ſuch Words as intimate and imply the Intent of the Parties to be conditional are ſufficient to make a Condition as well as the uſual Words.

[c] Litt. R. 136. 1. Finch 43. 2. Finch 60.

[c] And therefore if a Man makes a Feoffment *ad ſolvendum* 20 s. at ſuch a Time, this is a Condition, for the Matter ſhews that the Intent of the Feoffor was to have the 20 s. for the Land.

[d] Litt. R. 136. 1. Finch. 43. 2. Finch. 60.

[d] So if a Man makes a Feoffment in Fee to one *ad erudiendum* his Son in ſuch an Art, this is a Condition, becauſe the Words purport ſuch Intent, and therefore they are conditional altho' they are not the uſual Words. So a *Proviſo* that the Leſſee or Feoffee do ſuch an Act is a Condition, and yet it is not ſpoken by the Leſſor or Feoffor any more than by the Leſſee or Feoffee; but becauſe the Word purports the Intent of the Parties to be ſo, it ſhall enure as a Condition. So in our Caſe the Covenant and Grant by the Leſſee that the Demiſe ſhall be void being made by the Leſſee, to which the Leſſors agreed, ſhall enure by Law as a Condition, or in what Manner ſoever it be termed it ſhall enure as a Determination of the Leaſe, inaſmuch as it was made at the ſame Time when the Leaſe commenced. Further, it ſeems to me that the Leaſe is void without Entry.

[e] Ante 136 (a).

[e] For a Leaſe for Years may be made by Parol without other Circumſtance, and by the ſame Reaſon it may be diſſolved by Parol without Entry or other Circumſtance.

[f] See Ante 135. (e) and the Books there cited.

[f] But if it had been an Eſtate that requires Livery and Seizin, then an Entry ſhould be requiſite, becauſe an Eſtate of Freehold cannot commence by Parol without other Circumſtance, and therefore ſhall not be defeated by Parol without other Circumſtance, viz. Entry. But here in our Caſe the Leaſe made by Parol is defeated by the ſaid Agreement preſently without Entry.

[g] S. P. 1. Finch 309, 310. Ante 138. (a)

[g] But yet without Entry the Leſſors ſhall not have an Action of Treſpaſs; however this does not prove but that they may make a Leaſe before Entry.

[h] Vin. Abr. tit. Entry G. 4. pl. 1. Ante 137 (f)

[h] For if Land deſcends to the Heir, before his Entry he may make a Leaſe; and yet he ſhall not have [i] an Action of Treſpaſs before Entry. And if a Man makes a Leaſe to another to commence at the Feaſt of *St. Michael*, before the ſaid Feaſt the Leſſee may grant [k] the Leaſe over, and yet he ſhall not have an [l] Action of Treſpaſs before Entry. Therefore a Man may grant or leaſe Land in ſuch Caſes where he may not have an Action of Treſpaſs before his Entry. So ſhall it be in our Caſe, that is to ſay, the ſecond Leaſe made before Entry ſhall be good, altho' the Leſſors ſhould not have an Action of Treſpaſs. And as to the Form of the Rejoinder, Sir, it is not double. For the Record is, *if it ſhall happen the ſaid annual Rent and Farm of* 37 *l.* 3 *s.* 4 *d. or any Part thereof be in Arrear and unpaid in Part or in all according to the Times aforeſaid, that is to ſay, if the Moiety of the ſaid annual Rent be in Arrear and unpaid by the Space of two Months next following the Feaſt of* Mary *the Virgin, and the other Moiety of the ſaid Rent be in Arrear and unpaid by the Space of ſix Weeks next following the Feaſt of* St. Michael, *that then*, &c. So that if the Clauſe be well conſidered it will appear that the Leaſe ſhall not be void for the Rent behind at one Day, as *Mr. Recorder* recited the Caſe to be, but if the Rent be behind at both the Days it ſhall be void, or elſe not. And therefore it is incumbent upon us to ſhew that the Rent was behind at both the Days in order to avoid the Leaſe. As if one grants to me that if I pay him 20 s. at *Michaelmas*, and 20 s. at *Chriſtmas*, then an Obligation made by me to him ſhall be void, there if I would avoid the Obligation I ought to ſhew that I have paid 20 s. at each of the Days, and it ſhall not be double. No more

[k] M. 22. Ed. 4. 37. pl. 20. Bro. Grants 110. Co. Litt. 46. b. 270. b. 5. Co. 124. b. Cro. E. 15. pl. 4. 127. pl 8. Cro. J. 60. 1. Finch 309. 310. 3. Bac. Abr. 436. Poſt. 423. (f).

[l] P. 37. H. 6. 18. a. Bro. Surrender 21. Kelw. 163. a. 1. Finch 309, 310. 3. Bac. Abr. 423. Vin. Abr. tit. Entry G. 4. pl. 7.

ſhall

ſhall it in the principal Caſe. And ſo the Caſe is not as Mr. *Recorder* recited it to be, nor is it like any of the Caſes put by him. Wherefore the Plea is ſingle enough. But it ſeems to me that there is a Fault in the Plaintiff's Declaration. For the Treſpaſs is aſſigned to be done the *third* Day of *July anno* 1. *Edw.* 6. and the detaining the Plaintiff out of Poſſeſſion is aſſigned until the *ſecond* Day of *June*, *Anno* 7. *Edw.* 6. and it appears by the Plaintiff's own ſhewing in his Replication that his Leaſe was ended at *Michaelmas Anno* 5. *Edw.* 6. For he has ſhewn that the Leaſe was made for 20 Years to be accounted from the Feaſt of *St. Michael Anno* 23. *H.* 8. then next following; which Leaſe ended *Anno* 5. *Edw.* 6. and then to alledge the Continuance of the Treſpaſs until the *ſecond* Day of *June Anno* 7. *Edw.* 6, cannot be good, for his Eſtate by his own ſhewing was ended before. Wherefore it ſeems to me that the Rejoinder is good, and the Declaration bad.

Afterwards in *Michaelmas* Term 1 & 2. *Philip* and *Mary*, *Ramſey* argued again, and *Catline* Serjeant anſwered him. And in *Hillary* Term next following *Ramſey* argued again, and *Catline* then anſwered him again; but becauſe their Arguments were much to the ſame Effect with their former Arguments before reported, for this Reaſon as well as to avoid tiring the Reader's Patience with the Length of the Arguments, I have omitted the Report of them here. And after this laſt Argument, *Bromley* Chief Juſtice in the ſame *Hillary* Term ſaid that there were two Faults in the Rejoinder, which were not moved by the Counſel, and which he ſaid were incurable, and ſo ſaid the other Juſtices. The firſt was, in that the Subſtance of the Rejoinder is to ſhew the firſt Leaſe to be void and determined; and the Matter to prove it is in the Clauſe by which it is covenanted and granted that if the Rent was behind, *ut ſupra*, the Leaſe ſhould be void; which Clauſe is not recited in Fact to be a Covenant or Grant, but it is ſhewn only by way of Recital. [a] For it is ſhewn in this Manner, viz. *in the ſaid Indenture made to the Plaintiff it is contained, that if it ſhall happen the ſaid Rent be in Arrear, &c. the ſaid* Browning *covenanted and granted that the ſaid Demiſe ſhould be extinct, &c.* which ſaying that *it is contained in the ſaid Indenture* is only pleaded by way of Recital. For it is not a preciſe Allegation or Affirmation that the ſaid *Browning* did covenant and grant that if the Rent was in Arrear the Leaſe ſhould be void, but it is an Affirmation that the Indenture ſays ſo, and the Party himſelf ought to ſay that it is ſo, and not ſay that the Indenture ſays ſo, or that it is contained in the Indenture that it is ſo, for ſuch Allegation is but a Report of the ſaying of another, viz. that the Indenture ſays ſo. And it might juſtly be ſaid to him, "You ſay that the Indenture ſays ſo, but what ſay you?" for to ſay, it is contained in the Indenture that it is covenanted and granted, and to ſay, that it is covenanted and granted by the Indenture, are two Things. For the ſaying that it is contained in the Indenture is not an Affirmation of the Thing which is mentioned to be contained in the Indenture. [b] As in 21. *Ed.* 4. where the Abbot of *Waltham* was appointed Collector of a Tithe granted to the King, and in Diſcharge thereof he pleaded in the Exchequer, that *inter recorda de termino Paſchæ anno* 15. *Ed.* 4. *inter alia continetur*, that King *Richard* 2. granted to the Predeceſſor of the Abbot, that neither he nor any of his Succeſſors ſhould be Collectors of any Tithe afterwards to be granted, and there it is adjudged that this Plea pleaded by *inter alia continetur* was not ſufficient to diſcharge him for the Reaſon before ſhewn. So in the Caſe here. [c] But in our Caſe if the Indenture had been inrolled *de verbo in verbum*, then it would have been ſufficient to have ſaid *ut ſupra*, for by the Inrollment it would have appeared to the Juſtices judicially, and then the ſaying that *it is contained in the Indenture* is a putting them in mind of a Thing which appears to them of Record. But as it is alledged here it is no good Plea. The ſecond Fault was in this, viz. where the Clauſe is, *that if the one Moiety of the Rent be in Arrear and unpaid after two Months next following the Feaſt of* St. Mary, *and the other Moiety be in Arrear and unpaid after ſix Weeks next following the Feaſt of* St. Michael, *&c. that then, &c.* the Defendant in the Rejoinder (in order to make the Leaſe void) has pleaded that one Moiety of the Rent was in Arrear at the Feaſt of *St. Mary*, and by the Space of two Months next following the ſame, and that the other Moiety was in Arrear at the Feaſt of *St. Michael*, and by the Space of ſix Weeks next following; and ſo he has not directly affirmed the Rent to be in Arrear for the Time limited in the Indenture. For the Indenture is, if it be in Arrear *after two Months*, and he ſays that it was in Arrear *by the Space of two Months*, [d] which is not a direct Affirmation that it was in Arrear *after two Months*, but by Implication only, and ſo argumentatively, and not otherwiſe. For which Reaſon the Rejoinder is inſufficient.

And now this *Michaelmas* Term in the *ſecond* and *third* Years of the Reign of King *Philip* and Queen *Mary*, *Ramſey* argued for the Plaintiff, and *Richard Catline* Serjeant for the Defendant, as to theſe two laſt Exceptions only. And *Catline* ſaid that the Pleading of the Condition by the *continetur* here is well enough ſince the Indenture was recited by the Plaintiff in the Replication. But if the Defendant had pleaded by *continetur* in an Indenture whereof no mention was made before, it would not have been ſufficiently pleaded. As in the ſaid Caſe of 21. *Ed.* 4. And as to the other Exception he argued, that it is not poſſible for the Rent to be in Arrear *by the Space of* two Months, but therein it muſt be in Arrear *after* two Months: for it cannot poſſibly be paid between the laſt Part of the two Months, and before the Commencement of the Time afterwards, for the Times are connected together ſo cloſely that there is not Time enough between them

Mich. and *Hill. Terms* 1 & 2. *P. & M.*

Bromley C. J.

[a] Vide Winch 28. Hob. 13. 2. Rol. R. 170. Cro. C. 188. 1 Keb. 214. 1 Saund. 275. Lutwy. 1342. Heath's Max. 162.

[b] M. 21. Ed. 4. 49. Bro. Pleadings 110. Winch 28. Ante 126(a).

[c] Heath's Max. 162.

[d] S. P. *Wood v. Hamſtead* Cro. E. 262.

Mich. Term 2 & 3. *P. & M.*

them for the Payment of the Money, and then the ſaying that it was in Arrear *by the Space of* two Months proves in itſelf preciſely and without Implication that it was in Arrear *after* two Months, for there is no Poſſibility to the contrary. [a] And ſuch Pleas as don't anſwer the direct Words, but contain the Matter by neceſſary Conſequence are ſufficient in Law. [b] As in Debt upon Arrearages of Account it is a good Plea to ſay *nul tiel Account*, for if there was no ſuch Account, it neceſſarily follows that he does not owe him the Money thereupon. And he put ſeveral other Caſes on this Head. But *Portman* now Chief Juſtice, and the other Juſtices took the ſaid two Exceptions to be effectual for the Cauſes ſhewn before, and that the Rejoinder was vicious by Reaſon thereof. Wherefore they ſaid it was in vain for them to argue the other Matters in Law ariſing upon the Rejoinder, foraſmuch as the Rejoinder ſeemed clearly to them to be bad for the ſaid two laſt Reaſons. And therefore in regard of them only, without reſpect to the other Matters ariſing upon the Rejoinder and before debated, they gave Judgment as appears by the reſt of the Record hereunder written.

[a] S. P. Heath's Max. 67.

[b] H. 21. H. 7. 14. a. *per Read*,

The reſt of the ſaid ſecond Record.

At which Day before the Lord the King and Lady the Queen at *Weſtminſter* came as well the aforeſaid *John Browning* as the aforeſaid *William Beſton* by their Attornies aforeſaid. Whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the Lord the King and Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, it ſeems to the Court of the Lord the King and Lady the Queen here, that the Plea aforeſaid in Manner and Form aforeſaid pleaded is inſufficient in Law to preclude the aforeſaid *John Browning* from having his Action aforeſaid againſt the ſaid *William Beſton*, by Reaſon whereof the ſame *John Browning* ought to recover his Damages on Account of the Treſpaſs aforeſaid: But becauſe it is unknown to the Court of the Lord the King and Lady the Queen here what Damages the aforeſaid *John Browning* hath ſuſtained as well by Reaſon of the Treſpaſs aforeſaid as for his Coſts and Charges by him about his Suit in this Behalf laid out, it is commanded to the Sheriff that by the Oath of good and lawful Men of his Bailiwick he ſhould diligently inquire what Damages the aforeſaid *John Browning* hath ſuſtained as well by Reaſon of the Treſpaſs aforeſaid, as for his Coſts and Charges by him about his Suit in this Behalf laid out: And that Inquiſition ſo by him diſtinctly and plainly taken under his Seal, &c. and the Seals, &c. he ſhould return to the Lord the King at *Weſtminſter* on *Monday* the Morrow of the *Purification* of the bleſſed *Mary*, together with the King's Writ thereupon to him directed. The ſame Day is given to the aforeſaid *John Browning* there, &c. At which Day before the Lord the King and Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid: And the Sheriff, viz. *William Saunders* Eſquire returned a certain Inquiſition taken before him by virtue of the Writ aforeſaid at *Southwark* the laſt Day of *January* in the *ſecond* and *third* Years of the Reign of the ſaid Lord the King and Lady the Queen now, by which it appears that the aforeſaid *John Browning* has ſuſtained Damages by Reaſon of the Treſpaſs aforeſaid, beſides his Coſts and Charges by him about his Suit in this Behalf laid out, to the Amount of 60 *l.* and for his Coſts and Charges 20 *s.* Therefore it is conſidered that the aforeſaid *John Browning* recover againſt the aforeſaid *William Beſton* his Damages aforeſaid by the Inquiſition aforeſaid found. And that the ſame *William Beſton* be taken, &c.

A Rt-

A Report of a Caſe argued in the Common Bench *before the Juſtices of the ſame Bench in* Michaelmas *Term in the* ſecond *and* third *Years of the Reign of King* Philip *and Queen* Mary, *upon a Writ of* ſecond Deliverance *brought by* John Throckmerton *Eſquire one of the Maſters of the Court of Requeſts Plaintiff, againſt* Richard Tracy *Eſquire and* William Nicholſon *Defendants. And it was debated in ſeveral Terms afterwards, as is hereafter ſhewn. And the Record was as follows.*

Mich. Term. 2 & 3. *P. & M. Rot.* 436. *Glouceſt.*

RICHARD Tracy Eſquire and *William Nicholſon* were attached by Writ of the Lady the Queen of *ſecond Deliverance* to anſwer *John Throckmerton* of a Plea, wherefore they took the Cattle of the ſaid *John*, and them unjuſtly detained againſt Gages and Pledges, *&c.* And whereupon the ſame *John* by *William Underhill* his Attorney complains that the aforeſaid *Richard* and *William* the 26th Day of *March* in the 7*th* Year of the Reign of Lord *Edward* late King of *England*, the *ſixth* from the Conqueſt, at *Beckford*, in a certain Place called *Didcote*, took the Cattle, *viz.* 400 Sheep of the ſaid *John*, and them unjuſtly detained againſt Gages and Pledges, until *&c.* wherefore he ſays that he is damnified and has Damage to the Value of 40*l.* And thereupon he produces the Suit, *&c.*

Declaration. Same Precedent Raſt. Entr. 572. a. pl. 6.

And the aforeſaid *Richard* and *William* by *Richard Lone* their Attorney come and defend the Force and Injury when, *&c.* And the ſame *Richard* in his own proper Right well avows, and the ſame *William* as Bailiff of the ſame *Richard* well acknowledges the taking of the Cattle aforeſaid in the aforeſaid Place where, *&c.* and juſtly, *&c.* becauſe they ſay that the ſame Place where the taking of the Cattle aforeſaid is ſuppoſed to be done contains, and at the Time aforeſaid when the taking of the ſaid Cattle is ſuppoſed to be done, did contain in itſelf 100 Acres of Land with the Appurtenances in *Beckford* aforeſaid, whereof long before the Time aforeſaid when, *&c.* and at the ſame time when, *&c.* the ſame *Richard* was ſeized in his Demeſn as of Fee. And becauſe the Cattle aforeſaid at the ſame time when, *&c.* were in the aforeſaid Place where, *&c.* eating up the Graſs then growing there, and doing Damage there, the ſame *Richard* in his own proper Right well avows, and the aforeſaid *William* as Bailiff of the ſame *Richard* well acknowledges the taking of the Cattle aforeſaid in the Place aforeſaid where, *&c.* and juſtly, *&c.* for the Damage ſo done there, *&c.*

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And the aforeſaid *John* ſays, that neither the aforeſaid *Richard* for the Reaſon before alledged ought to avow, nor the aforeſaid *William* for the ſame Reaſon, as Bailiff of the ſame *Richard*, ought to acknowledge as juſt the taking of the Cattle aforeſaid in the aforeſaid Place where, *&c.* becauſe he ſays, that long before the aforeſaid *Richard* had any Thing in the aforeſaid 100 Acres of Land, one *Henry* late Abbot of the late Monaſtery of the bleſſed Virgin *Mary* of *Tewkſbury* in the aforeſaid County of *Glouceſter*, was ſeized of one Meſſuage and of the aforeſaid 100 Acres of Land with the Appurtenances amongſt other Things in *Beckford* aforeſaid, in his Demeſn as of Fee, in Right of his late Monaſtery aforeſaid. And being ſo ſeized thereof, the ſame late Abbot, by the unanimous Aſſent and Conſent of the ſame late Monaſtery and Convent, before the aforeſaid Time of the taking the Cattle aforeſaid, by his Deed (ſealed with the common Seal of the ſaid late Abbot and Convent) demiſed the Tenements aforeſaid with the Appurtenances amongſt other Things to one *John George*, *Dorothy* his Wife, and *Joan* the Daughter of the ſame *John* and *Dorothy*, to have to them for Term of their Lives, and of the longeſt Liver of them. By virtue of which Demiſe the ſame *John George*, *Dorothy*, and *Joan* were thereof ſeized in their Demeſn as of Freehold, the Reverſion of the ſame belonging to the aforeſaid late Abbot and his Succeſſors; and the ſaid *John George*, *Dorothy*, and *Joan* being ſo ſeized of the Tenements aforeſaid with the Appurtenances amongſt other Things, and the ſame late Abbot of the Reverſion thereof as of Fee and Right in Form aforeſaid, the ſame late Abbot, by the Name of *Henry* Abbot of the Monaſtery of the bleſſed Virgin *Mary* of *Tewkſbury*, and the Convent of the ſame Place, by the unanimous Aſſent and Conſent of the ſame late Monaſtery and the then Convent, afterwards and before the aforeſaid Time when, *&c. viz.* the 20th Day of *September* in the 17th Year of the Reign of Lord *Henry* the *Eighth* late King of *England*, at *Tewkſbury* aforeſaid, by his certain Writing indented, (one Part whereof ſealed with the common Seal of the ſaid late Abbot and Convent, the ſame *John Throckmerton* brings here into Court, the Date whereof is the ſame Day and Year,) delivered, granted, and to Farm let to one *John Smith* Citizen and Clothier of *London*, and *Margaret* his Wife, the Tenements aforeſaid with the Appurtenances amongſt other Things by the Name of the Reverſion of all and ſingular the Meſſuages, Lands, Tenements, Meadows, and Paſtures of the ſaid Abbot and Convent in *Didcote* in the County of *Glouceſter*, with all and ſingular their Appurtenances, together with the Chapel there being, (all which *John George*, *Dorothy* his Wife, and *Joan* their Daughter then held for Term of their Lives and of the longeſt Liver of them) to have and to hold the aforeſaid Meſſuages, Lands, Tenements, Meadows, and Paſtures, together with the Chapel, with their Appurtenances to the ſame *John Smith* and *Margaret*, and their Aſſigns, from the Feaſt of *St. Michael* the Archangel next coming after the Death, Surrender, or Forfeiture of the aforeſaid *John George*, *Dorothy* his Wife, and *Joan* their Daughter, or whenſoever by any other Means the Reverſion aforeſaid ſhould fall, until the End of the Term of 21 Years from thence next following, and fully to to be compleat. By Force whereof the ſame *John Smith* and *Margaret* were poſſeſſed of ſuch Intereſt and Term aforeſaid of and in the Tenements aforeſaid with the Appurtenances, and the ſaid *John Smith* and *Margaret* being ſo thereof poſſeſſed, the aforeſaid *Dorothy* and *Joan* di-d, and the aforeſaid *John George* ſurvived them, and held himſelf in the Tenements aforeſaid, and was thereof ſole ſeized in his Demeſn as of Freehold by Right of Survivorſhip. And afterwards

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wards the aforeſaid *John Smith* and *Margaret* being ſo poſſeſſed of the Intereſt and Term aforeſaid of and in the Tenements aforeſaid with the Appurtenances aforeſaid amongſt other Things, the ſame *John Smith*, before the aforeſaid Time when, *&c. viz.* the 10th Day of *October* in the 29th Year of the Reign of the aforeſaid Lord *Henry* the *Eighth* late King of *England*, at *Tewkſbury* aforeſaid, granted amongſt other Things his whole Eſtate, Term, and Intereſt which he then had to come of and in the Tenements aforeſaid with the Appurtenances to one *William Cartwright* the younger, and to *Henry Cartwright*. By Force whereof the ſame *William* and *Henry* were of the ſaid Intereſt and Term of and in the Tenements aforeſaid with the Appurtenances poſſeſſed, and being ſo thereof poſſeſſed, and the ſaid *John George* being ſeized of the Tenements aforeſaid with the Appurtenances amongſt other Things for Term of his Life, the Reverſion in Fee-ſimple thereof belonging to the aforeſaid late Abbot and his Succeſſors, the ſame late Abbot and the then Convent of the ſame Place, by their unanimous Aſſent and Conſent, afterwards and before the aforeſaid Time when, *&c. viz.* the *9th* Day of *January* in the *31ſt* Year of the Reign of the aforeſaid Lord *Henry* the *Eighth* late King of *England*, by their Writing ſealed with their common Seal, and inrolled of Record in the Court of *Chancery* of the ſame late King *Henry* the *Eighth*, gave, granted, and freely ſurrendered the aforeſaid Reverſion of the Tenements aforeſaid with the Appurtenances amongſt other Things to the aforeſaid late King *Henry* the *Eighth*, to have and to hold to the ſame late King *Henry* the *Eighth* his Heirs and Succeſſors for ever. By reaſon of which ſaid Gift, Grant, and Surrender, the ſame late King *Henry* the *Eighth* was of the aforeſaid Reverſion in Fee ſimple of the Tenements aforeſaid with the Appurtenances amongſt other Things ſeized as of Fee and Right. And afterwards and before the aforeſaid Time when, *&c. viz.* the *6th* Day of *June* in the *34th* Year of the Reign of the aforeſaid Lord *Henry* the *Eighth* late King of *England*, the aforeſaid *John George* at *Tewkſbury* aforeſaid in the County aforeſaid died; after whoſe Death, *viz.* on the Morrow of *St. Michael* the Archangel then next following, that is, the laſt Day of *September* in the aboveſaid *34th* Year of the Reign of the ſaid Lord *Henry* the *Eighth*, the ſame *William Cartwright* and *Henry* into the Tenements aforeſaid with the Appurtenances entered, and were thereof poſſeſſed for Term of the aforeſaid 21 Years to the aforeſaid *John* and *Margaret* in Form aforeſaid granted, the Reverſion thereof in Form aforeſaid belonging to the aforeſaid late King *Henry* the *Eighth* and his Heirs. And afterwards the ſame late King *Henry* the *Eighth*, being ſeized in Form aforeſaid of the Reverſion of the Tenements aforeſaid with the Appurtenances, by his Letters-patent, the Date whereof is at *Weſtminſter* the *14th* Day of *October* in the *36th* Year of his Reign, gave and granted the aforeſaid Reverſion of the Tenements aforeſaid with the Appurtenances to the aforeſaid *Richard Tracy*, to have to him and his Heirs for ever. By reaſon of which ſaid Letters-patent the ſame *Richard* was ſeized in his Demeſn as of Fee of the aforeſaid Reverſion of the Tenements aforeſaid with the Appurtenances, and the ſame *Richard* being ſo ſeized in Form aforeſaid of the Reverſion aforeſaid, and the aforeſaid *William Cartwright* and *Henry* being poſſeſſed in Form aforeſaid of the Tenements aforeſaid with the Appurtenances amongſt other Things, the ſame *William Cartwright* and *Henry* afterwards and before the aforeſaid Time when, *&c. viz.* the *6th* Day of *May* in the *6th* Year of the Reign of Lord *Edward* the *Sixth* late King of *England*, at *Coughton* in the County of *Warwick*, granted all their Eſtate, Term, and Intereſt which they then had to come of and in the Tenements aforeſaid with the Appurtenances amongſt other Things to the aforeſaid *John Throckmerton*. By virtue of which Grant the ſame *John* into the Tenements aforeſaid with the Appurtenances before the aforeſaid Time when, *&c.* entered, and was thereof poſſeſſed, and being ſo thereof poſſeſſed, afterwards and before the aforeſaid Time when, *&c.* put his Cattle aforeſaid into the aforeſaid Place where, *&c.* to eat up the Graſs then growing there; and the Cattle aforeſaid the ſame Time when, *&c.* were in the aforeſaid Place called *Didcote* eating up the Graſs then growing there, until the aforeſaid *Richard* and *William*, the ſame Time when, *&c.* at *Beckford* aforeſaid, took the Cattle aforeſaid in the aforeſaid Place where, *&c.* and the ſame unjuſtly detained againſt Gages and Pledges until, *&c.* as the ſame *John Throckmerton* above complains againſt them. And this he is ready to verify, wherefore for that the ſame *Richard* and *William* have above confeſſed the taking of the Cattle aforeſaid in the aforeſaid Place where, *&c.* he prays Judgment, and his Damages by Reaſon of the taking and unjuſt Detention of the ſaid Cattle to be adjudged to him, *&c.*

Defendants pray *Oyer.*

And the aforeſaid *Richard Tracy* and *William Nicholſon* pray *Oyer* of the aforeſaid Writing indented by the aforeſaid late Abbot with the unanimous Aſſent and Conſent of the Convent of the ſame late Monaſtery to the aforeſaid *John Smith* and *Margaret* his Wife of the Tenements aforeſaid made. And it is read to them in theſe Words. " This Indenture made the *20th* Day of the " Month of *September*, in the *17th* Year of the Reign of King *Henry* the *Eighth*, between *Henry* " by divine Permiſſion Abbot of the Monaſtery of the bleſſed Virgin *Mary* of *Tewkſbury*, and " the Convent of the ſame Place of the one Part, and *John Smith* Citizen and Clothier of *London*, and *Margaret* his Wife of the other Part, witneſſeth, that the aforeſaid Abbot and Convent by their unanimous Aſſent and Conſent have delivered, granted, and to Farm-let to the " ſame *John* and *Margaret* the Reverſion of all and ſingular the Meſſuages, Lands, Tenements, " Meadows, and Paſtures of them the ſaid Abbot and Convent in *Didcote* in the County of " *Glouceſter*, with all and ſingular their Appurtenances, together with the Chapel there being, " all which *John George*, *Dorothy* his Wife, and *Joan* their Daughter now hold for Term of their " Lives, and of the longeſt Liver of them (the Goods and Chattels of Felons, Fugitives, Felons " of themſelves, and Perſons put in Exigent, condemned, outlawed, Waifs and Eſtrays, and all " other

" other Eſcheats whatſoever happening to the aforeſaid Abbot and Convent and their Succeſſors, " altogether excepted and reſerved) to have and to hold the aforeſaid Meſſuages, Lands, Te- " nements, Meadows, and Paſtures, together with the Chapel, with all their Appurtenances, " (except as before excepted) to the aforeſaid *John Smith*, *Margaret* his Wife, and their Aſſigns, " from the Feaſt of *St. Michael* the Archangel next to come after the Death, Surrender, or For- " feiture of the aforeſaid *John George*, *Dorothy* his Wife, and *Joan* their Daughter, or whenſo- " ever in any other Manner the Reverſion aforeſaid ſhall fall, unto the End of the Term of " 21 Years from thence next following, and fully to be compleat. Yielding therefore yearly to " the aforeſaid Abbot and Convent and their Succeſſors or Aſſigns ſeven Pounds *Sterling*, and " two Shillings for a Pittance of the Convent, to be paid at the uſual Terms there by equal Por- " tions, *&c.* In Witneſs whereof the Parties aforeſaid to theſe Preſents have interchangeably " put their Seals. Given in the Chapter-houſe of the Monaſtery aforeſaid the Day and Year above written." Which being read and heard, the ſame *Richard Tracy* and *William Nicholſon* ſay that the aforeſaid Plea of the aforeſaid *John Throckmerton* upon the aforeſaid Writing indented to the Avowry of the ſaid *Richard*, and Cognizance of the aforeſaid *William*, in Manner and Form aforeſaid above in Bar pleaded, is inſufficient in Law to preclude them the ſaid *Richard* and *William* from having their Avowry and Cognizance aforeſaid againſt the aforeſaid *John Throckmerton*, and that they have no Neceſſity, nor are by the Law of the Land bound to anſwer that Plea in Manner and form aforeſaid pleaded. And this they are ready to verify, wherefore for Want of a ſufficient Plea in Bar in this Behalf, the ſame *Richard* and *William* pray Judgment, and a Return of the Cattle aforeſaid together with Damages, *&c.* to be adjudged to them, *&c.*

Defendants demur.

And the aforeſaid *John Throckmerton*, for that he has above alledged ſufficient Matter in Law to preclude the aforeſaid *Richard Tracy* and *William Nicholſon* from having their Avowry and Cognizance aforeſaid againſt him, which he is ready to verify, which ſaid Matter the aforeſaid *Richard* and *William* do not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſe to admit, as before prays Judgment, and his Damages by Reaſon of the taking and unjuſt Detention of the ſaid Cattle to be adjudged to him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the *Octave* of *St. Hillary* to hear their Judgment thereon, becauſe the ſame Juſtices here thereof not yet, *&c.*

Joinder in Demurrer.

The Caſe was recited thus. *John Throckmerton* has ſued a Writ of ſecond Deliverance againſt *Richard Tracy* and *William Nicholſon* for taking his Cattle the 26th Day of *March* in the 7th Year of the Reign of King *Edward* 6. at *Beckford* in a certain Place called *Didcote*, *&c.* And the Defendants ſay, that the Place in which the taking was ſuppoſed to be, contains 100 Acres of Land with the Appurtenances in *Beckford*, whereof the ſaid *Richard Tracy* at the Time of the taking was ſeized in Fee. And he in his own Right avows, and the ſaid *Nicholſon* as his Bailiff acknowledges the taking of the Cattle therein for Damage feaſant, *&c.* And againſt this *Throckmerton* pleads in Bar to the Avowry, that long before the ſaid *Tracy* had any Thing in the ſaid Land, one *Henry* late Abbot of the late Monaſtery of *St. Mary* the Virgin of *Tewkſbury* in the ſaid County of *Glouceſter*, was ſeized of one Meſſuage and the ſaid 100 Acres of Land amongſt other Things in *Beckford* aforeſaid in his Demeſn as of Fee, in Right of his ſaid Monaſtery. And being ſo ſeized, he with the Aſſent of the Convent, before the Time when the taking is ſuppoſed to be, leaſed by Deed the ſaid Tenements to *John George*, *Dorothy* his Wife, and *Joan* their Daughter for Term of their Lives. And afterwards the ſaid Abbot with the Aſſent of the Convent, *viz.* the 20th Day of *September* in the 17th Year of the Reign of King *Henry* 8. at *Tewkſbury* aforeſaid by their Deed indented ſhewn forth, delivered, granted, and to Farm-let to one *John Smith* and *Margaret* his Wife the ſaid Tenements, amongſt other Things, by the Name of the Reverſion of all and ſingular the Meſſuages, Lands, Tenements, Meadows, and Paſtures of the ſaid Abbot and Convent in *Didcote* in the County of *Glouceſter*, with all and ſingular their Appurtenances, together with the Chapel there being, (all which *John George*, *Dorothy* his Wife, and *Joan* their Daughter then held for Term of their Lives, and of the longeſt Liver of them) to have and to hold the ſaid Meſſuages, Lands, Tenements, Meadows, and Paſtures, together with the Chapel, with the Appurtenances, to the ſaid *John Smith* and *Margaret*, and their Aſſigns, from the Feaſt of *St. Michael* the Archangel next following after the Death, Surrender, or Forfeiture of the ſaid *John George*, *Dorothy* his Wife, and *Joan* their Daughter, or whenſoever by any other Means the Reverſion aforeſaid ſhould fall, until the End of the Term of 21 Years thence next enſuing. By Force whereof the ſaid *John Smith* and *Margaret* were poſſeſſed of ſuch Intereſt and Term aforeſaid of and in the ſaid Tenements. And being ſo poſſeſſed, the ſaid *Dorothy* and *Joan* died, and the ſaid *John George* ſurvived them, and held himſelf in the ſaid Tenements, and was thereof ſole ſeized in his Demeſn as of Freehold by Right of Survivorſhip. And afterwards, *viz.* the 10th Day of *October* in the 29th Year of the Reign of King *Henry* 8. at *Tewkſbury* aforeſaid, *John Smith* granted his Eſtate and Term in the ſaid Tenements to one *William Cartwright* and *Henry Cartwright*. And then he ſhews that the Reverſion of the ſaid Tenements came to the ſaid King *Henry* 8. by Surrender. And afterwards, *viz.* the 6th Day of *June* in the 34th Year of the Reign of the ſaid King *Henry* 8. the ſaid *John George* died at *Tewkſbury* aforeſaid, after whoſe Death, *viz.* the next Day after the Feaſt of *St. Michael* then next following, the ſaid *William Cartwright* and *Henry Cartwright* entered into the Tenements. And he ſhews that afterwards the ſaid King *Henry* 8. granted the Reverſion of the ſaid Tenements to the ſaid *Richard Tracy* in Fee. And afterwards the ſaid *William Cartwright* and *Henry* granted their Eſtate and Term in

The CASE.
An Abbot leaſes Land for Life, and afterwards leaſes the *Reverſion* thereof, *habendum* the *Land* from *Michaelmas* next after the firſt Leaſe ended for 21 Years, this is a good Leaſe of the Land for ſo long, and the *habendum* and the Premiſſes ſtand well together. And therefore although the Tenant for Life dies before Attornment, yet the Grant is good, the *habendum* ſhewing that it was intended as a Leaſe of the Land, and not as a Grant of the Reverſion. S. C. Dy. 124. pl. 40. Bro. Attornment 61. Leaſe 73. B.N.C. §. 467. S.C. cited and agreed Poſt 197. 198. Vide 10. Co. 107. b. 2. Bac. Abr. 498. 3. Bac. Abr. 423, 424. 438.

in the ſaid Tenements to the Plaintiff, by Force whereof he entered into the ſaid Tenements, and was poſſeſſed. And being ſo poſſeſſed, he put his Cattle in the ſaid Place where, &c. which were there until the Defendants took them. And the Defendants demand *Oyer* of the ſaid Deed of Demiſe made to the aforeſaid *Smith* and his Wife, and it was read to them, and inrolled *de verbo in verbum*, and the Words were a Demiſe of the Reverſion, *habendum* the ſaid Meſſuages, Lands, and Tenements, &c. from the Feaſt of *St. Michael* next following after the Death, Surrender, or Forfeiture of the ſaid *John George*, *Dorothy*, and *Joan*, or whenſoever by any other Means the ſaid Reverſion ſhould fall, until the End of 21 Years thence next following, as appears before by the Record. And upon this the Defendants demur in Law.

And this Demurrer was argued by all the Serjeants at the Bar, *viz.* the new and ancient Serjeants hereunder mentioned. And *Walpole*, *Ruſtal*, *Rookby*, and *Gawdy* argued for the Defendants, and *Prideaux*, *Bendloe*, *Robert Catline*, *Morgan*, *Richard Catline*, *Anthony Brown*, and *Dyer* for the Plaintiff. And it was firſt argued in *Michaelmas* Term in the *ſecond* and *third* Years of the Reign of King *Philip* and Queen *Mary*; and it was alſo debated in *Hillary* and *Eaſter* Terms next following. And firſt of all I ſhall ſet down the Exceptions which were taken to the Pleading by the Counſel who argued for the Defendants, ſome of which were taken by one, and ſome by another of them; and afterwards I ſhall report the Matter in Law.

Mich. and Hill. Terms 2 & 3. P. & M.

Exceptions taken by the Defendants to the Pleading. 1.

One Exception taken was, for that the Plaintiff has conveyed to himſelf an Intereſt in a Leaſe made by an Abbot with the Aſſent of the Convent to one *Smith* and his Wife, which is made by the Name of a Reverſion, and to commence after a former Leaſe ended, *viz.* after the Leaſe made to *George* and his Wife and their Daughter, which Leaſe is alledged to be made by Deed indented, in which Caſe the Plaintiff ought to have ſhewn forth the Deed indented. For if there was no Deed thereof, there could be no Leaſe, and if there was no Leaſe, there could be no Reverſion; and alſo the ſecond Leaſe, which is to commence after the firſt Leaſe, has no certain Commencement ſhewn, nor can it be taken to continue until this Day, for if there was no former Leaſe, but the latter commenced preſently, then is it now expired. And ſo the Validity of the ſecond Leaſe depends upon the Validity of the firſt Leaſe, in which Caſe the Plaintiff, in order to make his ſecond Leaſe good, ought to ſhew the firſt Leaſe to be good, and in order to make that good, he ought to ſhew that it was by Deed; and alſo he ought to ſhew the Deed, becauſe it is a Means to make his own Leaſe, *viz.* the ſecond Leaſe, good, and therefore he ought to ſhew it, notwithſtanding the Deed was made to another, and alſo he ought to ſhew that the firſt Leaſe is determined. [a] And therefore it was ſaid, that in 13. *Ed.* 3. it appears that a Man brought a *Quare impedit* againſt the Abbot of *Crowland*, and counted of the Preſentment of his Anceſtor, and afterwards ſhewed that his Anceſtor granted to the Predeceſſor of the Abbot the next Avoidance, by Force whereof the Predeceſſor preſented to the next Avoidance, and the Preſentee died, and ſo it belonged to the Plaintiff to preſent, and there foraſmuch as he had confeſſed that the Predeceſſor of the Abbot preſented the laſt Incumbent, which put his Anceſtor out of Poſſeſſion (if it was not by Reaſon of the Grant by Deed, which he ought to ſhew) it was awarded that the Abbot ſhould have a Writ to the Biſhop. And ſo here he ought to ſhew the Deed of the Leaſe, for as it was made to another here, ſo was it in the other Caſe, and as the Eſtate here is ended, ſo was it in the other Caſe: And as the Grant in the ſaid Caſe made the Grantor to have the Reverſion, and to be as a Privy to the Preſentment, ſo in our Caſe the firſt Leaſe made the Leſſor to have the Reverſion, and was the Cauſe of the certain Commencement of the Plaintiff's Term according to the Limitation. And ſo the Plaintiff here ought to ſhew the Deed, as well as the Plaintiff in the other Caſe ought. And many other Caſes were put to enforce this Exception.

[b] In Anſwer to this it was ſaid, that it is not neceſſary to ſhew the Deed for three Cauſes. The firſt was, becauſe the Plaintiff here is not * Privy to the Deed, for it was made to a Stranger, and therefore the Plaintiff is a Stranger to it. [c] And as to this, the Caſe in 31. *Ed.* 3. was alledged, where in a *Scire Facias* for an Advowſon againſt the Patron and Incumbent, the Incumbent pleaded that the Queen had granted the Advowſon to the Earl of *Arundel*, whoſe Eſtate his Patron had, and he had his Plea by the clear Opinion of the Court, without ſhewing the Letters-patent, becauſe he was not Party to them, nor did they belong to him. [d] And alſo the Caſe in 7. *H.* 6. was cited, where a Parſon of a Church avowed for a Rent-Charge deviſed out of Tenements in *London* to his Predeceſſor and his Succeſſors, and the Plaintiff demanded *Oyer* of the Teſtament, and it was there clearly held that he ſhould not have it, becauſe it belongs to the Executors, and not to the Parſon. [e] And alſo the Caſe in 10. *Ed.* 3. was alledged, where one avowed upon a Prior for Fealty and Rent, and the Prior pleaded in Bar that the Avowant had granted by Deed the Services in Tail to another, and that his Predeceſſor attorned, and he had the Plea by Award without ſhewing the Deed, becauſe the Deed ought to tarry with him to whom it was made. [f] And alſo the Caſe in 22. *H.* 6. was cited, where the Servant of a Collector of *Fifteenths* juſtified the taking of Cattle for the *Fifteenth*, without ſhewing the Commiſſion of his Maſter, becauſe it belongs to his Maſter. [g] And the Caſe in 35. *H.* 6. was alſo alledged, where in Treſpaſs for Goods carried away the Defendant ſaid that he was Mayor of the Town of C. and that the King by his Letters-patent had granted to him being Mayor and to the Commonalty all the Goods of Outlaws, and ſaid that the Plaintiff was outlawed, and that he (the Defendant) then being Mayor took the Goods, and by the better Opinion he ſhall not be forced to ſhew the Letters-patent, becauſe they tarry with the Mayor and Commonalty, and now he is not Mayor, and therefore he ſhall not be forced to ſhew them. And ſeveral other good Caſes were put on this Head. And as in theſe Caſes alledged the Parties ſhould not be forced

to

a H. 13. Ed. 3. Fitz. Monſtrans de Faits 66. Vide Poſt 149.

b Vide Dy. 124. pl 41. Godb. 112. Heath's Max. 139. Vin. Abr. tit. Faits M. a. 23. pl. 6.

* *Regula.* Dy. 174. pl. 18. 2. Show. 418. *Per Levinz.* J. 10. Co. 93. b. 94. a. Heath's Max. 137. Vin. Abr. tit. Faits M. a. 29. *per totum.*

c T. 31. Ed. 3. Fitz. Quare Impedit 1. Monſtrans de Faits 177 P. 31. H. 6. 14. pl. 3. Fitz. Monſtrans de Faits 92. M. 20. H. 7. 6. a. 8. a. *Per Fineux* Bro. Monſtrans de Faits 172. Dy. 29. pl. 200. *Per Brown, Willoughby*, et *Baldwin.* 10. Co. 92. a. T. Raym. 19 Heath's Max. 138.

d M. 7. H. 6. 1. pl. 2. Bro. Bro. Monſtrans de Faits 49. L. P. Godb. 112. Heath's Max. 138.

e M. 10. Ed. 3. 47. pl. 17. Fitz. Monſtrans de Faits 20.

f H. 22. H. 6. 42. pl. 19. Fitz. Monſtrans de Faits 86. Bro. 58. M. 21. Ed. 4. 50 b. *Per Choke.* Bro. Ibid. 125. H. 5. H. 5. 11. pl. 28. Fitz. Ibid. 35. Dy. 29. pl. 200. *Per Brown, Willoughby, et Baldwin.* 10. Co. 92. a. 1. Keb. 9 8. T. Raym. 129 Vin. Abr. tit. Faits M. a. 27. pl. 3.

g M. 35. H. 6. 8. Fitz. Monſtrans de Faits 96. Bro. 11. Ante 81. (l) and the other Books there cited.

to ſhew Deeds which did not belong to them, for the ſame Reaſon in our Caſe the Plaintiff ſhall not be compelled to ſhew the Deed which does not belong to him.

The ſecond Cauſe was, for that the Eſtate contained in the Deed was ended and [a] determined by the Death of the Tenants for Life, in which Caſe foraſmuch as the Plaintiff does not * claim, nor can claim from them, but only ſhews the Leaſe in order to convey the ſecond Leaſe to himſelf, he ſhall not be forced to ſhew the Deed of the Intereſt that is determined. [b] And therefore it was ſaid, if one preſents to an Advowſon, and afterwards grants the next Avoidance to another by Deed, who preſents, and after the Church becomes void by the Death of the ſecond Preſentee, there if the Grantor preſent and be diſturbed by a Stranger, he ſhall have a *Quare Impedit*, and ſhall ſhew the Preſentment by the Grantee of the next Avoidance, and ſhall not be forced to ſhew the Deed of Grant thereof, becauſe the Eſtate is ended. And to warrant this one of the Years of *H.* 4. was alledged, *but there is no ſuch Caſe in the Year cited.* [c] *But, note, that in* M. 14. H. 4. *he that had the Nomination in Fee, that is, he that ought to preſent his Clerk to the Abbot, who was to preſent him over, preſented his Clerk to the Abbot, who did preſent him over, and afterwards he granted the Advowſon to one for Life, and after that granted the Reverſion in Fee, and the Heir of the Grantee in Fee, after the Death of the Tenant for Life, brought a Quare Impedit, and made his Title* ut ſupra. *And the Defendant demanded Oyer of the Deed of Grant for Term of Life, and alſo of the Grant of the Reverſion. And as to the Deed of Grant of the Reverſion, it was ordered by the Court to be ſhewn forth; and as to the Deed of Grant for Term of Life it was not, becauſe he did not claim by it, and the Eſtate was determined; which perhaps was the Caſe intended. However the Caſe vouched ſeems to be good Law. And the Difference between the ſaid Caſe* [d] *of the Abbot of* Crowland *and this Caſe, is this, viz. the one Caſe was againſt a Privy, and the other againſt a Stranger. And it ſeems good Reaſon, that if one alledges a Preſentment in himſelf or in his Anceſtor or Predeceſſor, I ſhall not ſay that he who preſented had but the next Avoidance, or a particular Eſtate which is now ended, without ſhewing the Deed thereof, for thereby I diminiſh the Eſtate gained preſumptively by the Preſentment, and a Deed is requiſite in ſuch Caſe; but a gainſt a Stranger, who is not privy to the Preſentment, it isotherwiſe, and this ſeems to be the Difference.*

The third Cauſe was, for that the ſecond Leaſe was * executed. And ſo it is pleaded by the Plea in Bar to the Avowry, *viz.* that the Plaintiff entered, which is confeſſed by the Demurrer. And then it was ſaid, that although in many Caſes a Deed ought to be ſhewn when the Thing is to be executed, yet when it is already executed the Party ſhall ſhew Title to it, without ſhewing a Deed. [e] And it was ſaid that 11. *H.* 4. tends to this Point *viz.* that if a Reverſion is granted in Tail by Deed, which is executed, the Iſſue in Tail ſhall have a *Formedon* in Deſcender, and ſhall not ſhew the Deed of Grant, becauſe it was executed. [f] And the Caſe in 40. *Ed.* 3. was alſo alledged, where a Prior brought an action of Treſpaſs for a Horſe, and counted that the King had granted to him all Chattles waived in a certain Place, and ſhewed that the ſaid Horſe was a Chattle waived there, and ſeized by the Bailiff of the Prior, and that the Defendant took him and carried him away, and the Defendant demanded *Oyer* of the King's Charter, and there it is ſaid, that if the King grants a Franchiſe or any Thing by Charter, and the Party brings an Action for the ſame Thing, where he never had any Poſſeſſion, he ought to ſhew the Charter, but if he brings an Action for Goods carried away out of his Poſſeſſion, although he recites the Charter where it is not neceſſary, the Charter for ſo much ought not to be ſhewn; ſo that there it was the clear Opinion that he ſhould not have *Oyer* of the Charter becauſe the Thing was executed. So here, although it ſhould be admitted for Argument's Sake, that in order to execute this ſecond Leaſe the Deed of the firſt Leaſe ought to be ſhewn, yet ſeeing that the ſecond Leaſe is now executed, the Deed of the firſt ſhall not be ſhewn. And afterwards by Rule of the Court this Exception was diſallowed.

Another Exception taken was, for that the Plaintiff has not ſhewn that Livery and Seizin was made by Letter of Attorney to the ſaid Leſſees for Life, for although Livery ſhall not be pleaded [g] where a Man makes a Leaſe for Life, or a Gift in Tail, or in Fee, but ſhall be intended to be made, becauſe the Perſon who made the Livery ſhall be intended to be upon the Land and to execute the ſame, yet when a Body politic of an Abbot and Convent make ſuch Eſtate, it cannot be intended that they were upon the Land, for the Law ſuppoſes [h] them to be always in their Houſe, and therefore if their Deed be denied it ſhall be tried where the Houſe is, becauſe it ſhall be intended to be made there, and no where elſe. [i] And it was ſaid that in 3. *H.* 6. in Treſpaſs againſt the Abbot of *T.* and his Canon, Exception was taken to the Writ, becauſe the Plaintiff had not declared of what Town the Canon was, and the Exception was diſallowed, becauſe he ſhall be intended to be Canon of the ſame Houſe of which his Soveraign is ſuppoſed to be Abbot. So that religious Perſons ſhall be intended always to abide in their Houſe, and never to be elſewhere. And therefore here they cannot be intended to make Livery and Seizin in proper Perſon, nor otherwiſe than by Warrant, which ought to be pleaded, for it is neceſſary to ſhew that the Leaſe for Lives was good, becauſe the ſecond Leaſe is made by the Name of a Reverſion, and was to commence after the End of the firſt Leaſe, and ſo foraſmuch as it is not ſhewn that Livery was made by Warrant, the Bar to the Avowry is not good. But this Exception was diſallowed by the Rule of the Court, [k] becauſe the neceſſary Circumſtance, *viz.* the Livery ſhall be intended here as well as in the Caſe of another Perſon. And it has never been uſual before to plead the Livery, *ut ſupra*, but always to the contrary.

Another Exception was taken to the Plea in Bar to the Avowry, *viz.* that the Plaintiff has not alledged the Place where the ſecond Leaſe was made, for, it was ſaid, it ought to be ſhewn on Account of the Trial, if the Leaſe ſhould be denied. [l] As if Attornment be pleaded, the Place ought to be

[a] *Regula.* 3. Le. 205. Vin. Abr. tit. Faits M. a. 10. pl. 14.

* S. P. Dy. 174. pl. 18. 6. Co. 38. a. 10. Co. 93. b. 94. a. Yelv 201. 2. Show 418. *Per Levinz.* Heath's Max. 137. Poſt 233. (*).

[b] M. 26. H. 8. 9. a.

Nota bene by the Reporter.

[c] M. 14. H. 4. 11. Fitz. Monſtrans de Faits 130. Bro. 40.

[d] Ante 148 (a).

* *Regula.* 6. Co. 38. b. Dy. 29. pl. 194. Vin. Abr. tit. Faits M. a. 10. *Per totum.*

[e] M. 11. H. 4. 39. a. Fitz. Monſtrans de Faits 126. Bro. 34. Formedon 23. Nugation 4. 10. Co. Litt. 317. b. Ante 52. (e). and the other Books there cited.

[f] H. 40. Ed. 3. 10. pl. 19. Fitz. Monſtrans de Faits 136. Bro. 13.

[g] Bro. Pleading 145. in fine T. 22. Ed. 4. 15. b. *Per Tremail.* 8. Co. 82. b. Co. Litt. 303. b. Cro. E. 401. Cro. J. 635. 637. Cro. C. 101. Yelv. 135. Doc Pla. 48. 239. 4. Bac. Abr. 100. Vin. Abr. tit. Feoffment E. a. pl. 28.

[h] 1. Leon. 184. *arguendo.*

[i] H. 3. H. 6. 31. pl. 21. Fitz. Brief 16.

[k] S. P. Accord. 2. Saund. 305. And ſee the like Exception taken and diſallowed. Cro. J. 411. 1. Leon. 184.

[l] S. P. Poſt 191. (b). Sed contra Dy. 28. pl. 185. And M. 39. H. 6. 32. a. Bro. Lieu. 45. P. 5. H. 7. 24. pl. 6. Fitz. Bar 146. Bro. Lieu. 50. ſeem contrary, but the Reporter puts a *Quære* in both Books.

Exception 2.

Exception 3.

ſhewn where it was made, *cauſâ qua ſupra.* And it was ſaid here, the Plaintiff has alledged the ſecond Leaſe to be made at *Tewkſbury* * aforeſaid, where *Tewſbury* was not ſhewn before as a Place, but it was recited in this Form, *viz. the Abbot and Convent of the late Monaſtery of St. Mary the Virgin of Tewkſbury*; ſo that there *Tewkſbury* is not recited as a Place, but as the Name of a Monaſtery, for which Reaſon the Place of making the ſecond Leaſe is omitted, and therefore the Bar is bad. And this Exception was alſo diſallowed by the Court, becauſe when it is ſaid *that the Abbot of the late Monaſtery of St. Mary the Virgin of Tewkſbury, &c.* this is a Recital of the certain Place, for there can be no Monaſtery without a Place. And to ſay, *the Abbot of Dale*, is the Abbot of ſuch a Place, and ſo it contains the Certainty of ſuch a Place.

* S. P. Heath's Max. 163. 169. And ſee Poſt 415.

2 M. 9. Ed. 4. 47. pl. 35. *Per Cateſby* Bro. Leaſe 27. Monſtrans de Faits 71.

Exception 4.

Another Exception taken was, *viz.* that it is ſhewn in Bar to the Avowry, that *John Smith* granted over his Term to *William Cartwright* and *Henry Cartwright*, which is not pleaded to be by Deed. And it was ſaid, that the Leaſe had not been good if it had not been firſt made by the Abbot and Convent by Deed, and that which may not commence without Deed, may not be granted over without Deed; [a] as a Grant of the next Avoidance of an Advowſon, a Warren, and ſuch like, and eſpecially in the Caſe here, becauſe the Term was not commenced, and till then nothing but a Right or Title was granted, for which Reaſon it ought to be by Deed. But this Exception was alſo ruled by the Court to be of no Weight, becauſe the ſecond Leaſe is uſed not as a Grant of the Reverſion, but as a Leaſe to commence after the Eſtates for Life determined. Which, admitting the Leaſe good ([c] although it might not be good to bind the Houſe if it was not made by the Abbot and Convent by Deed at the Beginning) [d] might well enough be granted over by *Smith* without Deed, as a [d] Chattle which was in *Smith* and his Wife, altho' the Term was not commenced.

[b] T. 12. H. 7. 26. b. *Per Rede.* T. 38. H. 8. Bro. Grants 112. B. N. C. § 283. Co. Litt. 85. a. [c] Dy. 124. pl. 41. 2. Rol. Abr. 63. pl. 21. and the Books here next before cited. [d] Hereby note that an *intereſſe termini* is a Chattle.

Exception 5.

Another Exception was taken, *viz.* that in the Count the taking is ſuppoſed to be at *Beckford* in a Place called *Didcote*, and the Defendant has alſo affirmed the Land to lie in *Beckford*, and the Leaſe for Years by which the Plaintiff claims is alledged to be made by the Name of the Reverſion of all and ſingular the Meſſuages, Lands, *&c.* in *Didcote* in the County of *Glouceſter*, *&c.* which *Didcote* ſpecified in the *per nomen* ought to be intended a Town, for it is there limited as a Place in which the Lands lie, and that ſhall be intended a Town, and then if it ſhall be ſo intended, it cannot ſtand with what the Plaintiff has alledged in the Count, for in the Count the Town in which the taking is alledged to be is called *Beckford*, and the Place in the Town is there called *Didcote*, and now in the Plea in Bar to the Avowry the Plaintiff has alledged that the Lands which he claims by the Leaſe lie in *Didcote*, which is as much as if he had ſaid, the Town of *Didcote*, which Leaſe would not be ſufficient to convey to him the Lands lying in the Town of *Beckford*, for which Reaſon the Bar to the Avowry is inſufficient. To which it was anſwered, that the Plaintiff in the ſaid Plea in Bar to the Avowry has ſaid, that the Abbot with the Aſſent of the Convent leaſed to *Smith* and his Wife the ſaid Tenements amongſt other Things by the Name of the Reverſion of, *&c.* (which Word *(ſaid)* is an Averment in itſelf, and contains that they are the ſame Tenements which are ſpecified in the Count and in the Avowry. And if they are the ſame Tenements, then they muſt neceſſarily lie in *Beckford*, and the *per nomen* will ſtand with it. For *Didcote* in the *per nomen* may be a Hamlet of *Beckford*, or a Place known in *Beckford*, and ſo it may be in *Didcote* in *Beckford* without any Contrariety. And ſo this Exception was alſo diſallowed by the Court, and the Plea in Bar to the Avowry held good notwithſtanding it.

Exception 6.

Another Exception taken was, *viz.* that the Leaſe for Years is of the Reverſion of, *&c.* all which *George* and his Wife and his Daughter then held for their Lives, *&c.* And it was ſaid, that the Plaintiff ought to aver that they three held the Tenements for their Lives. But this Exception was diſallowed by the Court, becauſe it was pleaded that the Abbot with the Aſſent of the Convent leaſed the ſaid Tenements, *&c.* which Word *(ſaid)* comprehends that they three held them for Life, for if they did not hold them for Life, then they did not leaſe them, and ſo the Premiſſes and the *per nomen* ſtand well together, the one containing an Averment of the other. And by ſome the Words *(all which John George, &c. hold for Term of Life)* are but Words of Recital, and not of Subſtance.

Exception 7.

Another Exception was taken as to the Variance between the Words of Pleading the Demiſe, and the *per nomen* reciting the Demiſe itſelf. For the Words of the Plea are a Demiſe of the Thing itſelf, and the *per nomen* and the Leaſe, as it is entered, is a Demiſe of the Reverſion, which don't agree in one, but are in a Manner contradictory. [e] As if a Man will ſay that ſuch a one was ſeized of the Manor of *Dale*, and of the Manor of *Sale*, and infeoffed him of the Manor of *Dale* by Deed, by the Name of the Manor of *Sale*, this Plea is not good, becauſe the *per nomen* does not agree with the Premiſſes, and therefore will not warrant it. [f] So if a Man pleads that *J. S.* was ſeized of 20 Acres of Land by Deſcent on the Part of the Father, and thereof infeoffed him by Deed by the Name of all his Lands which he had by Deſcent on the Part of the Mother, this Plea is not good; for the *per nomen* does not agree with the Premiſſes, and therefore will not warrant the Premiſſes. So here the *per nomen* in Reverſion will not warrant the Demiſe of the Poſſeſſion, but for the Variance the Plea ſhall be bad. And many other Caſes were put to enforce this Point. To which it was anſwered by thoſe that argued for the Plaintiff, [g] that when a Man pleads by a *per nomen* a Plea of any thing given by Deed or other Writing whatſoever, if the Thing contained in the *per nomen* agrees in Effect and Subſtance with the Premiſſes before the *per nomen*, then the Plea is good, and the Premiſſes and the *per nomen* ſhall ſtand as one full and entire Matter varying in Words, and not in Subſtance. [h] And therefore it was ſaid if one makes Title to a Rent of 20*s.* and ſays that *J. S.* was ſeized of ſo much Land, *&c.* and granted to him by the Deed ſhewn forth the Rent by the Name of 20*s.* Rent iſſuing

[e] Vin. Abr. tit. Per Nomen A. pl. 6.

[f] Vin. Abr. tit. Per Nomen A. pl. 7. Vide 1. Rol. R. 422. pl. 11.

[g] Vin. Abr. tit. Per Nomen A. pl. 8.

[h] H. 8. H. 4. 19. pl. 5. Bro. Pleadings 17. 1. Freem. 77. *Per Curiam.*

iſſuing out of all his Lands and Tenements, this Plea with the *per nomen* is good, as it is held in 8. *H.* 4. and the *per nomen* and the Plea ſhall ſtand together. [a] And in 46. *Ed.* 3. a Man juſtified the taking of certain Goods, for that ſuch a one was ſeized of the Manor in which the taking was, and granted by the Deed ſhewn forth an annual Rent in Tail to a Man and his Wife, of whom the Defendant made himſelf Iſſue; and the Deed was thus, *Obligo me tali et uxori ejus filiæ meæ et hæredibus de corpore eorum in uno annuali redditu de tali ſumma, percipiendum annuatim de manerio meo de C. et obligo manerium meum prædictum, et omnia bona mea in dicto manerio meo exiſtentia diſtringenda per Ballivum Domini Regis*; and for the Rent behind at a Day he juſtified the taking of the Goods: And there the Book is that the Plea is good, and that there is no Variance between the Plea and the Deed, becauſe the Deed is in Subſtance the ſame with what is contained in the Plea, *viz.* a Grant of a Rent-Charge. And ſo a Leaſe of 100 Acres of Land and ſo many of Meadow, by the Name of a Yard-Land, ſtands well together, and may be ſo impleaded. And many Caſes were put upon this Head. [b] And it was ſaid that if the Matter in Law contained in the *per nomen* will warrant the Premiſſes of the Plea, the Plea is good enough, otherwiſe not. And ſo this cannot be made an Exception by itſelf diſtinct from the Matter in Law, but the Matter in Law and it are all one. Wherefore this Exception was referred to the principal Matter, *viz.* to the Matter in Law.

[a] T. 46. Ed 3. 18. b. Fitz. Grants 79. Bro. 21. Charge 5. 2. Rol. Abr. 425. F. Co. Litt 147. a. 1. Bac. Abr. 115.

[b] Vin. Abr. tit. Per Nomen A. pl. 9.

The Argument upon the Matter in Law.

And as to this, it was ſaid by the ſaid Serjeants who argued for the Defendants, that the Title which the Plaintiff has conveyed to himſelf is not good, becauſe the Leaſe made to *Smith* and his Wife is not a good Leaſe for Years. For it is to be obſerved, that by the Premiſſes of the Deed made to *Smith* and his Wife, the Demiſe is of the Reverſion of all and ſingular the Meſſuages, Lands, Tenements, *&c.* to *Smith* and his Wife from the Feaſt of *St. Michael* next after the Death, *&c. ut ſupra*, in which Caſe the Premiſſes and the *Habendum* do not ſtand together, for the Reverſion of the Land, and the Land itſelf are not the ſame Thing, but vary not only in Words but in Subſtance alſo. For the Reverſion of Land is a compound Word, which conſiſts of two Things, the one is, that it is the Reſidue or Remnant of an Eſtate, the other is, that it is of or in Land, and ſo it is part of an Eſtate in Land. And as a Manor is a compound Word, *viz.* conſiſting of the Demeſn and Services, [c] and the Word *(ſtagnum)* is a Word compounded of Land and Water, and contains both, [d] and as the Words *(aqua et piſcaria)* conſiſt of the Water and the Land, which a Man ſhall have by a Grant of the ſaid Words, as it is adjudged in the Eire of *Derby* in 4. *Ed.* 3. ſo in the ſame Manner a Reverſion of Land is a Compoſition of the Land and of the Eſtate therein, and contains the Land itſelf and an Eſtate in it, which Eſtate is always in one Degree only removed from the Poſſeſſion, and it is that which is left in the Perſon of him who makes a particular Eſtate. So that he who has the particular Eſtate in Demeſn is he that is poſſeſſed of the Land, and he who made the Eſtate, or his Heirs or Aſſigns, is he that has the Reverſion. So that there is never a Reverſion, but where there is a particular Eſtate in Poſſeſſion, [e] and if the Poſſeſſion comes to the Reverſion, then there is no Reverſion at all, and if the Reverſion comes to the Poſſeſſion, then alſo there is no Reverſion; for there cannot be a Reverſion of a Thing, but where the Poſſeſſion of it is divided from it, for the uniting of them deſtroys the Reverſion, and the Separation of Part of the Eſtate of him that has the Land, reſerving the Reſidue, makes it a Reverſion; ſo that a Reverſion cannot be but where there is a particular Eſtate in Poſſeſſion, and where there is a Diviſion and Separation of the Reverſion from the Poſſeſſion; wherefore the Poſſeſſion and the Reverſion are in Degree merely contradictory, but yet the Subſtance of them both is the Thing of which they conſiſt, as if it is of Land, then the Land is the Subſtance, and if it is of Rent, the Rent is the Subſtance, *et ſic de ſimilibus*. And therefore if the Reverſion of Land which *J. S.* holds for Life is granted in Fee, and Attornment is had, there if *J. S.* dies, the Grantee ſhall have the Land in Poſſeſſion, becauſe the Reverſion was compounded both of the Land and of the Eſtate therein, from which the Poſſeſſion was ſeparated, and then when the Reverſion is granted, all that which the Reverſion contains paſſes by the Grant, as by the Grant of a Manor all that which the Manor contains ſhall paſs. And ſo it is of a Grant *de* [f] *ſtagno*, [g] *aqua*, or [h] *piſcaria*; all that the Words contain ſhall paſs by the Grant, and they contain what is ſaid above. And ſo by the Grant of a Reverſion of Land, Land by a Mean ſhall paſs, that is to ſay, to be had in Poſſeſſion after the particular Eſtate ended, and therefore foraſmuch as it was granted as a Reverſion, and in ſuch Degree ſhall paſs, it carries with it the Land to be afterwards executed in Poſſeſſion. And this being admitted, it is next to be ſeen how it ſtands in the principal Caſe. And as to this, the Reverſion of the Lands is granted, *habendum* the Lands themſelves from the Feaſt of *St. Michael* after the Determination of the Eſtate *ut ſupra*, until the End of ſuch a Term; and, Sir, this *habendum* is not purſuant to the Grant precedent, for the Grant was of the Reverſion of the Land, which in it's true Definition is an Eſtate in the Land ſeparated from the Poſſeſſion, *habendum* the Land, which is as much as to ſay, the Poſſeſſion of the Land. For this Word *(Land)* is intended to be in Poſſeſſion, and ſimply without any Degree, and if it be taken in that Light it is contrary to the Premiſſes, for although a Reverſion does by a certain Mean contain Land, yet it is contrary to Land in Poſſeſſion, and ſo although Land is contained in each of them, yet it is Land in a different Degree, and therefore the Degrees are diſtinct and ſeveral, for which Reaſon that in the *habendum* is not purſuant to that in the Grant. And therefore it was ſaid if *J. S.* holds of a Manor by Fealty and 20 *s.* Rent, and he that has the Manor gives the Manor by Deed to *J. K. habendum* the Rent of 20 *s.* which is iſſuing out of the Land of the ſaid *J. S.* to the ſaid *J. K.* and his Heirs, this *habendum* is not purſuant to the Premiſſes, and yet the Premiſſes of the Deed before the *habendum*, that is to ſay, the Word *(Manor)* contains the Rent which is expreſſed in the *habendum*, but nevertheleſs the *habendum* is not purſuant thereto, becauſe in the

[c] Vaugh. 108. Co. Litt. 5. a. b.

[d] 4. Ed. 3. Itin. Derby. Fine. Feoffments 79.

[e] Poſt 163. (A).

[f] Co. Litt. 5. a. b. Poſt 157.

[g] Vide Poſt 154.

[h] Vide Poſt 154.

Word

Word *(Manor)* the Rent was granted as a Rent-Service Parcel of the Manor, and by the *habendum* it is limited as a Rent-Seck, and ſo it is in another Degree. In the ſame Manner if *A. B.* holds of me certain Land by Homage, Fealty, and 12 *d.* Rent, and I grant the Services to another, *habendum* the Rent to him in Fee, this *habendum* is void, becauſe in the Grant the Rent was contained as a Rent-Service, and now by the *habendum* it is a Rent-Seck, as in the other Caſe before, and ſo not purſuant becauſe it is in another Degree. And as a Rent Service and Rent-Seck are of ſeveral Degrees and of ſeveral Natures, and the Grant of the one and the *habendum* the other is not purſuant, ſo a Reverſion of Land and the Poſſeſſion of Land are of ſeveral Degrees and Qualities, inſomuch that by the Grant of the one the other ſhall not paſs. [a] And therefore the Caſe in 8. *H.* 7. was cited, where the Abbot of *Tewkſbury* avowed for an Amercement in a Leet, for that King *Edward* 4. was ſeized of a Hundred, of which a Leet for Time immemorial had been Parcel, and granted the ſame Hundred to one for Life, and afterwards the King died, and after that King *Richard* 3. by his Letters-patent reciting the ſaid Grant of King *Edward* 4. granted the Reverſion of the ſaid Hundred to the aforeſaid Abbot, and his Succeſſors, together with the Leet within the ſame Hundred, and for an Amercement afterwards in the Leet the Abbot avowed, and there it is debated, whether the Leet might be Parcel of the Hundred, and it ſeems by the better Opinion, that if the Leet might not be Parcel of the Hundred, then the Leet ſhould not paſs, for by the ſaid Grant the Reverſion of the Leet is granted, and ſo are the Words of the Grant to be taken, and King *Richard* 3. had no Reverſion thereof, becauſe the Leet did not paſs for Life by the Grant of King *Edward* 4. and it might not be granted as a Thing in Poſſeſſion from a Day to come, that is to ſay, after the Death of the Tenant for Life. And ſo the Grant of a Reverſion cannot make a Thing in Poſſeſſion to paſs, becauſe it is of another Nature and Degree. And it was ſaid, that it was held in the ſame Book, [b] that if I have a Rent in Fee, and I grant it *poſt mortem J. S.* this is void, for the Nature of the Grant is, that the Thing ought to paſs preſently, and that it cannot do, for it is granted as a Reverſion where there was no Reverſion of it, but the Thing was in Poſſeſſion. So that by the Grant of a Reverſion the Poſſeſſion cannot paſs, being a Thing of another Degree. And as the Reverſion of a Thing granted cannot make the Poſſeſſion to paſs, ſo, it was ſaid, if a Thing is granted as a Thing in Poſſeſſion, it cannot paſs the Reverſion. [c] As if I am ſeized of an Acre in Fee, and make a Leaſe for Years thereof, and afterwards I make a Feoffment in Fee of the ſame Acre by Deed, if Livery is not made thereupon, the Reverſion with Attornment ſhall not paſs, becauſe the Thing was granted in Poſſeſſion, by which Grant the Reverſion being of another Nature ſhall not paſs. And this Caſe was put the other Way by ſome who argued on this Side, for by them it was ſaid that when a Thing is granted, all the Grantor's Intereſt therein ſhall paſs, and therefore the Grant of a Thing is a general Grant, and will make the Reverſion to paſs; but the Reverſion will not make the Poſſeſſion to paſs; wherefore they could not agree as to this Caſe. [d] And ſo they ſaid that the *habendum* here is of a Thing which was not granted in the Premiſſes of the Deed, and therefore it is void. [e] And thereupon the Caſe of 38. *H.* 6. in a *Quare Impedit* brought by the King againſt the Abbeſs of *Sion* was cited, where the King being ſeized of a Manor in Fee to which an Advowſon was Appendant, granted the ſame Manor to two for their Lives, and afterwards the King reciting the Grant for Life granted that the ſaid Manor, after their Deaths, ſhould remain to two Biſhops, *habendum et tenendum omnia prædicta terras et tenementa, una cum Advocatione Eccleſiæ prædictæ, &c.* and there it is held by all the Juſtices that by the Leaſe of the Manor the Advowſon did not paſs, becauſe nothing was ſpoken of it in the Grant, but it remained in the King as in groſs, and not appendant in Right, nor in Poſſeſſion: And there it is alſo clearly held, that the Advowſon ſhould not paſs to the Biſhops, becauſe nothing was ſpoken of the Advowſon in the Grant, but in the *habendum*, and that nothing ſhall paſs in the *habendum* if it be not ſpoken of in the Grant, except it be a Thing appendant or appurtenant; and beſides the Advowſon being in groſs and ſevered from the Reverſion could not paſs by the Reverſion, as it was there granted, (for it was granted after the Death of the Tenants for Life) becauſe there was no Reverſion of it. And as the Advowſon in Poſſeſſion there was not included in this Word *(Reverſion)* nor ſhould paſs by the Grant of the Reverſion, and as the Thing which was not there comprized in the Premiſſes could not paſs by the *habendum*, ſo in the Caſe here this Word *(Reverſion)* ſhall not include the Poſſeſſion, nor ſhall the Thing which is not comprized in the Premiſſes paſs by the *habendum*. Then it is to be ſeen of what Effect the Grant made to *Smith* and his Wife is. And as to this, it is a good Grant of the Reverſion to them for their Lives, if Attornment had been had, and not otherwiſe. [f] And therefore it is taken in the Expoſition of Deeds, that the Nature of every *habendum* in Deeds is to declare and limit the Certainty of the Eſtate which ſhall paſs by the Deed, and if the Certainty is declared in the *habendum*, which ſtands with the Premiſſes of the Deed, the Law will adjudge the *habendum* to be of Force and effectual. [g] And therefore if a Man grants to another 20 *s.* Rent by Deed, if the Deed ſtop there this ſhall be adjudged an Eſtate for Life, becauſe the Deed is taken moſt beneficially for the Grantee, and moſt ſtrongly againſt the Grantor, and the greateſt Eſtate that the Grantee may have is a Freehold, except only an Eſtate of Inheritance, which none can have without Words of Inheritance, and therefore he ſhall have an Eſtate for Life, as hath been ſaid; but if the Deed goes further and ſays, *habendum* the Rent for a Day, or for a Year, then he ſhall not have it longer, becauſe the *habendum* has limited ſuch certain Eſtate, which is its Office, and ſuch Eſtate ſhall ſtand. [h] But it is a kind of Principle in the Law, that if the *habendum* is not purſuant to the Eſtate before, but is leſſer than it, or contrary to it, or repugnant, and the like, then the Eſtate before the *habendum* ſhall ſtand, and the *habendum* ſhall

[a] T. 8. H. 7. 1. Bro. Leet 23.

[b] T. 8. H. 7. 1. b. *Per Keble.* 3. b *Per Vavisor.* Bro. Grants 86. 8. Co. 74. b. March 31. Vaugh 36. 173. Hetl. 21. 4. Bac. Abr. 348. Plowd. Quær. § 302. Poſt 155. 156. 197.

[c] Vide Contra 154. (m).

[d] S. P. 2. Rol. Abr. 65. pl. 2. Perk. § 165. 2. Bac. Abr. 495.

[e] T. 38. H. 6. 34. Fitz. Grants 15. Bro. 60. Poſt 399. 5. Co. 11. b. 11. Co. 47. b.

[f] Co. Litt. 6. a. 2. Co. 55. a. 9. Co. 47. a. 10. Co. 107. b. 2. Rol. Abr. 65. pl. 1. Moor 880 2. Brownl. 3, 8. Cro. E. 903. Barnard. Cha. Rep. 47. 2. Bac. Abr. 495. Poſt 196.

[g] H. 7. Ed. 3. 10. a. *Per Trew.* Fitz. Aſſize 132. 7. Aſſ. pl. 1. Bro. Eſtates 30. Co. Litt. 183. a. 2 Co. 24. a. 5. a. 8. Co. 154. b. O. Bendl. 183. Dal. 30. pl. 10. *Per Brown.* 1. Rol. R. 249. *Per Coke* C. J. 3. Bulſt. 122. Cro. E. 254. 255. Hob. 170. 171. 2. Rol. Abr. 65. K. pl. 2. Perk. § 104. 2. Bac. Abr. 495. 496. Vin. Abr. tit. Grants J. a. 2. pl. 2.

[h] Perk. § 161. Dal. 5. pl. 10. 2. Co. 23. b. Cro. E. 255. Bridgm. 101. Jenk. 96. pl. 86. 1. Freem. 501. 12. Mod. 11. 2. Bac. Abr. 495. Vin. Abr. tit. Grants L. a. pl. 2.

ſhall be void. [a] As if the Grant is to one and his Heirs, *habendum* for Life, the *habendum* is void, becauſe it gives a leſſer [b] Eſtate; [c] or if the Grant or Gift is to two, *habendum* to the one for Life, the Remainder to the other for Life, this is a void *habendum*, becauſe the Premiſſes make them Jointenants, and the *habendum* would ſevere the Jointure, and make the one to have the whole during his Life, and the other to have the whole after him. [d] And if two Acres are given to two, *habendum* the one Acre to the one, and the other Acre to the other, this is a void *habendum*, becauſe it excludes the Intereſt of the one in the one Acre, and the Intereſt of the other in the other Acre, whereas the Premiſſes of the Deed has made them Jointenants of each Parcel. And if a Man grants to another an annual Rent of 20 *s.* payable yearly at the Feaſts of the *Annunciation* of our Lady and of *St. Michael*, *habendum* for a Day, this is a void *habendum* becauſe the Premiſſes of the Deed grant an annual Rent and payable at two Days, and now by the *habendum* it ſhall not be annual nor payable at any Day, and therefore it is repugnant. [e] And where a Man makes a Leaſe of two Acres, excepting one, or [f] reſerving all the Profits, as this Exception or Reſervation ſhall be void becauſe it is expreſly contrary to what goes before, ſo the *habendum* which is contrary to what goes before it is void. In our principal Caſe then the Reverſion of the Land was granted to *Smith* and his Wife, and if the Deed had ſtopp'd there this would have been an Eſtate for their Lives in the Reverſion; and when the *habendum* ſays, *to have the ſaid Meſſuages, Lands, &c.* this is a Limitation of an Eſtate in another Thing, and ſo not purſuant to the Premiſſes of the Grant, and therefore void. And altho' there is in the *habendum* this Word *(Tenements)* which includes and comprehends the Reverſion, yet this Word will not make the *habendum* purſuant to what goes before, for the Clauſe is *to have and to hold the ſaid Meſſuages, Lands, Tenements, &c. to the aforeſaid* Smith *and his Wife from the Feaſt of* St. Michael *the Archangel next following after the Death, Surrender, or Forfeiture of the ſaid* (Leſſees for Lives) *or whenſoever by any other Means the Reverſion ſhall fall, until the End of the Term of* 21 *Years thence next enſuing*; in which Caſe if a Man will take the Word *(Tenements)* to contain the Reverſion, and then will interpret the Clauſe in this Manner, viz. *habendum the Reverſion* from the Feaſt of *St. Michael* after the firſt Eſtate ended for 21 Years thence next enſuing, yet cannot he make this *habendum* effectual, becauſe when the particular Eſtate ends the Reverſion is no longer a Reverſion, for then the Land is in Demeſn, and the Reverſion is gone; and when a Man grants a Reverſion the Nature of it is to veſt and take Effect preſently whilſt it is a Reverſion, and not at a Day to come, but the *habendum* if taken that Way would make the Reverſion to take Effect when it was not a Reverſion, and a Thing to veſt when it was no longer in Being, and therefore the Time being material would deſtroy the *habendum* if taken that Way. So that *quacunque via data* the *habendum* ſhall be void, and the Eſtate granted ſhall be a Reverſion for Lives, and ſo is the Grant to be expounded, as ſome of them thought, and then the Intereſt of *Smith* and his Wife ſhould be for Lives if Attornment had been had, which is not pleaded. And others of them thought that the whole Grant ſhould be void, and conſequently that the Plaintiff had no Intereſt at all, and therefore that the Defendants ſhould have a Return.

[a] P. 13. H. 7. 23. b. *per Fineux.* M. 14. H. 8. 13. b. *per Pollard.* Perk. § 162. 2. Co. 23. b. 24. a. Davis 46. a. Litt. R. 134. Bridgm. 101. T. Jones 4. O. Bendl. 183. 1. Freem. 501. 2. Bac. Abr. 495.

[b] Which the *habendum* may not do when an expreſs Eſtate is given in the Premiſſes, but if no expreſs Eſtate is given in the Premiſſes but by Implication of Law only, there the *habendum* may well abridge the ſame, or even fruſtrate it, as in the Caſe put Ante 152 (g) Hob. 170, 171. 2. Rol. Abr. 65. K. pl. 2. 2. Bac. Abr. 495, 496. Show. P.C. 204.

[c] The Law is clearly otherwiſe, as appears by the Books cited in the Margin Poſt. 160 (e).

[d] Dal. 30. pl. 10. 79. pl. 17. Hob. 172. 12. Mod. 228. 302. Salk. 391. bis. Ld. Raym. 623. 628. 1. P. Wms. 19. 1. Finch 36. 2. Finch. 53. Perk. § 175. 2. Bac. Abr. 497.

On the other Side it was argued by *Prideaux*, *Bendloe*, *Robert Catline*, *Morgan*, and *Richard Catline*, and amongſt them it was ſaid that the Intereſt which paſſed by the Deed indented to *Smith* and his Wife ſhall be a good Leaſe for 21 Years after the Eſtates for Lives determined. And in order to prove or diſprove this we muſt have Recourſe to the Words of the Demiſe and of the *habendum*, which are to be weighed and diſcuſſed. And as to this (it was ſaid) the Reverſion of any Hereditament conſiſts of two Things, as it has been before defined. The chief or principal Thing is the Hereditament from whence it ſprings, as if it is a Reverſion of Rent, then the Rent is the principal Ingredient; if a Reverſion of Land, then the Land, for that is the Foundation of it; the other is no more than the Degree of it, for the Reverſion of Land is Land which is in a Degree of *Reverter*, for if there is no Poſſibility of a *Reverter*, then it is not a Reverſion, and it cannot revert but where there are two Eſtates in the Land, as where a Leaſe for Years, for Life, or in Tail is made, there he that has the particular Eſtate has one Eſtate, and he that made the particular Eſtate has another Eſtate left in him, and his Eſtate is called a Reverſion, becauſe the particular Eſtate may be ended, and then the Land ſhall come back again to him, which coming back again is called a *Reverter*. So that a Reverſion derives it's Name from *reverter*, and the Subſtance of which it conſiſts is the Thing itſelf from whence it ſprings, for a Reverſion of Land and Land in Reverſion is all one, ſo that Land is the Subſtance. And when a Reverſion of Land is granted, true it is that [g] Attornment ought to be had, and that it ought to veſt preſently by the Attornment and not at a Day to come, but this is always to be underſtood when it is granted and paſſes as a Reverſion, that is to ſay, when the Subſtance and the Degree are joined together. But in our principal Caſe it is quite otherwiſe, for here the Reverſion of the Land is granted, *habendum* the Land itſelf after the particular Eſtate ended, which *habendum*, in the Expoſition of the Deed, ought to be compared with the Premiſſes of the Deed, for the Premiſſes is one Part of the Deed, and the *habendum* is another Part, both which do but make one Deed. And by comparing them together it appears that the Intent of the Demiſe of the Reverſion of the Land here is not to be taken as a Demiſe thereof, as of the Reverſion of the Land, but as a Demiſe of the Land itſelf; but foraſmuch as the Demiſe is of the Reverſion of the Land, *habendum* the Land, and a Reverſion conſiſts of the Land itſelf and of the Degree, and here they cannot paſs together in ſuch Sort, it is to be ſeen whether the one may paſs without the other by Words of a Reverſion, that is to ſay, whether the Subſtance, viz. the Land, will paſs without the Degree, or whether the Degree will deſtroy the Grant of the Subſtance. And as to this it is to be conſi-

[e] *E contra* for the Plaintiff.

[e] S. P. Plowd. Quær. § 223.

[f] Bro. Reſervation 46. Dr. & Stud. lib. 2. cap. 22. fo. 182. 3. Bulſt. 105. Vin. Abr. tit. Reſervation B. 2. pl. 4. But See Poſt 524, where a Woman leaſed Mills in *Kent*, with an Exception of the Profits for her Life, and held good in Law.

[g] See now the Statute of 4 & 5. *Anne cap.* 16. by which this Ceremony is taken away.

dered that every Deed ſhall be taken moſt ſtrongly againſt the Grantor, and if by any reaſonable Intendment it can be taken to be good and effectual, it ſhall be ſo taken rather than be void, and if the Intent of the Parties appears, the Law will conſtrue the Words in ſuch Senſe as to perform that Intent rather than in any other Senſe. And here altho' the Premiſſes of the Deed has the Words, viz. *the Reverſion of the Land*, yet the Leſſors intended therein to paſs *the Land* which they had in Reverſion, for the *habendum* and the Limitation of the Commencement of the Term after the Eſtate ended argue and prove their Intent to be ſuch, and the Act of the Leſſees in taking the Eſtate by ſuch Words by Indenture proves that the Intention of the Leſſees alſo was ſuch, and that both of them intended here to exclude and ſever the one Ingredient of a Reverſion, viz. the Degree, and to uſe the Word *(Reverſion)* not in its proper Signification, but as deſcriptive of and confined to the Land itſelf, that is to ſay, all their Lands which they had in Reverſion in *Didcote*, &c. and that they would not have the Land to paſs in a Degree of Reverſion, but in Degree of Demeſn. And that the Law will oftentimes draw the Words from their proper and uſual Signification to fulfil the Intention of the Parties when the ſame appears, is eaſily proved by many Caſes. [a] And therefore if a Diſſeizee agrees with the Heir of the Diſſeizor who is in by Deſcent to confirm his Eſtate, and he makes him a Deed by theſe Words *dedi et conceſſi* the Land to him, this cannot enure in it's natural Senſe, for the Nature of *Dedi* is to give one a Thing which he had not before, but ſince it cannot enure ſo, it ſhall enure as a Confirmation, and the Law will apply the Word out of its proper Signification to fulfil the Intent. [b] So in 17. *Ed.* 3. it is held that a Manor may paſs by the Name of a Knight's-Fee, for if it was the Intent of the Parties to paſs the Manor, the Law adjudges it beſt to apply the Word *(Knight's-Fee)* to the Intent, altho' it be not it's proper Signification. [c] And ſo in 10. *Ed.* 4. it is held by the better Opinion that a Man may plead a Demiſe to him of Land for a Year, by Force of the Words of a Licenſe to him to occupy the Land for a Year: So that he may take the Word out of it's proper Signification, and uſe it in another Senſe in order to perform the Intent of the Matter. In the ſame Manner this Word *(Reverſion of Land)* may be applied out of it's common and natural Acceptation to the Land itſelf, when the Intent of the Parties is ſuch, and this Application is not very ſtrange, ſeeing it contains the Thing to which it is applied, for the Reverſion includes the Land. And therefore we may frequently ſee that where a Word includes a Thing in itſelf, the Thing included ſhall paſs by the Word. [d] As in 11. *R.* 2. it is held that if one grants to another *aquam ſuam*, the Piſcary in it ſhall paſs by the Grant, becauſe it is included in the Word (*aqua*). [e] And ſo by the Grant of a Piſcary the Soil ſhall paſs, as it ſeems by 40. *Ed.* 3. for there a *Monſtraverunt* lay of a Piſcary, by which it is implied that it contains Land and Demeſn, or elſe it could not have been held good, nor could [f] Diſtreſs be taken in it. [g] And in 7. *Ed.* 3. it is ſaid that if a Lord grants to another to dig Turves in a certain Place to ſell and carry them at his Pleaſure, the Property of the Soil paſſes by it, for it is included in ſuch a Grant of Turbary. [h] And ſo, it was ſaid, by the Grant of a Pool the Soil and Wear ſhall paſs, becauſe it is included in the Word: [i] for by one Book a *Formedon* lies *de gurgite*. [k] And ſo 100 Acres of Land may paſs by the Name of *una acra cornubienſis*, for *Corniſh* Acre contains ſo much. Therefore where a Grant is made by any Word, the Thing included in the Word ſhall always paſs. So in our Caſe, by the Grant of a Reverſion of Land the Land itſelf is included, and then the *habendum* the Land is not an *habendum* of another Thing, but of the ſame Thing that is contained in the Premiſſes, altho' according to the common Acceptation of the Thing in the Premiſſes it is there mentioned in another Degree, nevertheleſs they are both one ſame Thing in Subſtance, and as ſuch the *habendum* is purſuant to the Grant, altho' it varies ſomewhat in Words. As if one makes a Leaſe for Life of an Acre, Remainder in Fee, and he that has the Remainder grants it to another by the Name of the Remainder of the Acre, *habendum* the Reverſion of the ſaid Acre to him and his Heirs for ever, this *habendum* is good, and ſhall make the Remainder to paſs in Fee, and yet there the *habendum* varies in Words from the Premiſſes, and alſo in the Degree of the Thing, which Variance in the Degree is as great as in the principal Caſe, for a Remainder is that which paſſes from the Leſſor at the Time of the particular Eſtate made, and a Reverſion is that which is left in him who makes the particular Eſtate, ſo that it varies both in Terms and Degree, but inaſmuch as the Subſtance is one, that is, the Acre, the *habendum* is purſuant enough to the Grant in Judgment of Law, which regards the Intent of the Matter, and applies the Words to fulfil the ſame. So if a Man makes a Gift in Tail, reſerving the three firſt Years a Roſe, and afterwards a Rent of 20 *s.* and he reciting the Gift and Reſervation by Deed grants the Roſe to another, *habendum* the ſaid Rent of 20 *s.* to him and his Heirs, this *habendum*, altho' it varies in Terms, yet is purſuant enough to the Premiſſes, and good, becauſe it is the ſame Thing in Subſtance, for the Roſe and the 20 *s.* are but one [l] Rent in Subſtance, and not ſeveral. And ſo the Subſtance of the Reverſion in our Caſe is the Land, and the Subſtance and effectual Intent of every Grant of a Reverſion of Land is to have the Land after the particular Eſtate ended, and then when the Reverſion of the Land is granted, *habendum* the Land after the particular Eſtate ended, this is the ſame Thing to which the Effect of the Grant of the Reverſion tends, and is the Sum and Scope of the Matter, in the Limitation whereof by the *habendum* it cannot be ſaid that the *habendum* varies from the Premiſſes, or is of another Thing. For the Land is ſo much the Subſtance of a Reverſion, that by the Grant of the Land the Reverſion ſhall paſs. [m] And therefore if a Man has two Acres of Land, and leaſes the one for Years, and after makes a Deed of Feoffment of both, and makes Livery of that which is in his own Poſſeſſion, if the Leſſee attorns the Reverſion of the

[a] Littlet. § 531. Bro. Confirmation 20, 21.

[b] H. 17. Ed. 3. 8 b. *per Hilling. et Stone.* Fitz Feoffmen's et Faits 59. 2. Rol. Abr. 1. D. pl. 2. 2. Leon. 42. 3. Leon. 166. 4. Leon. 76. 1. Bulſt. 54.

[c] P. 10. Ed. 4. 4. a. M. 5. H. 7. 1. Bro. Leaſe 30. Licence 19. 1. Rol. R. 247. 2. Rol. R. 78. 1. Leon. 129. 2. Bulſt. 187. Palm 201. 2. Keb. 561. March 70. 1 Mod. 14. Hard. 347. Ld. Raym. 404. 3. Bac. Abr. 420. *Note*, the Current of the above Books are that the Party *muſt* plead it according to it's Operation in Law, viz. as a Leaſe.

[d] T. 11. R. 2. not in Print nor abridged. Co. Litt. 4. b. Davis 55. b. 2. Rol. Abr. 2. pl. 9. Vide Ante 151. (g).

[e] M. 40. Ed. 3. 45. b. Fitz. Monſtraverunt 2. Davis 55. b. Vide Ante 151. (h).

[f] S. P. 1. Finch 110. 2. Finch 136.

[g] M. 7. Ed. 3. 44. a. Fitz. Aſſize 134. Bro. Grants 160. 5. Aſs. pl. 9. 7. Aſs. pl. 9. But Bro. Grants 124. puts a *Quære*. And ſee Co. Litt. 4. b. contra.

[h] S. P. Co. Litt. 5. b.

[i] M. 14. Ed. 3. Fitz. Formedon 34. Bro. Præcipe quod reddat 31.

[k] M. 6. Ed. 3. 42. a. Fitz. Brief. 730.

[l] Plowd. Quær. § 302. And ſee M. 15. Ed. 3. Fitz. Execution 63. *per. Thirn.* 4. Co. 9. a. where it is ſaid they are ſo much one Reſervation, that Seizin of the one is Seizin of the other to have Aſſize.

[m] M. 7. Ed. 4. 20. pl. 20. Fitz. Feoffments 22. Grants 97. T. 11. H. 4. 71. a, admitted. 2. Rol. Abr. 56. pl. 14. Co. Litt. 49. a. 2. Bac. Abr. 491. Vide contra Ante 152 (c).

the other ſhall paſs; to prove which 7. *Ed.* 4. was cited. [a] And alſo it was ſaid that where the Heir had endowed the Wife of the third Part of a Mill, and afterwards gave to a Stranger *totum molendinum ſuum*, the Reverſion of the ſaid third Part of the Mill ſhould paſs thereby; and this Caſe was cited to be ſo adjudged in 30. *Ed.* 1. in the Eire of *Cornwal.* [b] Which Caſes prove that a Gift of Land ſhall make the Reverſion of the ſame Land to paſs, and yet the Land is in another Degree than the Reverſion of the Land. From whence it appears that the Reverſion of the Land and the Land itſelf are not two diſtinct Things, as before hath been alledged, but they are one ſame Thing in Subſtance. And then when the Reverſion of the Land is granted, *habendum* the Land itſelf, this explains what was the Meaning of the Party in the Word *(Reverſion)* and is purſuant enough to the Grant. And there are many Caſes where Words of Explanation of the Premiſſes of a Deed ſhall correct the Words that go before much more ſtrongly than they do in our Caſe. [c] And therefore in 7. *Ed.* 3. it is held that if I grant to one 10 *l.* Rent out of my Manor, to be taken out of one Acre of Meadow in the ſame Manor, nothing ſhall be charged but that Acre of Meadow. And if the Law be ſo that the Words of the Grant out of the Manor ſhall be corrected and explained by the Limitation of the *a prender* afterwards, and nothing but one Acre charged, and that by the Judgment of Law in order to perform the Intent of the Parties, *a fortiore* in our Caſe the Words *(Reverſion of the Land)* may be corrected and explained by the *habendum* to mean the Land itſelf being the ſame in Subſtance. And it was admitted that the Word *(Tenements)* in the *habendum*, which is a general Word [d] containing the Reverſion, would never help the Matter for the Reaſon given by the Counſel on the other Side, but that the Law will well enough warrant the *habendum* in the Words *(Lands, Meadows, Paſtures, &c.)* And therefore the Title of the Plaintiff is good, and he ſhall recover his Damages.

[a] 30. Ed. 1. Itin. Cornub. Fitz. Grant 86. Dy. 225. pl. 45. Litt. R. 18. Palm. 320. Poſt. 161.

[b] M. 38. Ed. 3. 26. a. *per Belkn.* Bro. Grants 30. Dy. 126. pl. 50. in marg. 4. Co. 36. a. 10. Co. 107. a. b. Cro. C. 400. 4. Leon. 77. Litt. R. 18. Vaugh. 83. March 32. Poſt. 161, 162. 422. 433. VideContra 35. H. 8. Bro. Grants 150. B. N. C. § 267.

[c] H. 7. d. 3. 10. a. Fitz. Aſſiſe 132.

[d] Moor 36. pl. 118. *per Dyer.*

Anthony Brown. The Matter which we are to conſider here is how the firſt Part of the Deed and the *habendum* ſtand together. And, Sir, the firſt Part contains a Demiſe and Grant of a Reverſion, and the *habendum* is of Meſſuages, Lands, Tenements, &c. which Words *(Tenements)* [e] compriſes the Reverſion. [f] For it appears in 33. *Ed.* 3. that where the King had granted Licenſe to an Abbot to purchaſe Lands and Tenements in Mortmain, and he purchaſed a Reverſion, there this Purchaſe was purſuant enough to the Licenſe; which proves that the Word *(Tenements)* compriſes a Reverſion. But altho' it does compriſe it, yet for two Cauſes the Word ſo taken in the *habendum* cannot agree with the Premiſſes by the Rule of Law. The firſt Cauſe (if it ſhould be ſo taken, and then the Clauſe to ſtand thus, viz. the *habendum the Reverſion* from the Feaſt of *St. Michael* after the firſt Leaſe ended for 21 Years thence next enſuing) is, for that then it is no Reverſion. For in the mean time, viz. after the Eſtate for Lives ended, and before the ſaid Feaſt of *St. Michael*, the Land is in Poſſeſſion, which the Leſſors ought to have and occupy, and the Reverſion is gone, for there cannot be a Reverſion but when there is a particular Eſtate continuing, whereas there the particular Eſtate by it's Determination is become no particular Eſtate, and conſequently the Reverſion is become no Reverſion, and to appoint the Reverſion to commence and veſt as a Reverſion at a Time when it is no Reverſion, but when the Land is in Poſſeſſion is repugnant and contradictory. [g] As in the Caſe in 21. *H.* 7. where a Man made a Gift in Tail upon Condition that if the Donee alien'd in Fee, then his Eſtate ſhould ceaſe, and the Land ſhould remain to a Stranger, there this Remainder cannot be good, for a Remainder cannot veſt but during the particular Eſtate, and when his Eſtate ceaſes, and all the particular Eſtates are determined, and the Land is become Land in Poſſeſſion, then there cannot be a Remainder, for it is then in another Degree; and as a Remainder in Land cannot veſt in a Stranger, as a Remainder, when the Land is become in Poſſeſſion after the particular Eſtate ended, no more can a Reverſion of Land veſt in a Stranger, as a Reverſion, when the Land is become in Poſſeſſion after the particular Eſtate ended. [h] And upon this Reaſon the Caſe in 9. *Ed.* 3. is founded, where it is put, that if a Man makes a Gift in Tail rendring Rent, and afterwards the Donor takes a Wife, his Wife ſhall be endowed of the Rent, but if the Donee is a Woman, who dies, and her Huſband is Tenant by the Curteſy of the Land, and afterwards the Iſſue in Tail dies without Iſſue, now the Wife of the Donor ſhall not have Dower of the Rent; for her Title of Dower was to be endowed of the Rent of Inheritance, and there cannot be an Inheritance in the Rent longer than the Inheritance of the Land endures, and ſo the one is in Reſpect of the other; and ſince her Title was to be endowed of the Rent of Inheritance, and now the Rent is changed into a Rent for Life only, and ſo is in another Degree before the Execution of her Eſtate, it ſhall never be executed, for it would be repugnant in itſelf. So in our Caſe, foraſmuch as the Reverſion of the Land was granted, and the *habendum* appoints the Commencement and Execution of it to be at a Time when it ſhall not be a Reverſion, but in Poſſeſſion, and conſequently in another Degree, it cannot ſo veſt or be executed, for it is a Contradiction in itſelf, and therefore it ſhall be void. The other Cauſe is, for that if [i] a Reverſion might be granted at a Day to come, from thence it would follow that the Grantor would have a particular Eſtate in it in the mean time of his own Creation, which cannot be by the Rule of Law that a Man ſhould be [k] Leſſor to himſelf, or that he ſhould diminiſh his own Eſtate, reſerving a [l] leſſer Eſtate, and giving the greater out of him without Alteration of his leſſer Eſtate. [m] And therefore it is truly ſaid in 8. *H.* 7. that if one has a Rent in Fee, and grants it to another after the Death of *J. S.* this is void, for if it ſhould be good, then until *J. S.* was dead he ſhould have a Freehold of his own Grant, and the Grantee ſhould have the Fee, for if the Fee ſhall ever paſs, it ſhall paſs preſently; but the Law will not ſuffer him to have a particular Eſtate in the Rent by ſuch Means, nor will it ſuffer the Eſtate to be ſo ſeparated and divided without an Alteration of the whole Eſtate. Nevertheleſs the

On the ſame Side.

[e] Moor 36. pl. 118. *per Dyer.*

[f] M. 33. Ed. 3. Fitz. Grant 102. Bro. Alienation 35.

[g] H. 21. H. 7. 12. a. 2. And. 104. Ante 25. (m).

[h] S. P. 10. Ed. 3. 27. a. Fitz. Avowry 159. *per Parn.* which ſeems to be the Caſe here meant.

[i] That a Reverſion cannot be granted to commence *in futuro*, 8. Co. 74. b. Cro. E. 450. 585. Palm. 30. Bridgm. 105. Vin. Abr. tit. Eſtate B. pl. 9. Poſt. 197. 483. unleſs it be a Reverſion for years. *Palmer v. Thorp.* Cro. E. 152. 1. Leon. 171.

[k] T. 1. H. 5. 10. a. b. *per Hull.* Fitz. Scire Facias 57.

[l] T. 38. H. 6. 38. a. Bro. Grant 60. Reſervation 19. T. 1. H. 5. 8. b. *per Hull et Skrene.* Perkins § 704. Vin. Abr. tit. Reſervation B. 2. pl. 3.

[m] T. 8. H. 7. 3. b. *per Vaviſor.* Bro. Grants 86. See Ante 152. (a) and the other Books there cited.

See post 158 (B) Co. Litt. 44. B.

[a] P. 12. Ed. 3. Fitz. Condition 11. M. 22. Ed. 3. 19. pl. 86 Fitz. Ibid. 12. P. 5. Ed. 2. Maynard 161. Fitz. Dower 143. H. 19. H. 7. 13. b. *per Keble.* Perk. § 327. 1. Co. 87. a. 1. Leon. 330. 4. Leon. 83. Goob. 103. Jenk. 4. pl. 6. 2 Sid. 117. 1. Vent. 96. 10. Mod. 367. 2. Bac. Abr. 127. Vin. Abr. tit. Dower H. pl. 9. [b] S. P. 6. Co. 41. a. 8. Co. 17. b. [c] T. 8. H. 7. 3. b. *per Vavisor.* Bro Grants 86. 2. Rol. R. 427. Palm. 30. 2. Vent. 204. 1. Show. 300. 4. Mod. 280. 12. Mod. 80. 1. Bac. Abr. 117. 4. Bac. Abr 348. Vin. Abr. tit. Estate B. pl. 11. Post. 197. (e). Plowd. Quær. § 30. [e] Bridgm. 109. [d] Ante 152 (m). 155 (m). Bridgm. 109. [e] Littlet. § 60. Vin. Abr. tit. Feoffment L. pl. 38. [f] Co. Litt. 217. a. Wing. Max. reg. 28. pl. 7. 2. Bac. Abr. 488. Vin. Abr. tit. Feoffment E. 2. pl. 5. [g] S. P. Godb. 128. Vin. Abr. tit. Intent B. pl. 1. [h] M. 3. H. 6. 11. b. *per Martin et Rolf.* M. 19. H. 6. 17. b. *per Poston.* M. 21. H. 6. 8. b. *per Poston.* Bro. Feoffments 58. M. 11. H. 4. 33. a. *per Hank.* Bro. ibid. 10. 1. Finch 48. 2. Finch 67. that it amounts to a Feoffment. [i] S. P. M. 7. H. 6. 7. b. which seems to be the Case here meant. [k] H. 22. H. 6. 43. a. *per Newton.* Fitz. Feoffment et Faits 11. Bro. Confirmation 11. Owen 102. Hardr. 49. 4. Mod. 150. Vin. Abr. tit. Confirmation X. pl. 8. [l] T. 9. H. 7. 2. a. *per Conisby.* But see to the contrary Post. 397. 8. Co. 167 where it is cited to be pleadable only as a Confirmation. [m] P. 21. H. 7. 23. b. Bro. Bar. 52. Defeasance 15. Grants 58. [n] M. 24. Ed. 3. 32. b. Fitz. Grant 66. Bro. 49. Estates 24. Waste 93.

the Case in 12. *Ed.* 3. may stand well enough with Law and good Reason, [a] for there it is held that if one grants to another a Rent out of his Land in Fee, upon Condition that if the Grantee or any of his Heirs die, his or their Heir being within Age, then during such Nonage the Rent shall ceale, there if the Grantee dies, his Heir being within Age, his Wife shall have Dower, but Execution shall cease during the Nonage of the Heir; but there it is put, that if the Heir dies during his Nonage, his Wife shall not have Dower of the Rent, for there the Rent was never leviable in the Son as it was in the Father, and the Rent would have been in *esse* at the full Age of the Heir, if he had lived so long; [b] and so there the Rent for a Time may be in *esse*, and for a Time shall not be in *esse*, because it was newly granted. And at the first Commencement of a Grant a Man may grant the Thing in what Form he pleases. [c] As a Rent *de novo* may be granted to commence after the Death of J. S. * But when a Rent or a Reversion, or other Thing is in *esse*, a Man cannot make it to be in *esse* at one Time and to cease at another, nor grant it to another Person after the Death of any one, or at a Day to come, reserving to himself an Estate in the mean Time. And therefore for these Causes it seems that tho' one should take the Word (*Tenements*) to contain the Reversion, yet this does not agree with the Premisses of the Deed. And as to what has been said, that forasmuch as the *habendum* is not pursuant to or agreeable with the Premisses, the *habendum* shall be void, and the Demise before the *habendum* shall be good, in which Case *Smith* and his Wife should have had the Reversion for their Lives if Attornment had been made, and so the Deed shall not be utterly void, but shall take Effect for their Lives; Sir, this is not so, for the Limitation of the Time in Gifts or Grants is material, and if it cannot pass according to the Time limited it shall be utterly void. [d] As in the Case that I have put before, viz. if I have a Rent in Fee, and I grant it to another, if I stop there the Grant shall be for Life, but if I go further and say, "*habendum* after the Death of J. S." there the whole shall be void, for the Time is Part of the Intent of the Party, and material, and therefore if it cannot pass as he intended it, the whole shall be void. So if I have Land for Years, and I grant to another all my Interest therein, if I stop there he shall have the whole, but if I say further, "*habendum* after my Death," there the whole shall be void, for the Time is material, and the Estate by such Words ought to pass presently or never, and to take the whole Interest to pass presently, contrary to the Intent of the Party, would be very unreasonable. [e] And if a Man makes a Lease for Years the Remainder in Fee, if the Tenant for Years enters before Livery his Term is good, but the Remainder is void by *Littleton*. [f] But if the Lessor appoints the Lease to commence at *Michaelmas* next, the Remainder over in Fee, there although he makes Livery and Seizin to the Lessee, yet the Livery and Seizin and Remainder shall be void, because there is no present Estate to which the Livery may be annexed, or on which it can rest in the mean Time. And if Livery and Seizin shall be there void, because the Time of the Commencement of the Lease is postponed, and the Livery shall not destroy the Time, but the Time shall destroy the Livery and the whole Estate in Fee, *a fortiore* in our Case when the Reversion is demised, *habendum* the Tenements, that is, the Reversion after the particular Estate ended, the Grantee shall not have it before, and if he cannot take it then it shall be void. So that the Time shall destroy the Livery of Seizin or Grants, rather than Livery of Seizin or Grants shall destroy the Time limited by the Party. From whence it appears that the Argument made on the other Side, which would have the Premisses of the Deed to stand, and the *habendum* to be void, is not agreeable to Law, but in Truth tends to the utter Destruction of the whole Grant and Demise, and to make the Deed meerly void. And such Expositions of Deeds are by no Means reasonable, if by Law or Reason they may be taken otherwise; for every Deed is made to some Purpose, and therefore it is reasonable that it should be construed to some Purpose, and not to be void. And every Act shall be taken most strongly against him that does it, and most beneficially for him to whom it is done, [g] and the Law gives him to whom the Deed is made an Election to use it in the same Sense, and to the same Purpose for which he says it was made. [h] And therefore a Man may plead a Lease for Years and Release as a Feoffment. [i] So in 8. *H.* 6. a Deed of Feoffment was pleaded as a Confirmation. [k] So it is said in 22. *H.* 6. that one Jointenant shall plead the Feoffment of his Companion as a Confirmation. [l] So in 9. *H.* 7. it is said that where the King by Act of Parliament (reciting that he had granted the Land by his Letters-Patent) ratifies and confirms the Estate of the Patentee, and further adds *damus et concedimus* the same Land to the Party, there the Party may plead this Act as a Grant or as a Confirmation. [m] And so in 21. *H.* 7. where the Obligee had granted by Deed to the Defendant that he should not be sued nor vexed by Force of the said Obligation before the Feast of *St. Michael*, and if he was impleaded, that then he should plead the said Grant as an Acquittance, and that the Obligation should be held void and of no Effect; it was there held that if an Action of Debt was brought before the Feast of *St. Michael*, the Defendant might use the Deed as he pleased, that is to say, he might plead it in Bar of the Duty, or have an Action of Covenant upon it. [n] And in 24. *Ed.* 3. where there was Tenant for Life, the Remainder for Life, the Remainder to the right Heirs of the first Tenant for Life, and the first Tenant for Life afterwards granted by Deed to him in Remainder for Life that he might do Waste, there it is held that he might plead this in Bar of an Action of Waste brought against him after the Death of the first Tenant for Life, and therefore in a *Quod juris clamat* he knew the Advantage. From which Cases we may see that Deeds which have *primâ facie* one Sense may be used in another Sense, and that the Party to whom they are made has Liberty to apply them, contrary to the Sense they bear at first Sight, in such Manner as serves best for his own Benefit. In our Case then the

the Deed *primâ facie* is a Demiſe and Grant of the Reverſion of the Land, but the Party has uſed it as a Demiſe or Leaſe of the Land itſelf, and not as a Grant of the Reverſion. And foraſmuch as that is beſt for his Advantage, he may uſe it in that Senſe by Law, as I apprehend. [a] For a Reverſion of Land is that Part of the Land which is left in him that makes the particular Eſtate, and may well be called the Reſidue or Remnant of the Land. And Land is compriſed in this Word *(Reverſion of Land)*; [b] for if a Man releaſes all his Right in the Land to him in the Reverſion, the Releaſe ſhall be good, and his Right ſhall be extinct, *ergo* the Land is compriſed in the Reverſion. But it has been ſaid that the Reverſion comprehends the Land where it is granted as a Reverſion, and veſts as a Reverſion by Attornment, as to this, Sir, if the Land was not included in it before Attornment, the Attornment could not make the Land to paſs. [c] And it appears by 5. *H.* 5. that if a Man makes a Leaſe for Years, and afterwards the Leſſor grants a Rent-Charge out of the Land, this ſhall charge the Reverſion, which proves that the Land and the Reverſion are not two diſtinct Things, but that the Land is contained in the Reverſion. [d] For if a Man recovers the Land againſt Tenant for Life, this ſhall deveſt the Reverſion. And if I make a Covenant to aſſure the Reverſion of two Acres of Land by Fine to one, and he brings a Writ of Covenant *quod teneat conventionem* of two Acres of Land, I ought to levy a Fine upon this Writ, [e] for when a Man levies a Fine of the Reverſion of Land, the Writ of Covenant is of the Land itſelf. And the Concord of a Fine for the Reverſion of Land is, *viz. that the aforeſaid* (the Conuſor) *hath acknowledged the Tenements aforeſaid with the Appurtenances to be the Right of the ſaid R. and hath granted for himſelf and his Heirs, that the Tenements aforeſaid with the Appurtenances, which H. the Day when this Agreement was made held for Term of his Life by the Law of England of the Inheritance of the aforeſaid* (the Conuſor), *and which after the Death of the ſaid H. ought to revert to the aforeſaid* (the Conuſor) *and his Heirs, ſhall immediately after the Death of the ſaid H. remain to the aforeſaid R. and his Heirs*; and this is the uſual Form of the Grant of a Reverſion by Fine. And if the uſual Form in ſuch Caſe is according to the Matter, as we ought to intend it, then to have the Reverſion of the Land is to have the Land itſelf. For the Party grants that *the Land ſhall remain after the Death, &c.* and ſuch Grant is called a Grant of the Reverſion of Land, ſo that the Reverſion of Land comprehends the Land itſelf. And when the Conuſee of the Reverſion of Land by Fine brings a *Quid Juris clamat* againſt the particular Tenant for Life, the Writ is, that the Sheriff ſhall diſtrain him, *&c.* and ſhall have his Body at ſuch a Day, *to ſhew what Right he claims in one Meſſuage, one Garden, and* 14 *Acres of Land with the Appurtenances in S. which T. in the Court of the King here hath granted to* (the Plaintiff) *by Fine between them made, &c.* and ſo it recites that the *Land* was granted, whereas in Fact nothing was granted but the *Reverſion*. But foraſmuch as by the Grant of the Reverſion the Land in Subſtance and Effect was granted, the Words of the Writ of *Quid juris clamat* are true in Effect. [f] And ſo it was held in 4. *Ed.* 3. where the Reverſion of Tenant for Life was granted in Tail, that the Iſſue in Tail ſhould have a *Formedon of one Meſſuage, which J. S. granted after the Death of* the Tenant for Life, *&c.* [g] And *Littleton* ſaith in his Book that if there is Tenant for Years, and the Reverſion of the Land is granted to him in Fee, he has the Land in Poſſeſſion in Fee-ſimple preſently. By which Caſe, and by the others before put it is evident that the Reverſion of Land and the Land itſelf are not two diſtinct Things, but the one in the Premiſſes and the other in the *habendum* are purſuant enough to each other, for in the Grant of the Reverſion the Land was granted, and then *habendum* the Land after the Eſtate for Lives determined is the ſame in Subſtance with what is contained in the Premiſſes. And although the *habendum* is not in the Degree of a Reverſion as the Premiſſes of the Deed is, yet inaſmuch as the Words *(Reverſion of the Land)* compriſe the Land in Subſtance, it ſhall be good enough to make the Contract here valid; as we may ſee in other like Caſes where a Word contains another Thing in Senſe. [h] As a Grant of the Reverſion of Land ſhall enure as a Remainder; and ſo a Grant of a Remainder, where he has a Reverſion, is good enough to make the Reverſion paſs. [i] And ſo in 3. *H.* 6. it is held that if a man makes his Will, and commits the Adminiſtration to one, thereby he ſhall be Executor, for the Word *(Adminiſtration)* compriſes Executorſhip in Subſtance. [k] And by 7. *Ed.* 3. an Advowſon ſhall paſs by the Grant of a Church. [l] And if one grants to me that I ſhall name to him a Clerk for his Church when it becomes void, and that he ſhall preſent him over to the Biſhop, hereby the Preſentment ſhall paſs to me, and I ſhall have a *Quære Impedit*, by the Opinion of all the Juſtices in 14. *Ed.* 4. But it is there ſaid, if I grant to one that he ſhall name to me two Clerks, and I ſhall preſent the one, *&c.* in this Caſe the Preſentment is not given to the Grantee, for it is in my Election which of them ſhall have the Benefice. [m] And in 8. *Ed.* 3. it is held that if one makes a Gift in Tail reſerving Rent, and if the Rent be in Arrear that the Land ſhall return, this is a good Condition, for by *returning* it is intended that he ſhall have the Land again, and therefore in Senſe it includes another Word. [n] So by a Grant *de ſtagno molendini* the Soil where the Water is ſhall paſs, for it is not a Pond without Soil, nor with Soil without Water. From which Caſes it appears that where a Word comprehends another Thing, the Thing comprehended ſhall paſs by ſuch Word, although it has not the ſame Name. [o] And ſo if the Thing is comprehended in the Premiſſes, and has another Name in the *habendum*, which contains the Thing, the *habendum* is good. [p] As if the Nomination of an Advowſon is granted, *habendum* the Advowſon, the *habendum* is good, although it varies in Name, for it is the ſame Thing. So a Gift of a Manor, *habendum* the Services, is a good *habendum*, *cauſâ qua ſupra*. So if a Manor be granted or rendered by Fine, *habendum* an Acre Parcel of the Manor to him and his Heirs, thereby he ſhall have the Manor for Life, and the Acre in Fee, becauſe there wants a Limitation of Eſtate for the reſt of the Manor. So if an Acre Parcel of a Manor is let to one for Life, and afterwards the Manor is given, *habendum* the Reverſion of the Acre in Fee, this is a good *habendum* for the Acre, *cauſâ qua ſupra*,

[a] Co. Litt. 22. b. Cart. 14. 1. Finch. 102. 2. Finch 113. Vin. Abr. tit. Reverſion B. pl. 1. 4. Bac. Abr. 292.

[b] Litt. § 449. Vin. Abr. tit. Releaſe K. 2. pl. 2. Poſt. 161.

[c] H. 5. H. 5. 8. pl. 20. Fitz. Charge 4. Bro. 10. Grants 118. Dy. 126. pl. 47.

[d] Litt. § 674.

[e] H. 19. Ed. 4. 9. pl. 8. *Per Brian.* Bro. Fines Levies 97.

[f] F. N. B. 218. d. Poſt. 159. (h).

[g] Litt. §

[h] See ante 134. (d) and the Books there cited.

[i] M. 3. H. 6. 7. a. Bro. Executors 9.

[k] H. 7. Ed. 3. 5. Fitz. Quare impedit 19.

[l] H. 14. Ed. 4. 2. b. Bro. Grants 101. Quare impedit 133.

[m] 8. Aſſ. pl. 34. Bro. Conditions 100. M. 20. H. 7. 11. a. Dy. 22. pl. 140. 125. pl. 45. 1. Rol. R. 330. 3. Bulſt. 154 Bridgm. 13. Poſt 159. (o).

[n] Ante 151. (c) and (f), and the Books there cited.

[o] Vin. Abr. tit. Grants J. a. 4. pl. 3.

[p] Dy. 126. pl. 48. Vin. Abr. tit. Grants J. a. 4. pl. 3. N. a. pl. 1. Poſt 160 (f).

and he ſhall have the Manor only for Life, becauſe no Eſtate was expreſsly given in it. [a] And if I give to Man all my Lands in *Dale*, *habendum* Black-acre in Fee, if Black-Acre lies there it is a good *habendum*, for it was compriſed in the Premiſſes. [a] And *Littleton* in his Book ſays that where a Man confirms the Eſtate of his Tenant for Life, *habendum* the Land to him and to his Heirs, the Fee ſhall paſs thereby, and this *habendum* is good, and yet the Land was not given in the Premiſſes, nor was any Thing given, but only his Eſtate in the Land was confirmed, nevertheleſs foraſmuch as the Land was contained in the Eſtate, for this Reaſon the *habendum* the Land is purſuant to the Premiſſes. [b] And ſo *Littleton* alſo puts the Caſe where there are two Jointenants, and the one confirms the Eſtate of the other, *habendum* the Land to him and to his Heirs, that the Fee ſhall paſs thereby. By which Caſe, and by the others before cited it appears, that where there are words in Deeds which comprehend other Things in Senſe, the Thing comprehended ſhall paſs by the Words, and if it is contained in the Premiſſes of the Deed, and is named in the *habendum* by another Name, which contains the ſame in Subſtance, the *habendum* is good. And ſuch is our preſent Caſe, for in the Premiſſes of the Deed, which is a Demiſe of the Reverſion of the Land, the Land is contained and compriſed as the Effect and Subſtance of the Grant and Demiſe: and the *habendum* the Land after the Eſtate for Lives ended, as of Land in Poſſeſſion, is purſuant enough to the Contents of the Premiſſes. For if the Reverſion of the Land had been granted for 20 Years after the particular Eſtate ended, he ſhould have had the Land in Poſſeſſion by ſuch Grant. And this proves that the Limitation of the Land in Poſſeſſion is not a Limitation of a Thing not compriſed in the Premiſſes, but it is a Limitation agreeable and purſuant enough thereto, and ſufficient in Law to fulfil the Intent of the Parties in making good a Contract. For the Law does many Times allow of a more ſtrange *habendum* than this is. [c] For if a Man deviſes Land to one, *habendum* to him and to his Heirs after the Death of the Wife of the Deviſor, there although the Wife is not named before the *habendum*, yet ſhe ſhall take an Eſtate for Life thereby. [d] So it is held in 4. *Ed.* 3. where a Man gave Land to another, *habendum* with *Joan* the Daughter of the Donor in Frankmarriage, there the Wife not named before the *habendum* ſhall take a joint Eſtate with her Huſband by the *habendum*. [e] And if I leaſe Land to *J. S. habendum* to him for 20 Years, the Remainder to *J. K.* in Fee, he ſhall take the Fee-Simple, and yet he is not named before the *habendum*, for ſuch was the Intent of the Parties. And then I ſay, if the *habendum* is of ſuch Efficacy in Law that it ſhall enable another Perſon to take who is not named in the Premiſſes of the Deed, *a fortiore* in our Caſe the *habendum* may explain the Intent of the Premiſſes in ſhewing the Senſe of a Word, and eſpecially where the Subſtance of the *habendum* is compriſed in the Premiſſes. Wherefore it ſeems to me that the Plaintiff ought to recover his Damages.

a Litt. § 524. Gilb. Treat. Ten. 72, 73. Vin. Abr. tit. Confirmation A. a. pl. 12.

b Lit. § 523. Gilb. Treat. Ten. 72.

c H. 13. H. 7. 17. pl. 22. Bro. Deviſe 52. M. 29. H. 8. Bro. Ibid. 48. B. N. C. § 107. *Note*, this Caſe, as it is here put, is clearly contrary to the ſettled Rule of Law at this Day, and is not warranted by the Book of 13. *H.* 7. here cited, tho' it is by the Abridgment thereof in Bro. Deviſe 52. (which is a moſt incorrect Abridgment of it) and by 29. *H.* 8. Ibid. 48. For the Caſe in 13. *H.* 7. is of a Deviſe to the Heir at Law after the Death of the Wife, which is univerſally agreed to be good Law, and to carry an Eſtate for Life to the Wife by neceſſary Implication, for if ſhe ſhould not take it, nobody elſe could, becauſe the Heir is expreſsly excluded by the Deviſe from taking it until after her Death. But here the Caſe is put of a Deviſe to a Stranger after the Death of the Wife, which varies materially, and cannot carry an Eſtate for Life to the Wife by neceſſary Implication, becauſe during her Life it ſhall go to the Heir, who ought to have it immediately on the Death of his Anceſtor, and from whom the Law will never give away the Land by a poſſible Implication only of the Deviſor's Intent (as here), but by a neceſſary Implication. And therefore in this Caſe it is only a Demonſtration when the Eſtate of the Stranger ſhall commence. So note a Diverſity between a poſſible and a neceſſary Implication, wherewith agree all the later Books of Authority. And therefore 29. H. 8. Bro. Deviſe 48. is not Law. See Accord Cro. J. 75. Vaugh. 263, &c. 1. Freem. 11. 2. Lev. 207. 208. 1. Vent. 323. 373. 376. 2. Keb. 782. T. Raym. 453. 454. 1. P. Wms. 38. 473. 1. Vern. 22. 2. Vern. 571. 572. 2. Bac. Abr. 66.

Eaſter Term 2 & 3. *P. & M.*

Afterwards in *Eaſter* Term 2 & 3. *Philip* and *Mary*, the Caſe was argued again by *Gawdy* for the Defendants, and by *Dyer* for the Plaintiff. But I have not here reported *Gawdy*'s Argument, becauſe it was much to the ſame Effect with that before reported on the Part of the Defendants, for this Argument was in a great Meaſure a Repetition of what he ſaid in his firſt, and I only heard Part of his former Argument as well as of this, and therefore I have not here reported it, though what I heard was very well argued by him.

d See Poſt 160. (e) and the Books there cited.

On the ſame Side.

Dyer. [f] This Word (*Reverſion* of Land) has a double Meaning; the one is the Eſtate left in him that makes the particular Eſtate, (as before hath been truly defined,) and is *jus revertendi*, for the Land ſhall revert to the Eſtate left: The other is the Land itſelf when it is reverting, and that is the proper Definition of the Word. For *reverſio* is a *Latin* Word, and in *Latin* it is called a *Noun-verbal*, which is as much as to ſay, a Noun derived from a Verb, and ſo it is, for it is derived from this Verb (*revertor*) and in *Engliſh* it is called (*returning*). So that *reverſio terræ* is in *Engliſh*, *the returning of the Land*, which is as much as to ſay, *the Land returning*. Which Senſe is warranted by the *Latin*, by converting the Noun-verbal into the Participle of the Verb from which it is derived. And ſo the *returning of the Land*, and *the Land returning*, is all one. And in this Senſe of *Land returning* a Reverſion is oftentimes taken by Statutes, and alſo by the Writs in the *Regiſter*. For the Statute of *Weſtminſter* 2. *cap.* 5. concerning Advowſons of Churches ſays, *it is provided that ſuch Preſentments ſhall not be ſo prejudicial to the right Heirs, or to them unto whom ſuch Advowſons ought to revert after the Death of any Perſons*, &c. ſo that the Statute calls the Reverſion of an Advowſon, the Advowſon itſelf which after the Death of the particular Tenant ought to revert, and therefore by this Statute a Reverſion is of a Thing which is in ſuch Eſtate as may revert, and it does not call it a Right, or a Poſſibility of Reverſion, but it calls it the Thing itſelf which ought to revert after the particular Eſtate ended. [g] And the Form of Entry for him that prays to be received upon Default of Tenant for Life is, *and ſo ſays, that T. S.* (the Tenant for Life) *holds the aforeſaid Tenements with the Appurtenances for Term of his Life, the Reverſion thereof after the Death of the aforeſaid J. S. belonging to the ſame* (him that prays to be received) *and his Heirs*, &c. which Form of Entry terming this a *Reverſion after Death*, proves that by a Reverſion is meant the Thing itſelf after the particular Eſtate ended, and it is not only that which a Man has during the particular Eſtate, for it is a Reverſion after Death. And therefore it is the Thing which is immediately after the particular Eſtate ended, and that is *the returning of the Land*, or *the Land returning*. Which Speech is moſt properly applied to living Things, and by Uſage it is transferred from animate Things to Things inanimate.

e 2. Bac. Abr. 495. Vin. Abr. tit. Faits C. a. pl. 5.

f Dy. 125. pl. 42. Cart. 11. Poſt 160. (m).

g Dy. 125. pl. 43. Vin. Abr. tit. Reſceipt A. 2. pl. 5. fo. 52.

* And

* And ſo in 14. *Ed.* 2. the Reverſion of the Tenant for Life was granted to one and to his Heirs; *ſi ſupervixerit* the Tenant for Life, and he had an Action of Waſt againſt the Tenant for Life, which is grounded upon the Reaſon above. [a] And, Sir, the Writ of Eſcheat is, *quæ ad ipſum reverti debet tanquam eſchata ſua.* [b] And ſo the Writ of *Ceſſavit* is, *quod ad ipſum reverti debet per formam ſtatuti, &c.* [c] And the Writ of *Contra formam Collationis* is, *ad præfatum* (the Demandant) *reverti debet, &c.* [d] And the like Words are in the Writs of *Formedon* in Reverter; and the Writs of *ad terminum qui præteriit*, *Intruſion*, *in Caſu proviſo*, and *conſimili caſu*, do expreſs that the Land ought to revert to the Demandant, which Writs at the ſame Time that they declare that the Land ought to revert to them, do alſo declare that there is a Reverſion of the Land when the particular Eſtates are ended. For in the very reverting of the Land, there is a Reverſion, that is, *a returning*. And a Remainder and Reverſion have a great Reſemblance. [e] For the Fine by which a Reverſion is granted after the Death of the Tenant for Life ſays, that the Land after the Death of the particular Tenant ſhall *remain*, and does not ſay, *revert*. [f] And if a Reverſion is granted in Tail dependant upon an Eſtate for Life, the Grantee ſhall have a *Formedon* in Remainder, and not a *Formedon* in Reverter, by *Fitzherbert's Natura Brevium*. The Reaſon, (as I apprehend) is, becauſe the whole [g] Eſtate is not given, but the Fee is reſerved; [h] and the Writ demands the Land which the Donor, after the Death of the Tenant for Life, granted to the Demandant, *habendum* after the Death of the Tenant for Life, *&c.* And ſo there the Writ is alſo the uſual Form of every Fine, as hath been recited, *viz.* that the Land ſhall *remain* after the particular Eſtate ended. And therefore it declares that the Remainder of the Land is the Land itſelf which ſhall remain after the particular Eſtate. [i] And in 10. *Ed.* 2. 3. where a Woman was endowed of the third Part of a Houſe, the Heir granted the two other Parts together with the third Part which the Wife held in Dower *cum acciderit*, and by ſuch Grant the Reverſion of the third Part ſhall paſs: for the Reverſion is nothing elſe but the Land itſelf when it falls, and it is a common Phraſe of Speech, that he who has taken a Leaſe for Years to commence after a former Leaſe, has taken the Reverſion of the Land which the Leſſor held, and the Senſe of the Word is proper enough for the Matter. [k] And the Statute of Erection of the Court of *Surveyors*, which gave them Authority to demiſe the Lands of the King for 21 Years, has a *Proviſo* in it, that they ſhall not make any Leaſe of the Reverſion of any of the ſaid Lands, and it was expounded that they might not make a Leaſe to commence after any other Leaſe, for that in Effect was a Leaſe of the Reverſion, which Statute does therein declare that the Reverſion of the Land may be taken for the Land itſelf after the Determination of the firſt Eſtate. And to ſay that ſuch a one demiſed *reverſionem terræ*, or *terram cum revertetur*, or *reverſionem cum acciderit*, is all one in common Speech, and of the ſame Effect. And therefore *reverſio terræ* is rather *poſſeſſio revertendi*, than *jus revertendi*. And foraſmuch then as this Word *(Reverſion)* has two Intendments, the one being that Eſtate which a Man has during the particular Eſtate, the other that which is immediately after the particular Eſtate ended, and according to this laſt Intendment is its proper Signification and Definition, and foraſmuch as it is the Intent of the Parties to have the Demiſe enure according thereto, why therefore ſhall it not enure ſo? Indeed I know no Reaſon to the contrary. And that the Intent of the Parties is ſuch, is very apparent, for if it ſhould be taken as a Grant of the Reverſion, then the Rent which the Abbot reſerved upon the firſt Leaſe ſhould paſs with it, which was not the Intent of the Abbot, as every Man may diſcover. And the Appointment of the Term to commence after the firſt Eſtate ended declares alſo the Intent of the Parties to be that it ſhould enure as a Leaſe, and not as a Grant of the Reverſion. Alſo the Words *have delivered*, *granted*, *and to Farm-let*, imply the Intent of the Parties to be, that it ſhould enure as a Leaſe of the Demeſn, and not as a Grant of the Reverſion. For one cannot properly be Farmer of a Reverſion, nor ſhall a Man have an *Ejectione firmæ* of a Reverſion, and therefore theſe Words *(to Farm-let)* declare that it was the Intent of the Parties that it ſhould enure as a Leaſe after the Eſtates for Lives ended. And therefore inaſmuch as the Intent was ſuch, and the Words are capable of performing the Intent, it ſeems to me that the Demiſe ſhall enure accordingly. [l] But if the *habendum* here had been for Life, or in Fee, then it might not be good, nor commence after the particular Eſtate ended; for when a Freehold is to paſs it ought to have Livery or Attornment, but that is not neceſſary in Caſe of a Leaſe for Years which is but a Contract; and therefore it ſeems to me that the Intent appearing as it is here ought to be favoured. And the Words here incline to make the Thing enure accordingly, as *Bracton* well ſays, [m] *quod cartæ et munimenta benignè interpretanda ſunt, ut res magis valeat quam pereat. But note, the true Words of* Bracton, *as Dyer ſhewed me afterwards in his Book, are thus, viz. benignè faciendæ ſunt interpretationes inſtrumenti propter ſimplicitatem laicorum, ut res magis valeat quàm pereat:* And to cavil about the Propriety of Words, when the Intent of the Parties appears, is not commendable, nor has it been practiſed by the Judges in former Times, but on the contrary they have applied the Words to fulfil the Intent, rather than have deſtroyed the Intent by reaſon of the Inſufficiency of the Words. And therefore in 3. *Ed.* 2. a Man prayed to be received upon Default of Tenant for Life, becauſe he had the Remainder, and the Deed which he had of it was, *volo et concedo* that after the Death of the Tenant for Life the Land ſhall deſcend to him, *&c.* and there it is adjudged, that he ſhould be received, and that the Word *(ſhall deſcend)* is of the ſame Senſe as the Word *(ſhall remain.)* [n] So in 6. *Ed.* 2. there is a Caſe of a Feoffment in which it was contained, that if the Feoffor pay ſuch a Sum, *&c.* it ſhall be lawful for him *recipere terram*, this is there adjudged to be the ſame Thing in Senſe as if it had been ſaid, he ſhall *re-enter*, becauſe the Intent was ſuch. *Note that afterwards I ſaw* Dyer's *Book which was, if the Rent be in Arrear, it ſhall be lawful for the Feoffor ad recipiendam terram illam, et eam ordinandam ad voluntatem ſuam.* [o] And ſo in the ſaid Caſe cited in 8. *Ed.* 3. the Words that the Land ſhall *return*, were taken as a Condition, *cauſa qua ſupra.* And a Gift of Land to a Man for

[*] Dy. 125. pl. 45.
[a] F. N. B. 144. Dyer 125. pl. 43. 1. Finch. 270.
[b] F.N.B. 208. h. Dy. 125. pl. 43.
[c] F.N.B. 211. d.
[d] F. N. B. 219. Dy. 125. pl. 43.
[e] Dy. 125. pl. 43. Co. Litt. 299. b. Ante 157.
[f] F.N.B. 218. d. P. 6. Ed. 3. 23. 24. pl. 53. Dy. 125. pl. 43.
[g] Dy. 125. pl. 43.
[h] Ante 157. (f).
[i] Dy. 125. pl. 46. M. 38. Ed. 3. 26. a. *Per Belkn.* Bro. Grants 30. Vin. Abr. tit. Reverſion G. pl. 3.
[k] Stat. 33. H. 8. cap. 39. Dy. 125. pl. 41.
[l] Dy. 125. pl. 44.
[m] Dy. 125. pl. 44. *Nota bene.*
[n] M. 6. Ed. 2. Fitz. Entry congeable 55. Dy. 125. pl. 45. 1. Rol. R. 69. 330. 3. Bulſt. 154. Perk. §740.
Nota bene.
[o] See ante 157. (m) and the Books there cited.

for Life, and after his Death to *J. S.* and his Heirs, is held a good Remainder to *J. S.* for the manifest Intent of the Party, notwithstanding there is not any immediate Gift to him, nor any *habendum* in the Deed. And if the Intent has been so greatly considered in the said Cases, that in some the Words have been taken out of their proper Signification, in order to perform that Intent, and in others the Intent has supplied the Deficiency of the Words, then in our Case the Word *(Reversion of Land)* being declared in the *habendum* to be taken in the Sense of Land reverting, which is its proper Signification according to the Latin, may well enough be so taken, and shall be warranted by Law, in Favour of the Intent of the Parties, although most commonly it is used in another Sense. For an *habendum* will do greater Things than this does here. For sometimes the *habendum* shall give an Estate where nothing was given before the *habendum*, and sometimes it shall give to a Person not named before, and sometimes it shall alter the Estate given in the Premisses. [a] And therefore *Littleton* in his Book puts the Case, where a Woman Lessee for Life takes Husband, and the Lessor confirms their Estate, *habendum et tenendum* the Land for Term of their two Lives, in this Case the Confirmation shall enure to the Husband by Way of Remainder for Term of his Life: yet nothing is there given by the Premisses, but the whole is given by the *habendum*. [b] And so he also puts the Case in his Book, that where the Lessor confirms the Estate of his Tenant for Life, the Remainder to another in Fee, this shall be a good Remainder to him, if it may not be a Grant of the Reversion; but be it the one or the other, there is nothing granted by the Premisses of the Deed, for the Estate of the Tenant for Life is not enlarged, but the last Words of the Deed do only give the Estate. [c] So a Gift to a Man, *habendum* to him with a Woman in Frankmarriage, shall enable the Woman to take tho' not named before the *habendum*. [d] And *Littleton* puts the Case, that where Land is given jointly to two, *habendum* the one Moiety to the one, and the other Moiety to the other, this shall sever the Jointure, and make them Tenants in common. [e] So by the better Opinion in 8. *Ed.* 3. where a Man gives Land to two, *habendum* to the one for Life, and after his Death to the other and his Heirs, the one shall have the whole for Life only, notwithstanding the Jointenancy given in the Premisses, although it has been put contrary *fo.* 153. And if the *habendum* shall give an Estate in a Thing not given before, and to a Person not named before, and shall alter an Estate given before, then may it best declare the Sense of the Words of the Premisses in our Case; especially where the Premisses comprehends the Thing in the *habendum*, as it does in our Case. [f] As a Grant *de dispositione Ecclesiæ*, *habendum advocationem*, or a Grant of the Soil of a Wood, *habendum* the Wood, or a Grant *de fundo domus*, *habendum domum*, or a Grant of a Manor, *habendum* the Advowson which is appendant to it, is good, for the Thing in the *habendum* is contained in the former Part of the Grant, as it is in our Case. [g] But a Grant of Common out of Land, *habendum* the Land, or of the Herbage of a Park, *habendum* the Park, and such like, is not a good *habendum*, because it is of another Thing which is not comprised in the Premisses of the Deed. But ours is quite a different Case, as I have shewn before, wherefore it seems to me that the Plaintiff shall recover his Damages.

Afterwards at another Day in the same Term all the Justices argued. But because a great Part of their Arguments tended to the same Effect with those before reported, and also because the learned and ingenious Arguments already reported were very long, I have here but briefly touched upon what they said, and have rather shewn their Opinions upon the Matter, than reported their Arguments at large. For if I should report their Arguments as well as those of all the said Serjeants in full, it would make too large a Volume, and would tire the Reader's Patience.

Staunford J. *Staunford* puisn Justice laid down three Rules for the Understanding of Deeds. First, that they shall be taken most beneficially for the Party to whom they are made; secondly, that a Deed shall never be void, where the Words may be applied to any Intent to make it good; and upon this he cited *Bracton*, who saith, *benignè faciendæ sunt interpretationes instrumenti, ut res magis valeat quàm pereat*, and in another Place he saith, *in re dubiâ*; thirdly, [h] that the Words shall be construed according to the Intent of the Parties, and not otherwise; and here he cited what *Bracton* saith, *carta non est nisi vestimentum donationis*; and the Intent directs Gifts more than the Words. [i] As if an Annuity is granted *pro consilio impendendo*, and the Grantee has divers Faculties, yet the Counsel shall be given in such Faculty as was intended. [k] And so it is held in 9. *Ed.* 4. that if a Receiver is bound in an Obligation to his Master to pay him *omnia recepta et recipienda* in his Office, he is not thereby bound to pay all that he might receive, but only what he shall receive in Fact, so that the Intent shall be pursued rather than the Words. [l] And where a Man makes a Lease of a House, so that the Lessee may make his Profit of the House, he may not throw down the House, nor commit Wast therein, by the Opinion of the Book, for the Intent was otherwise, altho' the Words may seem to favour that Construction. And upon this last and the other two Rules he put several Cases. And he said that to pursue the Words is *summum jus*, which Judges ought to avoid, and rather pursue the Intent. And as to the principal Matter, he said [m] that a Reversion has two Intendments, the one is an Estate left continuing during the particular Estate, which is the most common Sense, the other is the returning of the Land after the particular Estate ended, which is the natural Sense of the Word, according to the Definition of the Latin-Tongue, so that the Reversion of the Land, and the Land when it reverts, is all one. And the Statute of *Westminster* 2. *cap.* 1. which says, *that they, to whom the Land was given under such Condition, shall have no Power to alien the same, but that it shall revert unto the Giver, if Issue fail, &c.* intending to put a Stop to the Power of the Donee from barring the Donor of the Reversion of the Land, prohibits his Alienation, and directs that *the Land shall revert* to the Donor, so that *the Reversion of the Land*, and *the Land reverting*, is all one. And in such Sense the Deed here is used; but if it had stopped in the first Part, *viz.* in the Premisses, then it should have been taken meerly as a Grant of the Reversion, but the *habendum*, which is the other Part, is

[a] Litt. § 523. Dy. 126. pl. 48. Ante 31. (l). and the other Books there cited.
[b] Litt. §. 573. Dy. 126. pl. 48. Sed contra Dr. & Stud. lib. 2. cap. 20. Ante 25. (l).
[c] H. 4. Ed. 3. 4. b. Fitz. Brief 703. P. 5. Ed. 3. 17. a. Dy. 126. pl. 49. Co. Litt. 21. a. 2. Rol. Abr. 67. pl. 17. Poph. 126. 182. 2. Bac. Abr. 494. Ante 158. (d).
[d] Litt. § 298. Dy. 10. pl. 36. 126. pl. 49. Dal. 30. pl. 10. 67. pl. 30. 79. pl. 17. Moor 880. Hob. 172. Co. Litt. 183. b. Salk. 391. Ld. Raym. 623. 628. 1. Finch 88. 2. Finch 99. Perk. § 175. 2. Bac. Abr. 497. 3. Bac. Abr. 194. Plowd. Quær. § 370.
[e] M. 8. Ed. 3. 59. pl. 16. Fitz. Feoffments 73. Dy. 10. pl. 37. 126. pl. 50. 160. pl. 43. Dal. 30. pl. 10. 79. pl. 17. 2. Rol. Abr. 65. K. pl. 1. Co. Litt. 183. b. 2. Co. 55. b. Cro. E. 25. pl. 2. 89. pl. 13. Hetl. 22. Palm. 34. Hob. 172. 1. Freem. 501. 12. Mod. 300. Perk. § 174. Barnard. Cha. Rep. 48. 2. Bac. Abr. 497. Vin. Abr. tit. Grants J. a. pl. 1. J. a. 3. pl. 1. K. a. pl. 1.
[f] Dy. 126. pl 48. See Ante 157. (P).
[g] Dy. 126. pl. 48. Vin. Abr. tit. Grants J. a. 4. pl. 1.
[h] Vin. Abr. tit. Intent A. pl. 1.
[i] 41. Ed. 3. 6. 19. Fitz. Annuity 19. Bro. 7. T. 16. H. 7. 10. b. *Per Fineux.* Bro. Grants 174. Bac. Max. reg. 10.
[k] T. 9. Ed. 4. 22. b. Bro Exposition 12.
[l] H. 17. Ed. 3. 7. pl. 21, Fitz. Wast 101.
[m] See ante 158. (f) and the Books there cited.

is such an Addition as makes the Clause but one in effect. As if I release all Actions, and stop there, all Actions are gone; but if I say further, "which I have as Executor to *J. S.*" there the Generality is restrained. [a] So in the Case of 7. *Ed.* 4. where the King had granted to *Garter* King of Heralds 10 *l.* for Term of his Life, if he had stopp'd there he should have had it absolutely for Term of his Life; but when he says further, *by Reason of his Office*, thereby the Generality of the Grant is restrained, so that if he were removed from his Office he should lose the Annuity. So is it in the Case here, if the Deed had stopp'd when the Reversion was granted, it had been meerly a Reversion in the Nature of a Reversion commonly taken; but when it is said, *habendum* the Land from the Feast, &c. this is become annexed to the first Part, and makes it but one entire Deed, which ought to agree in itself, *nam turpis est pars quæ cum suo toto non convenit.* And then forasmuch as every Part of the Deed ought to be compared with the other, and one entire Sense ought to be made thereof, to this End the three Rules abovesaid are to be remembered, by the one of which the Deed ought not to be made void, if any Sense can be made of it, as there may here; by the second Rule it shall be taken most beneficially for *Smith* and his Wife; and by the third Rule it shall be taken according to the Intent of the Parties: And in order to accomplish these three Rules the Deed here ought to be taken as a good Lease for 21 Years after the first Estate ended, for such Way the Deed takes Effect, and shall be most beneficial for him to whom it is made, and shall enure according to the Intent of the Parties; and in taking it in this Sense the three Rules are fulfilled. [b] And he said that where the Party demises and grants *reversionem terræ, habendum terram*, here is an *habendum* of the same Thing which is mentioned before, altho' it is in another Case, for (*terræ*) is in the Genitive Case, and (*terram*) is in the Accusative, and it is not necessary that they should both be in the same Case. For if a Man grants to another all his Estate *in una acra terræ, habendum prædictam acram sibi et hæredibus suis*, this is a good *habendum*, altho' the Acre was mentioned before in the Ablative Case, and in the *habendum* it is in the Accusative, for the Acre was mentioned before notwithstanding it was in another Case. So is it in our Case here. Wherefore it seemed to him to be a good Lease, and that the Plaintiff should recover his Damages. And this was the Substance of his Argument, altho' it was much more amplified with many Cases.

Saunders Justice to the same Purpose. He said that Deeds ought to have a reasonable Exposition, which shall be without wrong to the Grantor, and with the greatest Advantage to the Grantee. [c] As if an Abbot grants a Corody to one for him and his Servant to sit at his Mess, he may not bring one that has a noisom Disease. [d] So if one grants Estovers to another out of his Manor, he may not cut down Fruit Trees. [e] So if one grants to another Common in his Land for all his Cattle, yet he shall not have Common for Goats or Geese, which are Things hurtful to the Land. Wherefore there is a Kind of Equity in Grants, so that they shall not be taken unreasonably against the Grantor, and yet shall with Reason be extended most liberally for the Grantee. [f] As a Release by the Lessor of all his Right made to the Lessee for Years shall enlarge his Estate for his Life; [g] but if the Grantor was Tenant in Tail, then it should only be for the Life of the Tenant in Tail. [h] So a Grant of 20 s. by two Tenants in common out of their Land shall enure as several Grants, so that the Grantee shall have 20 s. of each. [i] So in 34. *Ass.* where a Man granted *totam partem suam piscariæ de Tese quamdiu terræ suæ se extendunt, salvo tamen stagno molendini*, there it is held that the Fishery in the Mill-pool should pass to the Grantee, for the Deed shall be taken most strongly against the Grantor, so that the Pool and not the Fishery shall be excepted. From whence we may see that there is an Equity in the Exposition of Deeds, and that they are taken most liberally for the Grantees. Then in the principal Case, he that has the Reversion of the Land dependant upon an Estate for Life is the Proprietor of the Land, and the Tenant for Life is the Possessor, and the Land is included in his Estate who is in the Reversion, and who is the Proprietor of the Land; for if one warrants the Land to him he shall vouch, and if he that has the Reversion grants a Rent out of the Land, or accepts a Release of Right in the Land it shall be good. And he admitted the said Cases of 7. *Ed.* 4 and 30. *Ed.* 1. that a Reversion shall pass by a Grant of the Land or of a Mill, as it is put before *fo.* 155. [l] And so he said that a Grant of the Land shall make a Reversion to pass, [m] and a Grant of the Reversion shall make the Land to pass, and the Nature of an *habendum* is to give, enlarge, or qualify, and the *habendum* here is good, for the Thing in Substance was granted in the Premisses. Wherefore the Premisses and the *habendum* make a perfect Demise, and the one with the other have the Substance and Intent of a Lease. And he said he was of the like Opinion that *Brudnel* seemed to be of in [n] 14. *H.* 8. that Contracts shall be as it is concluded and agreed between the Parties, according as their Intents may be gathered. And to cavil about the Words in Subversion of the plain Intent of the Parties, as *Tully* [o] says in his Book *of Offices*, *Est calumnia quædam et nimis callida sed malitiosa juris interpretatio, ex quo illud, summum jus, summa injuria*; as he puts an Example of one who had taken a Truce for 130 Days with his Enemy, and in the Night he destroyed and depopulated their Possessions, because (as he said) the Truce was for Days and not for Nights, which *Tully* accounted meer Injury and Injustice. And such Interpretation of the Law he has admonished Men to avoid, and to observe and follow the Intent of the Words. And certainly the Words are no other than the Testimony of the Contract. And in the Case here (as he apprehended) there are all the five Garments which *Bracton* says are necessary for the cloathing of Contracts, as they are expressed in these Verses,

[p] *Re, verbis, scripto, consensu, traditione,*
Junctura, vestes sumere pacta solent.

for here there is Matter of Substance, Words, Writing, Consent, and Delivery, and then it shall be a perfect Contract, and consequently a Lease. And therefore he was of Opinion that the Lease

[a] M. 7. Ed. 4. 22. b. Fitz. Annuity 12. H. 5. Ed. 4. 8. pl. 1. Bro. Office 50. Estates 44. Patent 60. Dy. 336. pl. 34. Co. Litt. 42. a. 1. Finch 7. 2. Finch 8. Kitch. 287. Wing. Max. regt 19. pl. 59. Post. 381.

[b] Dy. 126. pl. 47.

[c] 1. Finch 42. 2 Finch 56.

[d] 2. Rol. R. 280. Style 181. 1. Finch 42. 2. Finch 56.

[e] M. 9. H. 6. 36. a. *per Babing.* Bro. Grants 5. Common 3. Abridgement of Assizes 128. a. Perk. § 108. 2. Rol. R. 280. 1. Finch 41. 122. 2. Finch 56.

[f] Littlet. § 465. 546.

[g] Litt. § 606. Bro. Releases 82. 3. Co. 84. b. Post. 5. 6.

[h] See Ante 140. (i) and the Books there cited.

[l] 54. Ass. pl. 11. Fitz. Assize 316. Bro. Reservation 23. Perk. § 646. Vaugh. 108. Davis 55. b. 2. Rol. Abr. 455. pl. 4.

[k] Ante 137. (b)

[l] Ante 155. (b)

[m] Contra Post 162 (e).

[n] H. 14. H. 8. 22. a.

[o] Tully de Officiis lib. 1. fo.

[p] Bract. lib. 2. cap. 5. Co. Litt. 36. a.

was good, and that the Plaintiff ſhould recover. And he put much other Matter, and many other Caſes in Maintenance of his Opinion.

Brown J. Sir *Humphrey Brown* Juſtice to the ſame Purpoſe. He ſaid that the Intent of the Abbot and Convent, and of *Smith* and his Wife was to have the Land paſs as a Leaſe after the particular Eſtate ended, and not otherwiſe; and foraſmuch as it was their Intent that the Word (*Reverſion*) ſhould enure ſuch Way, it ſeemed to him that the Law would warrant it. For the Land is included in the Reverſion, which if it was not, a Man by a Grant of the Reverſion could not have the Land in Poſſeſſion after the particular Eſtate ended. And a Feoffment of a Carve, *habendum* [a] the Manor of D. is good, if the Carve conſtitutes the Manor. And if Land is parcel of an Office it ſhall paſs by a Grant of the Office, becauſe it is included in the Grant. So is it in the Caſe of a Grant of a Reverſion, and much more, he ſaid, when it has a Tendency to make the Leaſe good. And therefore he was of Opinion that the Plaintiff ſhould recover.

[a] Co. Litt. 49. a. 2. Rol. Abr. 1. B. pl. 3. 1. Keb. 331.

Brook C. J. *Robert Brook* Chief Juſtice to the contrary. There ſeems to me to be a Diverſity between the Caſes put and our Caſe here. For where a Releaſe of the Right in the Land is made by him in the Reverſion to the Termor, *habendum* the Land, this is a good *habendum*, altho' he did not give the Land before, for the Termor had the Land, and ſo was in Poſſeſſion of it, and therefore it was not neceſſary to give him the Land, but the *habendum* enuring by way of Enlargement of his Eſtate is good. But in our Caſe *Smith* and his Wife had nothing in the Land before the Deed of Demiſe, ſo that it commences *de novo*, in which Caſe the Premiſſes of the Deed ought to give an Eſtate before the *habendum* can enlarge it, for which Reaſon the Caſes are not alike. And as to the Caſe where a Man gives all his Eſtate in the Land, *habendum* the Land in Fee, Sir, this is a good *habendum*, for this Word (*Eſtate in Land*) is a general Word, which comprehends the Land and all the Degree which the Party has in it, and therefore the *habendum* is there purſuant to the former Part. But a Reverſion of Land is not a general Word, but a ſpecial Word, and does not contain all the Degrees, or all Eſtates in the Land, but one Degree, or one Eſtate only: And then when a Man grants the Reverſion, which is in one Degree, *habendum* the Land, which is in another Degree, and the Word is general, it is not alike, for in the one Caſe the general Word goes before, and in the other the ſpecial, and ſo the Caſes are not alike. [b] And as to the Caſe of an Office, by the Grant whereof Land ſhall paſs, Sir, this is true, and the Caſe is in 1. *H.* 7. but there the Land is [c] appurtenant and appendant to the Office, which the Land is not to the Reverſion, but the Reverſion is a ſpecial Eſtate in the Land; and therefore the Caſes do not agree. And as to what has been ſaid, [d] that by the Grant or Feoffment of the Land the Reverſion ſhall paſs with Attornment, [e] and ſo by the Grant of the Reverſion the Land ſhall paſs, Sir, I admit that a Reverſion ſhall paſs by a Grant of the Land, for the Word (*Land*) is a general Word which contains all Eſtates that the Grantor or Feoffor has in it, and therefore it is able to convey to another all Eſtates which the Grantor or Feoffor has in it. But a Reverſion is a particular Eſtate made out of the general Land, which Particular is not able to convey to another the General, and ſo the Caſes are not alike. And as to the Caſes where a Thing may paſs by another Name, as a Manor by the Name of a Carve, and an Advowſon by the Name of a Nomination or Diſpoſition, and the like, Sir, there the Thing itſelf paſſes, for he that has an Advowſon has no other Profit or Thing but the Nomination or Diſpoſition, and the Manor is made of the Carve, and ſo it is one ſame Thing. But the Poſſeſſion and the Reverſion are two Things, the one whereof is not known by the Name of the other, but they are diſtinct Things, and therefore the Caſes are not alike. And as to what is ſaid, that the Intent of the Parties appears here, which we ought always to purſue, and for that Purpoſe the Rule of *Bracton* is cited, Sir, to this it may well be anſwered, *non eſt regula quin fallit*, and there ought to be apt Words to expreſs the Meaning, or elſe the Meaning ſhall be void. [f] For the Party ought to direct his Meaning according to the Law, and not the Law according to his Meaning, for if a Man ſhould bend the Law to the Intent of the Party, rather than the Intent of the Party to the Law, this would be the Way to introduce Barbarouſneſs and Ignorance, and to deſtroy all Learning and Diligence. For if a Man was aſſured that whatever Words he made Uſe of his Meaning only ſhould be conſidered, he would be very careleſs about the Choice of his Words, and it would be the Source of infinite Confuſion and Incertainty to explain what was his Meaning. [g] And therefore a great Number of Caſes might be produced where the Intent ſhall be ſet aſide, if it does not agree with the Law. [h] As in the Caſe of 9. *H.* 6. where an Abbot and Convent by Deed indented gave a Croft to W. in Fee, and in Return for this Gift the ſaid W. *renunciavit toti communiæ quam habere conſuevit averiorum ſuorum cum averiis* of the Abbot and Convent, and this Releaſe of the Common was there taken to be void, becauſe it did not ſhew to whom he renounced the Common, yet there the Intent was plain, for he had Common in the Land of the Abbot, and his Meaning was to releaſe it to the Abbot, but becauſe of the Incertainty it was void. [i] And where a Leaſe was made to Huſband and Wife, and the Reverſion of the Land *which the Huſband held* was granted, this was held void notwithſtanding the Intent, becauſe it miſtakes the Certainty of the particular Eſtate. [k] And ſo where there was Lord and Tenant of 3 Acres, and the Lord granted the Seigniory which he had in one Acre, this was holden void in 17. *Ed.* 3. notwithſtanding the Intent, becauſe his Intent did not agree with the Law. [l] So where one holds of a Man by Caſtle-guard, Homage, and Fealty, and he grants to another all the Services, it is held in 31. *Ed.* 1. that the Caſtle-guard cannot paſs becauſe he does not grant the Caſtle but reſerves it, and therefore he that has not the Caſtle cannot have the Caſtle-guard; wherefore his Intent to grant all the Services could not make them all to paſs, becauſe it was not according to Law, ſo that the Law rules the Intent, and not the Intent the Law. [m] But in Teſtaments the Intent only ſhall be obſerved and conſidered, becauſe it is preſumed that the Teſtator has not Time to ſettle every Thing according to the Rules

[b] T. 1. H. 7. 29. a. Bro. Grants 129. Incidents 13.
[c] See Poſt. 169.
[d] Ante 155 (b)
[e] Ante 161 (m).
[f] B. N. C. § 60.
[g] Dr. & Stud. lib. 1. cap. 24. fo. 71. lib. 2. cap. 20. fo. 175. Vin. Abr. tit. Intent A. pl. 2.
[h] M. 9. H. 6. 35. pl. 8. Fitz. Feoffments 5. Bro. Expoſition 8. Faits 1. Grants 5. 2. Brownl. 334. Sed Contra 3. Rol. R. 330. *per Coke et Dodder.* J. 3. Bulſt. 154. *per Haughton.* J. Perk. § 179. *dubitatur.*
[i] H. 13. Ed. 3. Fitz. Grants 63. Bro. 137. Jointenants 63. 2. Co. 67. b. Winch. 56. 3. Leon. 136. Cro. E. 802. 2. Brownl. 334. Gouldſb. 26. Cart. 151. Vin. Abr. tit. Reverſion E. pl. 1. 2.
[k] M. 7. Ed. 4. 25. a. *per Litt.* Fitz Grants 19. 2. Co. 67. b.
[l] M. 31. Ed. 1. Fitz. Aſſize 441. Bro. Grants 162. Tenures 58. 4. Co. 86. b. 1. Finch 12. 2. Finch 15. Wing. Max. reg. 41. pl. 59.
[m] T. 19. H. 8. 9. b. *per Norwich, Fitzh. et More.* 3. Co. 20. b. 27. b. 3. Leon. 166. 1. Bulſt. 62. 192. 2. Bulſt. 129. 2. Brownl. 309. 1. Freem. 143. 4. Mod. 68. Ld. Raym. 630. 1. P. Wms. 20. Perk. § 562. 1. Finch 151. 2. Finch 172. Poſt: 413. 523. 540.

Rules of Law, and Wills are moſt commonly made on a ſudden, and in the Teſtator's laſt Moments; and ſo is the Difference between them and Acts executed in the Party's Lifetime. And Sir, here the Reverſion of the Land, as it is uſed and taken in our Law, and the Land itſelf are of two different Natures, and the one will extinguiſh the other, [a] for if the Reverſion comes to the Poſſeſſion it is no longer a Reverſion, no more is it where the Poſſeſſion comes to the Reverſion, *ergo* it is a diſtinct Eſtate from his Eſtate. And for theſe Reaſons the *habendum* the Land is not purſuant to the Reverſion granted in the Premiſſes, and ſo the Intent is not framed according to Law. And it is moſt certain that the Cloiſterers in making their Leaſes and Deeds had commonly a peculiar Form thereof which they would ſtick to ſo preciſely, that rather than deviate from their Cuſtom they would mar the whole; and therefore becauſe they would not direct their Form according to the Rule of Law, but would have the Law bend to their Uſage, they have deſtroyed the Force of many Deeds, as they have done here; for which Reaſon the Plea in Bar to the Avowry is not good.

[a] Ante 151 (e).

And *Note*, he and alſo *Brown* Juſtice ſaid that the Avowry was not good, becauſe the Avowant had not averred his Plea. But afterwards the Prothonotaries ſearched their Precedents, and told the Juſtices that the common Uſage in ſuch Avowry was to make the Avowry *ut ſupra*, without Averment, with which the Juſtices were ſatisfied. And afterwards *Brook* ſaid to Juſtice *Saunders* (as I was informed by *Saunders* himſelf) that he was content that Judgment ſhould be given for the Plaintiff, and accordingly the ſame Term Judgment was given for the Plaintiff by Award of the Court, as hereafter appears by the reſt of the Record.

Averment not neceſſary in Avowry S. P. 3 M. 1. Bro. Averment 81. B. N. C. § 468. Co. Litt. 303. a. 8. Co. 161. a. Hardr. 79. Bridgm. 21. Doc. Pla. 49, 50. 1. Finch 175. Ann. cap. 16.

2. Finch 359. Heath's Max. 32. 4. Bac. Abr. 373. Vin. Abr. tit. Averment B. pl. 24. 26. Poſt. 342. See Statute 4 & 5,

At which Day here came as well the aforeſaid *John Throckmerton* as the aforeſaid *Richard Tracy* and *William Nicholſon* by their Attornies aforeſaid; whereupon the Premiſſes being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices that the aforeſaid Plea of the aforeſaid *John Throckmerton* upon the aforeſaid Writing indented to the Avowry of the aforeſaid *Richard*, and to the Cognizance of the aforeſaid *William* in Manner and Form aforeſaid above in Bar pleaded, is ſufficient in Law to maintain the Action of the aforeſaid *John Throckmerton* for the taking the Cattle aforeſaid againſt the aforeſaid *Richard Tracy* and *William*, and to preclude the ſaid *Richard Tracy* and *William* from their Avowry and Cognizance aforeſaid againſt the aforeſaid *John Throckmerton*, as the aforeſaid *John* hath above alledged. Therefore it is conſidered that the aforeſaid *John* do recover againſt the aforeſaid *Richard* and *William* his Damages by Reaſon of the taking and unjuſt Detention of the Cattle aforeſaid. But becauſe it is unknown what Damages the ſame *John* has ſuſtained by Reaſon of the taking and unjuſt Detention of the Cattle aforeſaid, it is commanded to the Sheriff that by the Oaths of good and lawful Men of the County aforeſaid he diligently enquire what Damages the aforeſaid *John* has ſuſtained as well by Reaſon of the taking and unjuſt Detention of the ſaid Cattle, as for his Coſts and Charges by him about his Suit in this Behalf laid out; and the Inquiſition which, &c. the Sheriff ſhould make appear here from the Day of the holy *Trinity* in fifteen Days, under his Seal and the Seals &c. At which Day here came the aforeſaid *John Throckmerton* by his Attorney aforeſaid. And the Sheriff, viz. *Walter Dennis* Knight now returned a certain Inquiſition taken before him at *Winchcomb* in the County aforeſaid the *ſeventh* Day of *June* laſt paſt by the Oaths of twelve &c. by which it is found that the aforeſaid *John* has ſuſtained Damages by Reaſon of the Premiſſes, beſides his Coſts and Charges by him about his Suit in this Behalf laid out, to the Amount of 30 *l.* and for his Coſts and Charges 8 *l.* Whereupon it ſeems to the Juſtices here that the aforeſaid *John* ſhall mitigate the Damages aforeſaid for Coſts &c. in a reaſonable Manner to be releaſed before they give Judgment thereon, wherefore it is ordered to the ſaid *John* that he do ſo. And thereupon the ſame *John* remits here in Court to the aforeſaid *Richard Tracy* 60 s. of the ſaid Damages; and prays Judgment of the Reſidue of the Damages aforeſaid to be rendered to him; whereupon the ſaid 60 s. being deducted and taken off, it is conſidered that the aforeſaid *John* do recover againſt the aforeſaid *Richard* and *William* the Reſidue of his Damages aforeſaid to the Amount of 55 *l.* by the Inquiſition aforeſaid above found. And the aforeſaid *Richard* in Mercy, &c.

The reſt of the Record.

Judgment.

Note,

Note, *That fifteen Days after* St. Michael *in the* ſecond *and* third *Years of the Reign of King* Philip *and Queen* Mary, *ſeven new Serjeants were made, viz. out of the Inner-Temple,* John Prideaux, *who was of the County of* Devon, *out of the Middle-Temple,* Francis Morgan, *who was of the County of* Northampton, Robert Catline, *who was born at* Thrapſton *in the County of* Northampton, *and dwells in the County of* Bedford, *and* Anthony Brown, *who was of the County of* Eſſex; *out of Lincoln's-Inn,* William Raſtal, *who was born at the City of* Coventry, *but for the moſt Part dwells in* London *and* Kent, *and* W. Bendloe *of the County of* Eſſex; *and out of Gray's-Inn,* John Walpole *of the County of* Norfolk, *and they argued their Caſe, called the Serjeant's Caſe, in* Eaſter *and* Trinity *Terms in the ſaid* ſecond *and* third *Years of the Reign of the ſame King and Queen. And the Juſtices argued the ſaid Caſe in the Term of* St. Michael *then next following, viz. in the* third *and* fourth *Years of the Reign of the ſaid King and Queen. And the Caſe was depending in the* Common Bench *between* William Hill *Plaintiff in an Action of* Treſpaſs, *and* John Grange *Defendant, a brief Report whereof here follows. And the Record was read thus.*

Hil. Term 2 & 3 P. & M. Rot. 412. Eſſex. Declaration. Same Precedent Rast. Entr. 657. b. pl. 8.

JOHN GRANGE late of *Great-Eſton* in the County aforeſaid Yeoman was attached to anſwer *William Hill* of a Plea, wherefore with Force and Arms the Cloſes and Houſe of the ſaid *William* at *Great-Dunmow* he broke, and his Graſs to the Value of 10 *l.* there lately growing with certain Cattle eat up, trod down, and conſumed, and other Wrongs to him did, to the great Damage of the ſaid *William*, and againſt the Peace of the Lord the King and Lady the Queen now, &c. And whereupon the ſame *William* by *John Bill* his Attorney complains that the aforeſaid *John* the *tenth* Day of *November*, in the *ſecond* and *third* Years of the Reign of the Lord the King and Lady the Queen now, with Force and Arms the Cloſes and Houſe of the ſaid *William* at *Great-Dunmow* broke, and his Graſs to the Value, &c. there lately growing with certain Cattle, viz. Horſes, Oxen, Cows, Hogs, and Sheep eat up, trod down, and conſumed, and other Wrongs, &c. to the great Damage &c. and againſt the Peace &c. wherefore he ſays that he is damnified, and has Damage to the Value of 20 *l.* and thereupon he brings Suit, &c.

Bar as to Part.

And the aforeſaid *John* by *Robert Bedingfield* his Attorney comes and defends the Force and Injury when, &c. and as to the coming with Force and Arms ſays that he is not guilty thereof, and of this he puts himſelf upon the Country; and the aforeſaid *William* likewiſe. And as to the reſt of the Treſpaſs aforeſaid above ſuppoſed to be done, the ſame *John* ſays that the Cloſes and Houſe aforeſaid, and alſo the Places in which the Treſpaſs aforeſaid is ſuppoſed to be done, are, and at the Time aforeſaid when the Treſpaſs aforeſaid is ſuppoſed to be done were, one Meſſuage, 100 Acres of Land to the ſame Meſſuage appertaining from Time beyond the Memory of Man, and 100 Acres of Meadow with the Appurtenances in *Great-Dunmow* aforeſaid. And as to any Treſpaſs in the aforeſaid Meſſuage and 100 Acres of Land with the Appurtenances of the Tenements aforeſaid, the ſame *John* ſays that the aforeſaid *William* his Action aforeſaid thereof againſt him ought not to have, becauſe he ſays that before the aforeſaid Time when the Treſpaſs aforeſaid is ſuppoſed to be done, one *Henry Pate* was ſeized of the ſame Meſſuage and 100 Acres of Land in his Demeſn as of Fee, and being ſo ſeized thereof before the aforeſaid Time when &c. viz. the *ſixth* Day of *Auguſt* in the *ſecond* and *third* Years of the Reign of the Lord the King and Lady the Queen now, at G[illegible]*Dunmow* aforeſaid, by a certain Indenture made between the aforeſaid *Henry* of the one Par[illegible] the aforeſaid *John* of the other Part, (one Part whereof ſealed with the Seal of the ſaid *Henry* the ſame *John* here brings into Court, the Date whereof is the ſame Day and Year) demiſed the aforeſaid Meſſuage with all the Lands to the ſame Meſſuage appertaining to the aforeſaid *John*, to have to him and his Aſſigns from the ſame *ſixth* Day of *Auguſt* until the End and Term of 20 Years from thence next following and fully to be compleat, yielding therefore yearly to the aforeſaid *Henry* and his Heirs forty Shillings at two Terms of the Year, that is to ſay, at the Feaſts of the *Annunciation* of the bleſſed Virgin *Mary*, and of *St. Michael* the Archangel to be paid by equal Portions, by virtue of which Demiſe the ſame *John* was and yet is poſſeſſed of the ſame Meſſuage and 100 Acres of Land. And the aforeſaid *William*, claiming the aforeſaid Meſſuage and 100 Acres of Land by Colour of a certain Deed of Demiſe thereof made to him for Term of his Life by the aforeſaid *Henry Pate* long before the Demiſe aforeſaid made to the ſaid *John* (where nothing of the ſaid Meſſuage and 100 Acres of Land ever paſſed into the Poſſeſſion of the aforeſaid *William* by that Deed) into the ſame Meſſuage and 100 Acres of Land before the aforeſaid Time when, &c. entered, upon the Poſſeſſion of which ſaid *William* thereof the ſame *John* afterwards, viz. the ſame time when, &c. claiming his Term aforeſaid, into the ſaid Meſſuage and 100 Acres of Land re-entered, and the Graſs in the ſame 100 Acres of Land then growing with the Cattle aforeſaid eat up, trod down, and conſumed, as it was lawful for him to do; and this he is ready to verify, wherefore he prays Judgment if the aforeſaid *William* his Action aforeſaid thereof againſt him ought to have, &c. And as to any Treſpaſs in the aforeſaid 100 Acres of Meadow the Reſidue of the Tenements aforeſaid with the Appurtenances, the ſame *John* ſays that the aforeſaid *William* his Action aforeſaid thereof againſt him ought not to have, becauſe he ſays that before the aforeſaid Time when the Treſpaſs aforeſaid is ſuppoſed to be done, one *John Palmer* late Abbot of the late Monaſtery of the bleſſed Virgin *Mary* of *Tiltey* in the aforeſaid County of *Eſſex* was lately ſeized of the ſame 100 Acres of Meadow with the Appurtenances in his Demeſn as of Fee, in Right of his late Monaſtery aforeſaid, and being ſo ſeized thereof, the ſame late Abbot with the Conſent of the then Convent of the ſame late Monaſtery, before the aforeſaid Time when, &c. viz. the *ſixth* Day of *November* in the 24*th* Year of the Reign of Lord *Henry* late King of *England* the *eighth* from the Conqueſt, the Father of the Lady the Queen now

Bar as to the reſt.

by

by his certain Writing indented, one Part whereof ſealed with the common Seal of the ſame late Abbot and the then Convent the ſame *John* produces here in Court, the Date whereof is in the Chapter-Houſe of the ſame late Abbot and Convent, at the aforeſaid late Monaſtery of *Tiltey* aforeſaid, the ſame Day and Year, demiſed the ſame 100 Acres of Meadow with the Appurtenances to the aforeſaid *John Grange*, to have and occupy to him and his Aſſigns from the ſame *ſixth* Day of *November* until the End and Term of ſixty Years from thence next following fully to be compleat, yielding therefore yearly to the aforeſaid late Abbot and his Succeſſors forty Shillings to be paid by equal Portions at the Feaſt of the *Annunciation* of the bleſſed Virgin *Mary*, and of *St. Michael* the Archangel, by virtue of which Demiſe the ſame *John* was and yet is thereof poſſeſſed. And the aforeſaid *William*, claiming the ſame 100 Acres of Meadow with the Appurtenances by Colour of a certain Deed of Demiſe thereof made to him for Term of his Life by the aforeſaid late Abbot, long before the aforeſaid *ſixth* Day of *November*, (where nothing of the ſame 100 Acres of Meadow ever paſſed into the Poſſeſſion of the aforeſaid *William* by that Deed,) into the ſame 100 Acres of Meadow with the Appurtenances before the aforeſaid Time when, *&c.* entered, upon the Poſſeſſion of which ſaid *William* thereof the ſame *John* afterwards, *viz.* the ſame time when, *&c.* into the ſame 100 Acres of Meadow with the Appurtenances re-entered, and the Graſs aforeſaid in the ſame 100 Acres of Meadow with the Appurtenances then growing with the Cattle aforeſaid eat up, trod down, and conſumed, as it was lawful for him to do; and this he is ready to verify, wherefore he prays Judgment if the aforeſaid *William* his Action aforeſaid againſt him ought to have, *&c.* Colour.

And the aforeſaid *William*, as to the aforeſaid Plea of the aforeſaid *John* to the Treſpaſs aforeſaid done in the aforeſaid Meſſuage and 100 Acres of Land above in Bar pleaded, ſays that by any thing before alledged in the ſame Plea he ought not to be precluded from having his Action aforeſaid thereof, becauſe he ſays that true it is that before the aforeſaid Time of the Treſpaſs aforeſaid done the aforeſaid *Henry Pate* was ſeized of the ſame Meſſuage and 100 Acres of Land in his Demeſn as of Fee, and being ſo ſeized thereof, before the ſame Time when, *&c. viz.* the aforeſaid *ſixth* Day of *Auguſt* in the *ſecond* and *third* Years aboveſaid, at *Great Dunmow* aforeſaid, demiſed the ſaid Tenements by the Name of one Meſſuage, and all the Lands to the ſame Meſſuage appertaining, to the aforeſaid *John*, to have to him and his Aſſigns from the ſame *ſixth* Day of *Auguſt* until the aforeſaid End and Term of the aforeſaid 20 Years from thence next following, and fully to be compleat; yielding therefore yearly to the aforeſaid *Henry* and his Heirs 40 Shillings, to be paid by equal Portions at the aforeſaid two Terms of the Year, *viz.* at the aforeſaid Feaſts of the *Annunciation* of the bleſſed Virgin *Mary*, and of *St. Michael* the Archangel. And the aforeſaid *William Hill* further ſays, that the aforeſaid Demiſe was made upon the Condition following, *viz.* that if and whenſoever the Rent aforeſaid ſhould be in Arrear in part or in all after any of the aforeſaid Feaſts on which it ought to be paid, as is aforeſaid, by the Space of ten Days during the Term aforeſaid, that then and ſo often it ſhould be lawful for the aforeſaid *Henry* and his Heirs into the ſaid Tenements with the Appurtenances to re-enter, and the ſame as in his former Eſtate to have again, the aforeſaid Demiſe in any wiſe notwithſtanding; by virtue of which Demiſe the ſame *John* was poſſeſſed of the ſame Meſſuage and 100 Acres of Land, and being ſo poſſeſſed thereof, and the aforeſaid *Henry Pate* being ſeized of the Reverſion of the ſame Tenements in his Demeſn as of Fee, the ſame *Henry* afterwards, *viz* the *firſt* Day of *September*, in the *ſecond* and *third* Years aboveſaid, at *Great Dunmow* aforeſaid, by his certain Writing, (which the ſame *William* produces here in Court ſealed with the Seal of the aforeſaid *Henry*, the Date whereof is the ſame Day and Year,) granted his Reverſion and Intereſt of and in the ſame Meſſuage and 100 Acres of Land to the ſame *William*, to have to him and his Heirs for ever, to which ſaid Grant of the Reverſion aforeſaid the aforeſaid *John* at *Great Dunmow* aforeſaid attorned himſelf to the aforeſaid *William*, whereby the ſame *William* became ſeized of the Reverſion of the ſame Meſſuage and 100 Acres of Land in his Demeſn as of Fee and Right. And the ſaid *William* being ſo ſeized of the Reverſion of the ſame Meſſuage and 100 Acres of Land, for that twenty Shillings of the Rent aforeſaid for half a Year ending at the Feaſt of *St. Michael* the Archangel in the aboveſaid *ſecond* and *third* Years of the Reign of the Lord the King and Lady the Queen now to the ſame *William* then due were in Arrear and unpaid, the ſame *William* the *ninth* Day of *October* in the *ſecond* and *third* Years aboveſaid came to the Meſſuage aforeſaid, and into the ſame entered one whole Hour next before the ſetting of the Sun the ſame Day, and remained there all the ſame Hour, to demand the aforeſaid twenty Shillings, until the ſetting of the Sun the ſame Day, and no one came on behalf of the aforeſaid *John*, before the ſetting of the Sun the ſame Day, then there to pay the aforeſaid twenty Shillings to the ſame *William*; by Reaſon whereof the ſame *William* the *twelfth* Day of *October*, in the *ſecond* and *third* Years aboveſaid, into the ſame Meſſuage and 100 Acres of Land entered, and was thereof ſeized in his Demeſn as of Fee, until the aforeſaid *John* the aforeſaid *tenth* Day of *November* in the *ſecond* and *third* Years aboveſaid, the Cloſes and Houſe of the ſaid *William*, in the aforeſaid Meſſuage and 100 Acres of Land in the aforeſaid firſt Plea ſpecified, broke, and his Graſs to the Value, *&c.* there lately growing with his Cattle aforeſaid eat up, trod down, and conſumed, againſt the Peace of the Lord the King and Lady the Queen now, as he above complains thereof againſt him: and this he is ready to verify, wherefore for that the aforeſaid *John* above confeſſes the Treſpaſs aforeſaid done in the aforeſaid Tenements with the Appurtenances in the aforeſaid firſt Plea of the ſaid *John* ſpecified, the ſame *William* prays Judgment and his Damages by reaſon of the ſaid Treſpaſs to be adjudged to him, *&c.* And as to the aforeſaid laſt Plea of the aforeſaid *John* to the aforeſaid Treſpaſs in the aforeſaid 100 Acres of Meadow with the Appurtenances above in Bar pleaded, the ſame *William* ſays that by any thing before alledged in the ſame Plea he ought not to be precluded from having his Action aforeſaid thereof, becauſe he ſays that true it is that before the aforeſaid Time of the Treſpaſs aforeſaid done, the aforeſaid late Replication.

Abbot of the ſaid late Monaſtery of *Tiltey* was ſeized of the aforeſaid 100 Acres of Meadow with the Appurtenances in his Demeſn as of Fee, in Right of the late Monaſtery aforeſaid, and being ſo ſeized thereof, the ſame late Abbot with the Conſent of the then Convent of the ſame late Monaſtery, before the aforeſaid Time when, *&c. viz.* the aforeſaid *ſixth* Day of *November* in the aboveſaid *twenty-fourth* Year of the Reign of the aforeſaid late King *Henry* the *Eighth*, by the aforeſaid Writing indented ſealed with the common Seal of the ſame late Abbot and the then Convent, the Date whereof is in the Chapter-houſe of the ſame late Abbot and the then Convent at the aforeſaid late Monaſtery of *Tiltey* aforeſaid, the ſame Day and Year, demiſed the ſame 100 Acres of Meadow with the Appurtenances to the aforeſaid *John Grange*, to have and occupy to him and his Aſſigns from the ſame *ſixth* Day of *November* until the aforeſaid End and Term of the aforeſaid *ſixty* Years from thence next following, and fully to be compleat; yielding therefore yearly to the aforeſaid late Abbot and his Succeſſors forty Shillings, to be paid by equal Portions at the aforeſaid Feaſts of the *Annunciation* of the bleſſed Virgin *Mary*, and of *St. Michael* the Archangel. And the ſame *William* further ſays, that the aforeſaid Demiſe by the aforeſaid late Abbot in Form aforeſaid made was upon the Condition following, *viz.* that if it ſhould happen the aforeſaid Rent be in Arrear and unpaid in part or in all by the Space of ten Days after any of the Feaſts aforeſaid on which it ought to be paid, as is aforeſaid, that then it ſhould be lawful for the aforeſaid Abbot and his Succeſſors into the ſame 100 Acres of Meadow with the Appurtenances to re-enter, and the ſame as in his former Eſtate to have again, and the aforeſaid *John Grange* and his Executors therefrom wholly to expel and remove, the aforeſaid Demiſe thereof notwithſtanding, as by the ſame Writing more fully appears. By virtue of which Demiſe the ſame *John Grange* was poſſeſſed of the ſame 100 Acres of Meadow with the Appurtenances, and being ſo poſſeſſed thereof, and the aforeſaid late Abbot being ſeized of the Reverſion of the ſame 100 Acres of Meadow with the Appurtenances in his Demeſn as of Fee, in Right of his late Monaſtery aforeſaid, the ſame late Abbot with the Aſſent of his Convent aforeſaid, afterwards and before the aforeſaid Time when, *&c. viz.* the *twelfth* Day of *May* in the *twenty-eighth* Year of the Keign of the ſaid late King *Henry* the *Eighth*, at *Weſtminſter* in the County of *Middleſex*, by his certain Writing ſealed with the common Seal of the ſame late Abbot and Convent, the Date whereof is the ſame Day and Year, and inrolled in the Court of Chancery of the ſaid late King before *Thomas Audley*, Knight of the moſt noble Order of the Garter, Lord *Audley* of *Walden*, then Chancellor of *England* to the ſame late King, by the Aſſent of his Convent aforeſaid gave and ſurrendered the ſame 100 Acres of Meadow with the Appurtenances amongſt other Things to the aforeſaid late King *Henry* the *Eighth*, to have to him his Heirs and Succeſſors for ever; by which the ſame late King was ſeized of the Reverſion of the ſame 100 Acres of Meadow with the Appurtenances in his Demeſn as of Fee, in Right of his Crown of *England*, and being ſo ſeized of ſuch Eſtate therein he died ſeized, after whoſe Death the Reverſion of the ſame 100 Acres of Meadow with the Appurtenances deſcended to the Lord *Edward* the *Sixth* late King of *England*, as Son and Heir of the ſame late King *Henry* the *Eighth*, by which the ſame late King *Edward* the *Sixth* was ſeized of the Reverſion of the ſame 100 Acres of Meadow with the Appurtenances in his Demeſn as of Fee, in Right of his Crown of *England*, and being ſo ſeized thereof, the ſame late King *Edward* the *Sixth*, afterwards and before the aforeſaid Time when, *&c. viz.* the *third* Day of *May* in the *ſecond* Year of his Reign, by his Letters-patent, (which the ſame *William Hill* here produces in Court, the Date whereof is at *Weſtminſter* the ſame Day and Year,) gave the ſaid Reverſion of the ſaid 100 Acres of Meadow with the Appurtenances to the aforeſaid *William Hill*, to have to him and his Heirs for ever. By reaſon of which ſaid Letters patent the ſame *William* was ſeized of the Reverſion of the ſame 100 Acres of Meadow with the Appurtenances in his Demeſn as of Fee, and the ſaid *William Hill* being ſeized in Form aforeſaid of the Reverſion of the ſame 100 Acres of Meadow with the Appurtenances, for that twenty Shillings of the ſaid Rent for half a Year ending at the Feaſt of *St. Michael* the Archangel in the *ſixth* Year of the Reign of the ſaid late King *Edward* the *Sixth* to the ſame *William* then due were in Arrear and unpaid, the ſame *William* the *ninth* Day of *October* in the *ſixth* Year aboveſaid came to the aforeſaid 100 Acres of Meadow with the Appurtenances by the Space of one Hour next before the ſetting of the Sun the ſame Day, and there remained, to demand the aforeſaid twenty Shillings, until the ſetting of the Sun the ſame Day, and no one on behalf of the aforeſaid *John*, before the ſetting of the Sun the ſame Day, then there came to pay the aforeſaid twenty Shillings to the ſame *William*, by Reaſon whereof the ſame *William*, the *twelfth* Day of *October* in the *ſixth* Year of the late King *Edward* the *Sixth* aboveſaid into the ſame 100 Acres of Meadow with the Appurtenances re-entered, and was thereof ſeized in his Demeſn as of Fee, until the aforeſaid *John*, the aforeſaid *tenth* Day of *November* in the *ſecond* and *third* Years aboveſaid, the Cloſe of the ſaid *William* in the aforeſaid 100 Acres of Meadow with the Appurtenances in the aforeſaid ſecond Plea ſpecified broke, and his Graſs to the Value, *&c.* there lately growing with the Cattle aforeſaid eat up, trod down, and conſumed, againſt the Peace of the Lord the King and Lady the Queen now, as he above complains againſt him. And this he is ready to verify. Wherefore for that the aforeſaid *John* above confeſſes the Treſpaſs done in the aforeſaid 100 Acres of Meadow with the Appurtenances, the ſame *William* prays Judgment, and his Damages by reaſon of the ſaid Treſpaſs to be adjudged to him, *&c.*

Rejoinder. Defendant demurs to one Part of the Plaintiff's Replication.

And the aforeſaid *John*, as to the aforeſaid firſt Plea of the aforeſaid *William* to the aforeſaid Treſpaſs in the aforeſaid Tenements with the Appurtenances in the ſame Plea ſpecified above by replying pleaded, ſays that the ſaid Plea is inſufficient in Law for the ſaid *William* to have or maintain his Action aforeſaid thereof againſt him, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer that Plea ſo pleaded, and this he is ready to verify, wherefore for want of a ſufficient Replication of the aforeſaid *William* in this behalf, the ſame *John* prays Judgment, and that the aforeſaid *William* may be precluded from having his Action aforeſaid

ſaid thereof againſt him. And as to the aforeſaid ſecond Plea of the aforeſaid *William* to the Treſpaſs aforeſaid done in the aforeſaid 100 Acres of Meadow with the Appurtenances in the ſame Plea ſpecified above by replying pleaded, the ſame *John* ſays that the aforeſaid *ninth* Day of *October* in the *ſixth* Year aboveſaid he came upon the aforeſaid 100 Acres of Meadow with the Appurtenances by the Space of one Hour next before the ſetting of the Sun the ſame Day, and there remained all the ſame Hour, ready to offer the ſaid Rent, and no one on behalf of the aforeſaid *William* during that Space of Time came there to receive the ſaid Rent of the ſame *John*, and of this he puts himſelf upon the Country. Offers Iſſue to the reſt.

And the aforeſaid *William*, as to the aforeſaid firſt Plea of the ſaid *John* above by replying pleaded to the aforeſaid Treſpaſs in the aforeſaid Tenements with the Appurtenances in the ſame Plea ſpecified ſays, for that he has above pleaded a ſufficient Replication to the Bar of the aforeſaid *John*, and is ready to verify the Matter contained in the ſame Replication, which ſaid Matter the aforeſaid *John* does not deny, nor thereunto in any wiſe anſwer, but wholly refuſes to admit that Averment, as before prays Judgment and his Damages by reaſon of the ſaid Treſpaſs done in the ſame Tenements with the Appurtenances in the ſame Plea ſpecified to be adjudged to him, *&c.* Surrejoinder. Plaintiff joins in Demurrer on the firſt Part of his Replication. And as to the aforeſaid ſecond Plea of the aforeſaid *John* above by rejoining pleaded to the aforeſaid Treſpaſs in the aforeſaid 100 Acres of Meadow with the Appurtenances, the ſame *William* ſays, that the ſaid Plea in Manner and Form aforeſaid by rejoining pleaded is inſufficient in Law to preclude the ſaid *William* from having his Action aforeſaid thereof againſt the aforeſaid *John*, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer the ſaid Plea in Manner and Form aforeſaid pleaded, and this he is ready to verify, wherefore for Want of a ſufficient Rejoinder of the aforeſaid *John* in that behalf, the ſame *William* as before prays Judgment, and his Damages by reaſon of the Treſpaſs in the ſame 100 Acres of Meadow with the Appurtenances to be adjudged to him, *&c.* Demurs to the Defendant's Rejoinder.

And the aforeſaid *John*, for that he has above pleaded a ſufficient Rejoinder in Bar to the Replication of the aforeſaid *William* to the Treſpaſs aforeſaid done in the aforeſaid 100 Acres of Meadow with the Appurtenances, and is ready to verify the Matter contained in the ſame Rejoinder, which ſaid Matter the aforeſaid *William* does not deny, nor thereunto in any wiſe anſwer, but wholly refuſes to admit the ſaid Averment, as before prays Judgment, and that the aforeſaid *William* may be precluded from having his Action aforeſaid thereof againſt him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until from the Day of *Eaſter* in fifteen Days, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.* Defendant joins in Demurrer.

It appears by the Record before recited, that *William Hill* has ſued an Action of Treſpaſs againſt *John Grange* for breaking of his Cloſes and Houſe, and ſpoiling his Graſs at *Great Dunmow* in the County of *Eſſex*, the 10th Day of *November* in the 2d and 3d Years of the Reign of the ſaid King and Queen. *Grange* ſays, that the Cloſes, Houſe, and Place where, *&c.* were one Meſſuage and 100 Acres of Land to the ſame Houſe appertaining from Time beyond the Memory of Man, and 100 Acres of Meadow with the Appurtenances in *Great Dunmow* aforeſaid. And as to the Treſpaſs in the Meſſuage and Land, he pleads in Bar, that long before the Treſpaſs ſuppoſed one *Henry Pate* was thereof ſeized in his Demeſn as of Fee, and being ſo ſeized, the 6th Day of *Auguſt* in the 2d & 3d Years of the Reign of the King and Queen that now are, by an Indenture bearing the ſame Date, leaſed the ſaid Meſſuage with all the Lands to the ſame Meſſuage appertaining, to the ſaid *John Grange*, to have and to hold from the ſame 6th Day of *Auguſt* until the End and Term of 20 Years thence next enſuing, yielding for the ſame annually to the ſaid *Henry Pate* and his Heirs 40*s.* to be paid by equal Portions at two Terms of the Year, *viz.* at the Feaſts of the *Annunciation* of our Lady, and of *St. Michael* the Archangel; by Force of which Leaſe he entered into the ſaid Meſſuage and 100 Acres of Land, and ſo as to this Part juſtifies the Treſpaſs, *&c.* and gives Colour to the Plaintiff, *&c.* And as to the Treſpaſs in the ſaid 100 Acres of Meadow, he pleads in Bar thereof a Leaſe for 60 Years made to him the 6th Day of *November* in the 24th Year of the Reign of King *Henry* 8. by Deed indented by the Abbot of *Tiltey* in the County of *Eſſex* with the Aſſent of the Convent, yielding for the ſame yearly to the ſaid Abbot and his Succeſſors 40*s.* to be paid by equal Portions at the Feaſts of the *Annunciation* of our Lady, and of *St. Michael* the Archangel, by Force of which he juſtifies, and gives Colour to the Plaintiff. The Plaintiff by his Replication as to the Meſſuage and the 100 Acres of Land, confeſſing that *Pate* was thereof ſeized, and leaſed *ut ſupra*, yielding *ut ſupra*, further ſays, that the Leaſe was made upon Condition that if and whenſoever the ſaid Rent was in Arrear in part or in all after either of the ſaid Feaſts at which it ought to be paid by the Space of ten Days during the ſaid Term, that then and ſo often it ſhould be lawful for the ſaid *Henry Pate* and his Heirs into the ſaid Tenements to re-enter, and them to have again as in his former Eſtate, by Force of which the Defendant entered; and he ſhews that after this, *viz.* the *firſt* Day of *September* next following the Leaſe, the ſaid *Pate* by Deed granted to the Plaintiff his Reverſion and Intereſt of and in the ſaid Meſſuage and 100 Acres of Land, to which the Defendant attorned. And ſays further, that becauſe 20*s.* of the ſaid Rent for half a Year ending at the Feaſt of *St. Michael* the Archangel in the 2d & 3d Years of the Reign of the ſaid King and Queen due to the ſaid Plaintiff were in Arrear and unpaid, the ſame Plaintiff the 9th Day of *October* in the ſaid 2d & 3d Years came to the ſaid Meſſuage, and entered into the ſame one whole Hour next before the ſetting of the Sun the ſame Day, and there remained all that Hour demanding the ſame 20*s.* until the ſetting of the Sun the ſame Day, and none on behalf of the ſaid *John Grange*, before the ſetting of the Sun the ſame Day, then there came to pay the ſaid 20*s.* to him the ſaid *William Hill*, wherefore the ſaid Plaintiff the 12th Day of the ſame *October* entered into the ſaid Meſſu-

The CASE.

The Grantee of a Reverſion of every common Perſon may enter for Conditions broken by the expreſs Words of the Statute of 32. *H.* 8. *cap.* 34. And ſo may the Patentees of a Reverſion of K. *Edw.* 6. and of all other Heirs of King *H.* 8. if not by the expreſs Words, yet by the Letter of the Statute. S. C. Dy. 130. pl. 69. Bro. Entry Congeable 139. B. N. C. § 483. S. P. Co. Litt. 215. a. Ante 34. (d).

Meſſuage and Land, and was thereof ſeized in his Demeſn as of Fee until the Deſendant did the Treſpaſs. And as to the laſt Plea in Bar, the Plaintiff confeſſing the Leaſe of the Meadow made to the Defendant *ut ſupra*, further ſays by Replication, that the Leaſe was upon Condition that if the Rent was in Arrear in part or in all by the Space of ten Days after either of the ſaid Feaſts on which (as is ſaid before) it ought to be paid, that then it ſhould be lawful for the ſaid Abbot and his Succeſſors into the ſaid 100 Acres of Meadow to re-enter, *&c.* And he ſhews further, that by force of the Leaſe *Grange* entered, and that in the 28th Year of the Reign of King *Henry* 8. the ſaid Abbot with the Aſſent of the Convent by Deed enrolled ſurrendered the ſaid 100 Acres of Meadow to the ſaid King *Henry* 8. in Fee, and that the Reverſion thereof deſcended from him to King *Edward* 6. who in the 2d Year of his Reign granted the Reverſion of the ſaid 100 Acres of Meadow to the Plaintiff and his Heirs; and he ſhews that becauſe 20*s.* of the ſaid Rent for half a Year ending at the Feaſt of *St. Michael* the Archangel in the 6th Year of the Reign of the ſaid King *Edward* 6. being due to the Plaintiff were in Arrear and unpaid, he came to the Meadow the 9th Day of *October* in the ſaid 6th Year, and demanded the ſame in Manner and Form as before is pleaded for the other Rent, and none came on behalf of the ſaid *Grange* to pay it, *&c.* for which Reaſon on the 12th Day of *October* in the ſaid 6th Year he entered into the ſaid 100 Acres of Meadow, and was thereof ſeized until the Defendant did the Treſpaſs, *&c.* And the Defendant by his Rejoinder as to the firſt of the Pleas demurs in Law, and as to the ſecond Plea he ſays, that the ſaid 9th Day of *October* in the ſaid 6th Year he came upon the ſaid 100 Acres of Meadow by the Space of one Hour next before the ſetting of the Sun the ſame Day, and tarried there all the ſame Hour ready to offer the ſaid Rent, and none came on behalf of the Plaintiff during the ſame Space of Time to receive the ſaid Rent of him the ſaid *John Grange*. And upon this Plea the Plaintiff by his Surrejoinder has demurred in Law.

And upon theſe Demurrers *Prideaux*, *Bendloe*, *Catline*, and *Brown* Serjeants argued on the Part of the Defendant. And *Walpole*, *Raſtal*, and *Morgan* argued on the Part of the Plaintiff. And upon theſe two Demurrers five Points were moved and debated as well at the Bench as at the Bar. The firſt was if Land might be appurtenant to a Meſſuage, or not. For the Defendant as to the Land has pleaded in Bar a Leaſe of the Meſſuage with all the Lands appertaining to the ſame Meſſuage, intending thereby that Land may be appurtenant to a Meſſuage, and that ſo it ſhall paſs to him. And if the Law be ſo that Land may not be appurtenant to a Meſſuage, then, it was ſaid, his Plea in Bar was not ſufficient to convey the Land by the Leaſe to him. And hereupon it was debated whether or no Land might be appurtenant to a Meſſuage. And by thoſe who argued for the Plaintiff it was ſaid that it might not; for a Meſſuage and Land are two diſtinct and ſeveral Things, and of diſtinct and ſeveral Natures, for a Meſſuage is a Place to dwell in, and Land is a Place to plow and ſow, and therefore they ſerve to ſeveral Purpoſes, and are in ſeveral Degrees, in which Caſe the one may not be appurtenant to the other, no more than one Liberty may be appurtenant to another Liberty of another Nature. [a] For a Warren cannot be appurtenant to a Leet, [b] nor a Leet to a Hundred, and the like, becauſe they are of ſeveral Natures, [c] nor can one Office be appurtenant to another, [d] nor one Land to another. [e] But Things which are of a compound Nature may have divers Things appurtenant to them, or Parcel of them. [f] As a Manor is compounded of ſeveral Things, and may contain Land, Meadow, Paſture, Wood, and Rent, and divers other Things, all of which are contained in the groſs Name. And ſo a Knight's-Fee contains divers Things, and Land and Meadow may be Parcel of it. [g] And ſo a Foreſt may be Parcel of an Honour, [h] and a Monaſtery contains the Houſe and the Lands and Poſſeſſions thereof. [i] In like Manner a Caſtle contains Land, for in the Caſtle of *Dover*, and in ſome other Caſtles there are four or five Acres of Land, and Land may be Parcel of the Caſtle. And a Town may contain Land and Paſture, for the Houſes may be decayed, and Land or Paſture be where the Houſes ſtood; and other like compound Words may contain Land, Meadow, Paſture, and divers other ſimple Things. And ſo may general Words, [k] as an Oxgang of Land, [l] or a Yard Land, or a Bovate of Land may contain in them Land, Meadow, Paſture, Wood, and divers other ſimple Things. But a Meſſuage is not a compound Word, nor a general Word, but it is a ſimple Word conſiſting of a ſpecial Thing, and containing nothing but one Particular, and therefore it cannot have Land Parcel of or appurtenant to it. [m] And therefore in 27. *H.* 6. where one pleaded a Deed of Feoffment of a Meſſuage, and ſaid that an Acre of Land paſſed as Parcel thereof, this was not received, becauſe (as it is there held) Land cannot be Parcel of or appurtenant to a Meſſuage. And, Sir, no more ſhall paſs by the Grant of a Meſſuage than ſhall be recovered by Demand of a Meſſuage. And in a *Præcipe quod reddat* nothing ſhall be recovered by the Demand of a Meſſuage but the Meſſuage itſelf, and no Land ſhall be recovered by ſuch Demand; and therefore it was ſaid that Land which is a diſtinct Thing from a Meſſuage cannot be appurtenant to a Meſſuage, and conſequently might not paſs by the Leaſe, *ut ſupra*. And ſeveral other Things were ſaid to enforce this Point.

On the other hand it was argued at the Bar for the Defendant, and admitted [n] that by a Feoffment or Grant of a Meſſuage with the Appurtenances Land might not paſs, for no more ſhall paſs thereby than the Edifices adjoining or appertaining to the Houſe, and all other Things that are incident or belonging to it; but Land is another Sort of a Thing which cannot paſs by ſuch Words, for it cannot be intended to appertain to a Meſſuage. But in the Caſe here the Defendant in his Bar has averred [o] that the 100 Acres of Land *have from Time beyond the Memory of Man*

1. Point. Whether Land may be appurtenant to a Meſſuage.

For the Plaintiff.

a T. 8. H. 7. 1. *Per Keble.*

b Ibid. But ſee that a Leet may be appendant to a Hundred. P. 12. H. 7. 17. a. *Per Rede.* Moor 426. pl. 595 admitted. March 75. pl. 115. *Per Jones.* J.

c Contra Poſt 169. (b).

d 1. Rol. Abr. 230 B. pl. 10.

e Vin. Abr. tit. Appendant. B. pl. 38.

f P. 10. H. 7. 19. a. *Per Keble.* Dy. 207. b. pl. 14. Poſt. 170. (i).

g 2. Rol. Abr. 73. pl. 2.

h Poſt 170. (k)

i M. 5. H. 7. 9. pl. 20. *Per Brian.* Bro. Compriſe 18. Præcipe quod reddat 23. Theol. Dig. lib. 8. cap. 2. § 15. Co. Litt. 5. a.

k Co. Litt. 5. a.

l Theol. Dig. lib. 8. cap. 14. § 1.

m M. 27. H 6. 2. pl. 14. Fitz. Feoffments 12. Bro. 54. Grants 7. Theol. Dig. lib. 8. cap. 1. § 7.

E contra for the Defendant.

n 23. H. 8. Bro. Feoffments 53. 31. H. 8. Bro. Leaſes 55. B. N. C. § 31. 160. 2. Co. 32. a. Litt. R. 6. Cro. C. 57.

Quære if the Law has determined in what particular Space of Time Land which has been uſually occupied with a Houſe may obtain the Reputation of being appurtenant to it, ſo as to paſs by that Name in a Grant of the Houſe: Or does not the Reputation of Appurtenancy rather ariſe from the Circumſtances of the Caſe. See Godb. 352. 2. Rol. R. 347. Palm. 376. Cro. E. 16. Cro. C. 169.

o S. P. 31. H. 8. Bro. Leaſes 55.

been

been appurtenant to the ſaid Meſſuage, and has pleaded that the Leaſe was made to him of the Meſſuage, *and of all the* * *Lands appertaining* to the ſame Meſſuage, by which Averment and Demiſe the Land may well paſs by the Leaſe; for the Averment ſhews to the Court the perpetual Continuance of the Land to the Meſſuage, and if it has been always uſed and continued with the Meſſuage, it may well paſs by the ſaid Words with the Meſſuage. For a Manor and the Things that appertain to it is conſtituted by Continuance of Time, for when the Inhabitants in a certain Meſſuage have always occupied ſuch particular Land, Meadow, and Paſture, and have had ſuch Rents and Services paid to them, and have preſented to the Advowſon of a Church, and ſuch particular Men have always done Service to the Inhabitants of ſuch Meſſuage, and have always demeaned themſelves as their Villains, this Continuance is what conſtitutes it a Manor, and makes the Advowſon to be appurtenant, and the Villains to be regardant to the ſame. [a] And ſo it is held in 1. *H.* 7. that Land may be appurtenant to an Office of Foreſterſhip, and it is there held by all the Juſtices that Land may appertain to an Office, as to the Office of Warden of the *Fleet*, and the like, and the Reaſon is, becauſe they who have had the Office have always had the Land, ſo that Continuance is the Cauſe thereof. And the Maſter of the Rolls has a Houſe appertaining to his Office. And ſeveral Farms are appurtenant to the Office of Warden of the Caſtle of *Colcheſter*, by Reaſon of Uſage and Continuance. [b] And ſo one Office may be appurtenant to another, as here in this Court the *Cuſtos Brevium* gives one of the Offices of the Prothonotaries, [c] and ſo the Judges, in reſpect of their Offices, have the Diſpoſal of certain Offices by virtue of Uſe and Continuance. And if Uſage and Continuance can make one Office of one Degree to be appurtenant to another Office of another Degree, and if it can make Land of one Condition to be appurtenant to an Office which is of another Condition, as well may it make Land which is of one Degree to be appurtenant to a Meſſuage which is of another Degree. But perhaps it may be ſaid that in the Caſes alledged the Office is greater than the Land, or the one Office is more worthy than the other, and as ſuch the leſſer may be appurtenant to the greater; Sir, ſo it is in our Caſe, [d] for the Meſſuage is more worthy than the Land, [e] and every Thing is placed in Writs in the *Regiſter* it is demanded before Land, [f] and Land before Meadow, and Meadow before Paſture, *et ſic de ſimilibus*. And every Thing is ranked and diſtinguiſhed in Dignity, for which Reaſon a Meſſuage is placed before Land, and Land before Meadow, and nity according to its neceſſary Uſe in Life, for to have a Houſe for a Man to dwell in, and to defend his Body againſt the Coldneſs and Inclemency of the Air is more neceſſary than to have Land to plow for Bread; and to have Land for Bread is again more neceſſary than to have Meadow for Hay for Cattle; and to have Meadow for Hay which will ſerve the whole Year is more neceſſary than Paſture, *et ſic de ſimilibus*; wherefore a Meſſuage is more worthy than Land. [g] And if a Man makes a Leaſe of a Meſſuage and of Land together, rendring Rent, and for Default of Payment a Re-entry, he ought to demand the Rent at the Meſſuage, and not upon the Land, becauſe the Meſſuage is more worthy. And if the Meſſuage is more worthy than the Land, then is it conſonant to Reaſon that the Land being the leſs may appertain to the Meſſuage being greater, and the leſs worthy may be appendant to the more worthy. [h] And in 3. *Ed.* 3. in the Eire of *Northampton* in Aſſize of *Mort-danceſtor*, the Tenant pleaded in Bar a Releaſe as to three Acres of Land, and three Rods of Meadow, and the Deed was read, which was, three Acres of Land *cum pertinentiis*, and the Demandant prayed Judgment and Seizin of the Meadow, becauſe the Tenant had confeſſed his Action by his Anſwer, for that the Deed was no Bar as to the Meadow, and it was there awarded that he ſhould anſwer over, becauſe Meadow may be appurtenant to Land. And if Meadow may be appurtenant to Land, *a fortiore* Land may be appurtenant to a Meſſuage, for as Land is more worthy than Meadow,, ſo is a Meſſuage more worthy than Land. [i] And in 5. *H.* 7. in Treſpaſs a Recovery was pleaded of a Caſtle, whereof an Acre, Part of the Land where the Treſpaſs was ſuppoſed to be done, was parcel, and Exception was taken to it, for that Land cannot be parcel of a Caſtle, *et non allocatur*, and it is there ſaid that if Land which is held by Caſtle-guard eſcheats, it ſhall be parcel of the Caſtle. And as Land may be parcel of a Caſtle, which is but a ſtronger Kind of a Houſe, ſo may it be parcel of or appurtenant to a Meſſuage. And, Sir, it is the common Courſe throughout the Realm, when a Man has a Mind to make a Leaſe of a Meſſuage and of all the Land uſed with it or lying to it, to make it by the Name of the Meſſuage and of all the Lands appertaining to the ſame, and if in ſuch Caſes it has always been the Intent of the Parties in every Country that the Land uſed with a Meſſuage ſhall paſs by a Contract made in ſuch Words, [k] it is the Office of the Judges to know the common Language of the People, and their common Method of ſpeaking, and to adjudge upon them according to the common Courſe and Underſtanding of the Country. [l] For he that takes a Leaſe for Years of a Farm in the *North* calls it *Tack*, and in *Lancaſhire* it is called *Fermholt*, and in *Eſſex*, *Wyke*, and if he takes it by the ſaid Words uſed in ſuch particular Country, it would be unreaſonable that he ſhould loſe his Farm becauſe he has not made Uſe of a Language which is not uſed in his own Country, but the Judge ought to enquire and know the Senſe of Words, and adjudge upon the ſame according to common Uſage, for elſe he would create great Confuſion and Diſturbance in the Public-weal. So here foraſmuch as it is in a Manner a univerſal Order and Form to make Leaſes by ſuch Words, and the Intent of the Leſſor and Leſſee is to have all the Lands paſs which were uſed to be occupied with the Meſſuage, and to that Purpoſe they uſed the Words, and ſo are they vulgarly uſed by the common People of every Country, for this Reaſon the Judges ought to adjudge accordingly, and that the Lands ſhall paſs by the Leaſe. And *Brown* ſaid, if any one will ſay that Land cannot be appurtenant to a Meſſuage, and that the Word *(appurtenant)* in our Caſe cannot have any Senſe in the Law, from thence it follows that for the Repugnancy it is utterly void, and then it is all one as if theſe Words *(to the*

* S. P. 23. H. 8. Bro. Feoffments 53. 31. H. 8. Bro. Leaſes 55. Litt. R. 6.

[a] T. 1. H. 7. 29. a. Bro. Incidents 13. P. 12. H. 7. 17. a. *per Rede.* 1 Rol. Abr. 230. B. pl. 8. Co. Litt. 121. b. 4. Co. 37. a. Godb. 352. Jenk. 170. pl. 33. 1. Finch 97. But this muſt be an Office of Inheritance, and not for Life only. Dy. 71. pl. 43. Davis 34. a.

[b] 1. Rol. Abr. 230. B. pl. 9. Contra Ante 168 (c).

[c] The Office of Exigenter is in the Gift of the Chief Juſtice of the Common Bench, Dy. 175. pl. 25. *Scrogs v. Coleſhil.*

[d] Theol. Dig. lib. 8. cap. 20. § 2. 2. Co. 31. b. 11. Co. 82. a. Vin. Abr. tit. Demand D. pl. 2.

[e] Regiſt. 1. b. F. N. B. 2. c. Theol. Dig. lib. 8. cap. 20. § 1. 11. Co. 55. b. 1. Finch. 17. 2. Finch. 24. Vin. Abr. tit. Demand D. pl. 1.

[f] 4. Co. 39. a.

[g] 9. Aſs. pl. 5. 2. Rol. Abr. 428. K. pl. 2. Perk. § 838. Co. Litt. 201. b. 2. Co. 31. b.

[h] Fitz. Bar. 298. Sed contra M. 3. Ed. 2. Fitz. Brief 783. Bro. Incidents 16. Theol. Dig. lib. 8. cap. 21. § 3.

[i] M. 5. H. 7. 9. pl. 20. Fitz. Bar. 143. Bro. Comprife 18. Præcipe quod reddat 23.

[k] Palm. 102.

[l] Co. Litt. 5. a.

ſame

ſame Meſſuage appertaining) had been left out, in which Caſe the Sentence is thus, viz. that *Pate* had demiſed to *Strange* the ſaid Meſſuage with all the Lands, and then the Leſſee ſhall have all the Lands of the Leſſor in any Place within the Realm, and the Bar ſhall be good to convey the Lands to the Leſſee, for there is a Difference where a Man limits a Thing which is void and does not appear, and where he limits a Thing which is void and does appear. [a] As if a Man makes a Leaſe to one of all his Lands in *Dale* which he has by Deſcent on the Part of his Mother, and he has no Lands in *Dale* by Deſcent on the Part of his Mother, if the Leſſor has other Lands in *Dale* the Leſſee ſhall not have them. [b] But if he had leaſed to him all his Lands in *Dale* which he has by Deſcent from his Son, there the Leſſee ſhall have all his Lands in *Dale* by whatſoever Title he has them, becauſe there it appears that he could not have Lands by Deſcent from his Son by the Courſe of Law, but in the other Caſe it might be that he had Lands by Deſcent on the Part of his Mother, in which Caſe he was deceived in Fact, whereas in the other he was deceived in Law. And ſo in our Caſe if Land cannot be appurtenant to a Meſſuage the Party is deceived in the Law, and the Words (*appertaining to the Meſſuage*) are void, from whence it follows that the Land ſhall paſs, and ſo the Bar is good. And many other Caſes were mentioned at the Bar on this Head.

[a] S. P. Godb. 237. *per Curiam.* Poſt. 395. (a).

[b] S. P. Godb. 236. *per Warburton* J.

Curia.

And afterwards all the four Juſtices argued, all whoſe Arguments I heard except the Beginning of *Staunford*'s Argument, and what I here affirm touching the Beginning thereof, I report upon the credible Information of others. And they all argued to the ſame Intent, and agreed unanimouſly [c] that Land could not be appurtenant to a Meſſuage in the true Senſe of the Word *appertaining*. [d] For a Meſſuage conſiſts of two Things, viz. the Land and the Edifice, and before it was built upon it was but Land, [e] and then Land cannot be appurtenant to Land. For a Thing of one Subſtance cannot be appurtenant to a Thing of the ſame Subſtance, and when it is built upon then it is a Meſſuage, and conſiſts in a great Meaſure of the ſame Subſtance that it did before. But the Name is changed entirely, ſo that if the Building afterwards falls to Decay, yet it ſhall not have the Name of Land, altho' there be nothing in Subſtance left but the Land, but it ſhall be called a *Toft*, which is a Name ſuperior to Land, and inferior to Meſſuage, and this Name it ſhall have in reſpect of the Dignity which it once bore. But the chief Subſtance of a Meſſuage is the Soil, altho' the Superſtructure and the Soil are one entire Thing; and then nothing can be appurtenant to another but where it is of another Nature and Subſtance. [g] And therefore it was ſaid there is *hæreditas corporata* and *hæreditas incorporata*. *Hæreditas corporata* is ſuch as Meſſuage, Land, Meadow, Paſture, Rents, and the like, which have Subſtance in them, and may continue always. But *hæreditas incorporata* is ſuch as Advowſons, Villains, Ways, Commons, Courts, Piſcaries, and the like, which are or may be appendant or appurtenant to Inheritances corporate; and ſuch Things are and may be termed Appurtenances. And *Bracton* calls the Things which are Inheritances corporate Things corporeal; and after he has treated of corporeal Things he has a Chapter concerning Appurtenances, wherein he treats of ſuch Things corporeal, *ut ſupra*, which are belonging, appendant, or appurtenant to Things incorporeal. [h] But a groſs Name may contain divers Things corporeal, as a [i] Manor, [k] Monaſtery, Rectory, Caſtle, Honour, and the like, are Things compound, and may contain all together Meſſuages, Lands, Meadows, Wood, and ſuch like, and a Thing corporeal may be parcel of a groſs Name, and of a Thing compound, [l] but one ſimple Thing corporeal cannot be parcel of or appurtenant to another ſimple Thing corporeal. As Land cannot be parcel of or appurtenant to Meadow, nor Meadow parcel of or appurtenant to Paſture, nor Paſture parcel of or appurtenant to Wood, nor can Land be parcel of or appurtenant to a Meſſuage, nor to any other Thing corporeal, for theſe Things are but ſimple Things, which of themſelves connot receive or include other Things corporeal. But an [m] Advowſon, [n] Way, [o] Eſtovers, and ſuch like Things incorporeal may well enough be appurtenant to a Meſſuage, and ſo is the Difference. And altho' it is here pleaded that the Land has been appurtenant to the Meſſuage from Time immemorial, this Pleading or Averment is to no Purpoſe or Effect. For a Man cannot aver that to be appurtenant which the Law will not ſuffer to be appurtenant, tho' Uſage and Continuance may make a Law in ſuch Things as ſtand with and are conſonant to Reaſon. But in Things which are againſt Law and Reaſon, there Uſage and Continuance is to no Purpoſe, as here the Pleading or Averment that the Land has been always appurtenant to the Meſſuage is an Averment that that is Law which is not Law. And all the four Juſtices agreed unanimouſly that the Averment or Pleading that the Land has been always appurtenant to the Meſſuage is not good here, and alſo they agreed that Land might not be appurtenant to a Meſſuage in the true and proper Definition of an Appurtenance. But yet all of them (except *Brown* Juſtice, who did not ſpeak to this Point) agreed that the Word (*appertaining* to the Meſſuage) ſhall be here taken in the Senſe of [p] *uſually occupied* with the Meſſuage, or *lying* to the Meſſuage, for when *appertaining* is placed with the ſaid other Words, it cannot have it's proper Signification, as it is ſaid before, and therefore it ſhall have ſuch Signification as was intended between the Parties, or elſe it ſhall be void, which it muſt not be by any Means, for it is commonly uſed in the Senſe of *occupied with*, or *lying to*, *ut ſupra*, and being placed with the ſaid other Words it cannot be taken in any other Senſe, nor can it have any other Meaning than is agreeable with Law, and foraſmuch as it is commonly uſed in that Senſe, it is the [q] Office of Judges to take and expound the Words, which common People uſe to expreſs their Meaning, according to their Meaning, and therefore it ſhall be here taken not according to the true Definition of it, becauſe that does not ſtand with the Matter, but in ſuch Senſe as the Party intended it. [r] As where a Leaſe was made for Life, and after his Death that the Lands *redibunt* to a Stranger, it was taken as *remanebunt*, for to that Purpoſe the Party there uſed it, and therefore by 18. *Ed.* 3. it ſhall be taken by way of a Remainder. [s] And ſo a Leaſe for Life, the *Reverſion* to a Stranger, ſhall be taken

[c] S. P. agreed *per Curiam* Ante 85 (m). and See the Books there cited.

[d] 2. Rol. R. 265.

[e] S. P. 2. Rol. Abr. 230. pl. 10.

[f] M. 21. Ed. 4. 52. pl. 15. *per Fairfax.* Bro. Judgment 83.

[g] Bracton lib. 2. fo. 53. 366. 368. Fleta lib. 3. cap. 1. § 4. cap. 15. § 1. Britton fo. 84. a. 101. b. Co. Litt. 9. a.

[h] Vin. Abr. tit. Parols J. pl. 3. Ante 168 (e).

[i] Ante 168 (f). and the Books there cited.

[k] Ante 168 (h).

[l] 4. Co. 36. b. Co. Litt. 121. b. 1. Rol. Abr. 230. B. pl. 3.

[m] Vide 1. Rol. Abr. 231. pl. 17.

[n] 1. Finch 97. Sed Contra Yelv. 159. for that a Way is an Eaſement only, and not an Intereſt. Hardr. 487.

[o] Co. Litt. 121. b. Vin. Abr. tit. Appendant B. pl. 39.

[p] Dy. 130. pl. 70. Moor 222. O. Bendl. 128. 2. Brownl. 223. T. Raym. 207. Vin. Abr. tit. Appendant B. pl. 37.

[q] S. P. 6. Co. 64. b.

[r] See Ante 29. (a) and the Books there cited.

[s] See Ante 134. (d) and the Books there cited.

taken for a *Remainder*, *cauſa qua ſupra*. And many other Caſes were put where a Word ſhall be taken out of its natural Senſe, according to the Senſe intended by the Party. So the Word *(appertaining)* ſhall be here taken as *occupied*, *uſed*, *or lying* with or to the Meſſuage, and in ſuch Senſe the Averment may ſerve to declare that the Land has been always occupied with, or has lain to the Meſſuage, and the Demiſe ſhall ſerve to convey the ſame to the Defendant, and ſo the Bar is good notwithſtanding the ſaid Exception. And that was the Opinion of the ſaid three Juſtices. And afterwards it was adjudged accordingly, as appears hereafter by the Judgment. And in this Argument *Brown* and *Saunders* Juſtices held [a] that a Garden and Curtilage are parcel of a Meſſuage: And *Saunders* ſaid that a Dove-houſe, a Mill, and Shops may be parcel of a Meſſuage, and ſhall paſs by the Name of a Meſſuage.

[a] T. 38 H. 6. 45. pl. 6. M. 23. H. 8. Bro. Feoffments 53. B. N. C. § 31. Co. Litt. 5. b. 56. b. 2. Co. 32. a. 2. Saund. 401. 2. Bulſt. 103. 3. Leon. 214. Cro. E. 89. Ibitt. R. 6. Theol. Dig. lib. 8. cap. 1. § 8. Vin. Abr. tit. Grants Y. pl. 15. But for the Garden ſee Kelw. 57. a. Dal. 29. pl. 5. Moor 24. pl. 82. Contra. See 2. Chan. Caſ. 27.

The ſecond Point moved and argued was touching that Part of the Plaintiff's Replication, where he ſhews Matter to avoid the Leaſe made to the Defendant by *Pate*, by Reaſon of a Re entry given him for the Rent not paid at *Michaelmas*. And it was ſaid by thoſe who argued for the Defendant, that no Rent was due to him, or payable at *Michaelmas*. For the Rent is reſerved at two Terms, viz. at the Feaſts of the *Annunciation* of our Lady, and of *St. Michael* the Arch-angel, to be paid by equal Portions. And foraſmuch as it is reſerved to be paid at the *Annunciation*, &c. and at *Michaelmas*, the *Annunciation* ought to be the firſt Day of Payment, for it is firſt named, and when he has reſerved it at two Terms, *viz. ut antea*, this *viz.* is a Demonſtration how he will have it, and he ſhall not have it in any other Manner, for by the *(viz.)* he has explained his Intent. And ſince it is to be paid at the *Annunciation*, and at *Michaelmas*, the firſt Payment ought to be made at the *Annunciation*, [b] for Reſervations ſhall always be taken moſt ſtrongly againſt the Reſervors, becauſe it is their Words and Act, and therefore they ſhall not be extended beyond the Words. [c] As if two Tenants in common make a Leaſe reſerving a Rent of 20 s. and a Horſe, they ſhall have but 20 s. and one Horſe. [d] But if two Tenants in Common grant a Rent of 20 s. and a Horſe out of their Land, the Grantee ſhall have of each of them a Horſe and 20 s. for it ſhall be taken moſt ſtrongly againſt the Grantors, and therefore ſhall enure as ſeveral Grants; and in the other Caſe it ſhall be taken moſt ſtrongly againſt the Reſervors, and therefore they ſhall have but one Rent of 20 s. and one Horſe; ſo that a Reſervation ſhall not be taken nor extended beyond the Words. [e] And in 10. *Ed.* 4. it is held that if a Man makes a Leaſe of two Acres for Life, yielding to him and his Heirs 12 *d.* for the one, and yielding to him 12 *d.* for the other, his Heir ſhall not have the 12 *d.* laſt reſerved, becauſe it was not reſerved to him and his Heirs. [f] And yet if he had reſerved the Rent without ſaying more, the Law would have given it to him and his Heirs, but when he ſays *reſerving to him*, the Law will not aid him beyond the Extent of the Words. So here he has expreſſed by the *(viz.)* how he would have the Rent, and he has appointed the Feaſt of the *Annunciation* to be the firſt Feaſt, and therefore he ſhall not have *Michaelmas* Rent. And, Sir, there is good Reaſon to ſay that he ſhall not have *Michaelmas* Rent, becauſe the Leaſe commenced but in *Auguſt* before, and if he ſhould pay the *Michaelmas* Rent, he ſhould pay Rent for half a Year when had only Occupation of it for eight Weeks, which would be unreaſonable, for which Cauſe he ſhall not have the Rent at *Michaelmas*, and conſequently he ſhall not enter for the Non-payment of it. And ſo the Replication is not ſufficient in this Point. And of this Opinion was *Saunders* Juſtice alſo.

2. Point. Where Rent is reſerved payable at 2 Days yearly, and the Day laſt named comes firſt, how it ſhall be paid.

For the Defendant.

[b] Dy. 377. pl. 27. 10. Co. 106. b. 1. Vent. 143. 2. Saund. 166. 368. Latch 44. 265. Yelv. 189. Hardr. 89. 1. Brownl. 109. 2. Mod. 93. 3. Mod. 230.

[c] Perk. § 107. Co. Litt. 197. a. 10. Co. 106. b. Yelv. 189. 1. Brownl. 109. 1. Finch. 46. 2. Finch 63.

[d] See Ante 140. (i) 161 (h) and the Books there cited.

[e] M. 10. Ed. 4. 18. b. *per Moile*. P. 11. Ed. 3. Fitz. Aſſize 86. T. 27. H. 8. 19. a. *per Audley*. Dy. 19. pl. 115. in margine. Ibid. 45. pl. 1. Co. Litt. 47. a. 12. Co. 36. 2. Rol. Abr. 450. N. pl. 2. 1. Rol. R. 371. § 39. Sed contra

[f] 3. Bulſt. 129. 528. Owen 9. Gouldſb. 148. pl. 68. Latch 100. 2. Saund. 368. 1. Vent. 148. 162. Hardr. 95. 1. Finch 46. 2. Finch 65. Plowd. Quær. Kelw. 88. b. pl. 5. [f] T. 21. H. 7. 25. b. *per Kingſmil*. T. 27. H. 8. 15. a. *per Chomley*. Dy. 45. pl. 2. and the other Books next before cited.

E Contra for the Plaintiff.

[g] On the other Hand it was argued by the Counſel for the Plaintiff, and by *Staunford* Juſtice, and *Brook* Chief Juſtice, (for *Brown* Juſtice did not argue upon this Point, but omitted it entirely in his Argument) that the Rent was payable at the firſt *Michaelmas*. For the Words of the Reſervation are, *yielding annually to the ſaid Pate, &c.* which Word (*annually*) ought to be fulfilled. And if the Rent ſhould not be paid at the firſt *Michaelmas*, then it would not be paid annually, for the firſt Year he would only have Rent for half a Year, becauſe the firſt Year commences in *Auguſt* and ends in *Auguſt*, and if he ſhould have no more than Rent for half a Year at the Feaſt of the *Annunciation* of our Lady, then he would not have annually 40 s. for he would only have 20 s. the firſt Year, and therefore in the Conſtruction of the ſaid Words of Reſervation a Man ought to conſider the firſt Part and the laſt, and every Word, and to make every Word effectual, and none to loſe it's Force, and here this Word (*annually*) would not have it's Effect and Operation if it ſhould be taken in ſuch Manner as the Counſel for the Defendant have argued. And as to the Reaſon that has been given why he ſhould not have the Rent at *Michaelmas*, viz. becauſe the Leaſe only commenced eight Weeks before *Michaelmas*, and therefore it ſeems to be intended that he ſhould not pay Rent for half a Year at *Michaelmas*, becauſe he could not have half a Year's Profit before *Michaelmas*, Sir, this is eaſily anſwered, for altho' he has not a whole half Year's Profit before the firſt Day of Payment, yet the laſt Year he ſhall have the Profit of the Land from the Feaſt of the *Annunciation* of our Lady until the *ſixth* Day of *Auguſt* without paying any Thing, ſo that what he wants in the firſt Year he ſhall have in the laſt; but according to the Argument for the Defendant he ſhall have half a Year's Profit without paying any Thing for it. For by that Argument he ſhall pay nothing for the Occupation of the Land from the Commencement of the Leaſe, viz. from the *ſixth* Day of *Auguſt* until the firſt *Michaelmas*, nor the laſt Year from the Feaſt of the *Annunciation* of our Lady until the End of the Leaſe, viz. the *ſixth* Day of *Auguſt*, ſo that he ſhould have half a Year's Profit without paying any Rent for it; and there is no Sort of Reaſon to induce us to believe that the Intent of the Parties was ſuch. And as to the (*viz.*) Sir, when it is reſerved at two Terms of the Year, *viz.* at the Feaſts of the *Annunciation* of our Lady, and of *St. Michael* the Archangel, this (*viz.*) which is (*that is to ſay*) is of no other Effect but to ſhew what Terms, and it is intended to expreſs and point out the Days of Payment rather than the Commencement of the Reſervation; ſo that the (*viz.*) and the Intent of the Parties to make the Payment commence at *Michaelmas* ſtand well together. And the Caſe

[g] M. 4. M. 2. 1. Bro. Leaſes 65. B. N. C. § 483. Co. Litt. 217. b. 5. Co. 112. a. 10. Co. 107. a. Dy. 130. pl. 70. O. Bendl. 183. 183. Hob. 172. 2. Rol. R. 213. 3. Bulſt. 328. Cro. E. 832. 2. Brownl. 221. Hardr. 91. 3. Keb. 209. pl. 10. Caſe of Uſes, Bac. fo. 4 Bac. Abr. 344. Vin. Abr. tit. Rent Y. a. pl. 2.

Case in 10. *Ed.* 3. was often cited upon this Point, * where one brought a Writ of Annuity bearing Date the 15th Day of *July Anno* 9. *Edw.* 3. against the Abbot of *Osney*, and counted upon a Deed bearing Date in *February Anno* 1. *Ed.* 3. by which 40 s. a Year were granted to him for his Life, payable at two Terms of the Year, viz. the one Moiety at the Feast of *St. Michael*, and the other Moiety at the *Annunciation* of our Lady, of which Annuity he was seized, and demanded 16 *l.* for the Arrears of eight Years, and the Defendant took Exception to the Count, because he had declared that he was seized, and further had shewed that the Annuity was in Arrear for eight Years before the Date of the Writ, and there was but eight Years in all, to which it is there answered that between the Date of the Deed of Grant and the Date of the Writ there are eight Years and one Day of Payment, accounting the first Day of Payment at the Feast of the *Annunciation* of our Lady next after the Grant, and it is there debated whether or no the first Payment should commence at the Feast of the *Annunciation* of our Lady, inasmuch as the Feast of *St. Michael* is there first named after the *viz.* and after it was debated it was said to the Defendant by *Stone* for the Court, "Answer if you will, we will not abate the Count." Which Case, it was said, is all one with our Case, saving that the Case there is by Grant, and in our Case it is by Reservation, but that makes no Difference, for they are both the same as to the misplacing of the Feast, and that too after the *viz.* and so in Effect and Substance there is no Difference between them; wherefore in our Case he shall have the Rent at *Michaelmas*, and then the Replication is good to avoid the Lease notwithstanding this Exception. And at last the Court agreed to this, and it was ruled accordingly, as appears hereafter by the Judgment.

* M. 10. Ed. 3. 43. pl. 4. Bro. Lease 74. Old N. B. 76. Co. Litt. 217. b.

Curia.

3. Point. At what Time Rent ought to be demanded by the Lessor, and tendred by the Lessee.

The third Point which was argued was touching the Time of the Demand of the Rent by the Plaintiff being the Person in Reversion, and the Time of the Attendance of the Lessee upon the Land. For as to the Entry into the Messuage and Land, the Plaintiff, in order to avoid the Lease thereof, has shewn that the Rent was in Arrear, and that he came to the Messuage the last Day an Hour before Sun set, and tarried there that whole Hour demanding the Rent, and none was ready there to pay it, and he has not shewn that he was there before that Time. And that he was there at the Time alledged by him, and tarried there until Sun set, is confessed by the Defendant by his Demurrer upon the Plea, by which Demurrer he [a] confesses all Matters of Fact well and materially alledged to be true. And as to the Meadow, whereas the Plaintiff has alledged a Demand of the Rent *ut supra*, and that none came on Behalf of the Defendant to pay it, the Defendant has alledged that he was upon the Meadow an Hour next before Sun set the last Day, and tarried there that whole Hour ready to offer the said Rent, and none came on Behalf of the Plaintiff during the same Space of Time to receive it, by which Pleading it is confessed that the Defendant was there the last Hour, for the Plaintiff has said that he was there, and that none came on Behalf of the Defendant, and the Defendant has said that he was there, and that none came on Behalf of the Plaintiff, which Pleas are sufficient to make two Issues without [b] a Traverse; for there are two Affirmatives and two Negatives, the first Affirmative is in that the Plaintiff says he was there, and the Negative to that is in that the Defendant says none came on Behalf of the Plaintiff; the other Negative is in that the Plaintiff says none came on Behalf of the Defendant, and the other Affirmative is in the Defendant's Answer thereto, viz. that he was there, and so the Defendant has offered him two Issues which are but one Matter in Effect, and when the Plaintiff does not maintain these Issues, but demurs, by which he confesses what the Defendant says to be true, therein he confesses that the Defendant was there the last instant, and also he confesses that he himself was not there; and therefore whether or no the Defendant's being there the said last Hour of the last Day, and continuing there until the last Instant of the same Day be sufficient for him being the Lessee, without saying that he was there from the rising of the Sun until the setting thereof the same Day, or for a greater Time than the last Hour, and whether the said last Instant of the last Day be sufficient for the Plaintiff being in the Reversion to make both the Demands or not, was debated, and both these Matters were made one Point and so argued.

[a] See Ante 13 (i). and the Books there cited.

[b] S. P. 36. H. 6. 15. pl. 9. Bro. Issues joined 242. 86. Traverse per &c. 155. 314.

Curia.

And as to this, all the Justices unanimously held and agreed [c] that the last Instant of the last of the said ten Days only was effectual enough as well for the Lessee to be ready to pay it, as for the Plaintiff being in the Reversion to demand it. And it is sufficient for him to demand it the last Instant, without making any Demand the first Day when it was due; tho', they said, formerly some were of Opinion that the Demand ought to be made both the last Instant of the first Day when it was due, and the last Instant of the Time limited after it also, but that, they said, is not requisite, for the last Instant of the last Time is sufficient for the Lessor and the Lessee also. And the Condition is, *that if the Rent be in Arrear after either of the said Feasts on which it ought to be paid by the Space of ten Days, that then he shall enter, &c.* in which Case the Lessee has Liberty during all the ten Days to pay the Rent, so that if it is in Arrear nine Days and a half he is in no Danger, for nine Days and a half are not ten Days, and if it is in Arrear nine Days and three Parts of the tenth Day, yet it is not in Arrear by the Space of ten Days. And therefore the Lessee is in no Danger as long as he has Time to come to pay it, and he has Time to come to pay it as long as the tenth Day continues, and the Day continues until the Night comes, and when the Night is come then his Time is elapsed. [d] So that his Time to pay it continues until the Seperation of Day and Night, which is the Time when the Day ends and the Night begins. And therefore the Lessee is not bound to be there before the last Instant of the last Time, and so (it was said) the Opinion is held in [e] 6. *H.* 7. And forasmuch as the Lessee is not bound to pay the Rent until the last Instant of the last Day, the Lessor is not bound to be there to demand it before the last instant of the last Day, for he is not bound to demand the Rent until the other is bound to pay it, for if the Law should force him to do it sooner than the other is forced to pay it, it would be contrary to all Reason, which our Law is not, for it will not compel a Man to make a vain Demand or Request for a Thing which the other is not bound to

[c] Bro. Conditions 60. Dy. 130. pl. 70. Ante 70 (a). and the other Books there cited. Vide Contra T. 22. H. 6. 57. b. P. 36. H. 8. Bro. Condition 192.

[d] S. P. 1. Finch 26. 2. Finch 38. Tho' Sun set is the legal Time for the demand or tender of Rent to take Advantage of a Condition of Re-entry, or to save a Forfeiture, yet whether it is compleatly due then or not until the last Minute of the natural Day (Midnight) so as to go to the Heir or Executor upon the Death of the Lessor after Sun set and before Midnight, See 1. Saund. 287. 1. P. Wms. 178, 179. Cha. Preced. 556. 9. Mod. 21 22.

[e] P. 6. H. 7. 3. pl. 6. Fitz. Entry congeable 22. Bro. 96.

to pay. [a] Yet the Law will compel him to make a Demand, or elſe he ſhall never enter, as it is held in 20. *H.* 6. And if the Leſſor does not come to the Land the laſt Inſtant of the laſt Day to demand the Rent, and the Leſſee be not there to pay it, the Leſſor ſhall never enter, becauſe he ought to do the firſt Act, that is, make a Demand. And ſuch Demand ſhall not be until the other is bound to pay it, and that he is not before the laſt Inſtant of the laſt Day, which Time only is material for them both. And according to this it was ruled, as it appears hereafter by the Judgment. And in arguing this Point *Robert Brook* Chief Juſtice and *Saunders* ſaid, [b] that if the Rent reſerved was a great Sum, as 500 *l.* or 1000 *l.* the Leſſee ought to be ready to pay it ſuch a convenient Time before Sun ſet in which the Money might be counted, for the Leſſor is not bound to count it in the Night after Sun-ſet, for if ſo, he might be deceived, for *Brook* ſaid, *qui ambulat in tenebris neſcit quo vadit.*

[a] P. 20. H. 6. 30. pl. 24. Fitz. Entry congeable 6. Bro. 2.

[b] Co. Litt. 202. a. 1 Finch 26. 2 Finch 38.

4 Point.

The fourth Point upon theſe Demurrers was, whether or no the Entry of the Plaintiff into the Meſſuage and Land for the Condition broken be lawful by virtue of the Statute of 32. *H.* 8. *cap.* 34. ſince the Reverſion did not come to the Hands of King *Henry* 8. Which Point is no other than this, viz. if the Grantee of a Reverſion of a common Perſon may enter for a Condition broken, or not. And as to this Matter it was ſaid by thoſe who argued for the Defendant, that the Cauſe of making the Statute ought firſt to be conſidered, and then the Words of the Statute. And if the Words fully anſwer the Cauſe of making the Statute, and remedy the Miſchief intended, and have a direct Tendency thereto in their Senſe and Meaning, then in ſuch Senſe they ought to be taken, and in no other. And (it was ſaid) both the Words and the Cauſe of making the Act agree in the ſame Thing, viz. that the Grantees of common Perſons ſhall not take Advantage of Conditions by the Statute. For the Statute was made in the 32 Year of *Henry* 8. and before that Time by Reaſon of the Statute of 27. *H.* 8. and of 31. *H.* 8. concerning the Diſſolution of Monaſteries, and by the Surrender and Suppreſſion of Abbies or otherwiſe, a great Part of the Lands of this Realm was come into the Hands of King *Henry* 8. who by free Gift, Exchange, Bargain and Sale, or otherwiſe, had parted with, and was very likely afterwards to part with a great Part thereof. And by the Statute of 31. *H.* 8. the King himſelf might take Advantage of Conditions, but not his Patentees. And that was conſidered by the Parliament of 32. *H.* 8. and taken as a general Miſchief, ſeeing that by the Gifts, Exchanges, and Sales of the ſaid King the Cauſe was become and likely to become in a Manner general, and to touch all the King's Subjects, for Remedy whereof only the Statute of 32. *H.* 8. was made. So that this particular Cauſe, viz. where a common Perſon had made a particular Eſtate upon Condition, and afterwards had granted the Reverſion to another, was not the Cauſe of making this Statute, for that was not a common Caſe, but a particular one which happened very rarely, and which the Parliament at no Time has gone about to amend; but the general Cauſe which laſt happened by the Diſſolution of Abbies was the great Grief, and the only Cauſe of making this Statute, and not the particular Cauſe above mentioned. And the Intent of the Makers of the Act was only to redreſs this great Miſchief, and according to ſuch Intent they have uſed the Words in the Act. For in the Preamble of the Act after it is recited that divers Leaſes have been made upon Condition, and that no Stranger may take Advantage of them by the Common Law, it is ſaid further, *by Reaſon whereof as well all Grantees of Reverſions, as alſo all Grantees and Patentees of the King of ſundry Manors, Lordſhips, &c. late belonging to Monaſteries, and other religious Houſes come to the Hands of the King ſince the fourth Day of* February *in the 27th Year of his Reign, be excluded to have any Entry or Action againſt the Leſſees, which the Leſſors before that Time might have had againſt the ſame Leſſees for the Breach of any Condition or Covenant, &c.* And the Act ſaith further, *be it therefore enacted, &c.* By which Words in the Preamble it is to be noted that the Makers of the Act did not intend to make a general Act for all Grantees of Reverſions, becauſe they have reſtrained the general Words by the Words after, for the general Words, viz. *as well all Grantees of Reverſions* are reſtrained by the Limitation of the Thing afterwards, viz. *of ſundry Manors, Lordſhips, &c. late belonging to Monaſteries and other religious Houſes come to the Hands of the King*, &c. and by putting theſe together, the Words are, all Grantees of Reverſions of ſundry Manors, Lordſhips, &c. late belonging to Monaſteries and other Religious Houſes come to the Hands of the King. So that theſe Words *(of ſundry Manors, Lordſhips, &c.)* come after the general Words, and after the ſpecial Words alſo, that is, after *(as well all Grantees of Reverſions)* and alſo after *(all Grantees and Patentees of the King)*. And ſo the Sentence is, viz. as well all Grantees of Reverſions of ſundry Manors, Lordſhips, &c. late belonging to Monaſteries and other religious Houſes come to the Hands of the King, as all Grantees and Patentees of the King of ſundry Manors, Lordſhips, &c. late belonging to Monaſteries and other religious Houſes come to the Hands of the King, &c. So that the Generality of the firſt Words is ſtraitned by the Thing to which it has Relation; as if a Man will give or leaſe to one all his Lands, if he ſtop there the Grantee ſhall have all his Lands which he has in *England*, but if if he ſays further, lying in *Dale*, there the Generality is ſtraitned by the other Words added after, and if he ſays ſtill further, parcel of his Manor of *Dale*, there he has reſtrained the general Words ſtill more, ſo that the Grantee ſhall have no Lands but ſuch as lie in *Dale* and are parcel of his Manor of *Dale*. Therefore this Word *(al')* contains perhaps but little, and is determined by the Things to which it is referred. So here the general Words *(as well all Grantees of Reverſions)*

Whether the Grantee of a Reverſion of a common Perſon may enter for a Condition broken by the Statute of 32. *H.* 8. *cap.* 34.

For the Defendant.

ſions) are referred to Lands belonging to religious Houſes, and yet not to all of them, but to ſuch only as came to the Hands of the King after the 4th Day of *February* in the 27 Year of his Reign. But perhaps it may be objected to the contrary that the Words cannot be ſo referred, for there are two Clauſes, viz. *as well all Grantees of Reverſions*, and *as all Grantees and Patentees of the King*, and if they ſhould both be referred to the Words after, viz. *of Lands belonging to Monaſteries*, then one Part of the Sentence would contain as much as both the Parts of the Sentence, and of Courſe the one would be void; Sir, in Anſwer to this it may be ſaid that it is not ſo, for the one Clauſe contains the Patentees of the King, that is, them to whom the Patents are made, and the other contains their Grantees. As if the King had granted by his Letters Patent to *J. S.* the Reverſion of ſuch Lands *ut ſupra*, *J. S.* is contained in the ſaid laſt Part of the Sentence. And if *J. S.* had granted it over to *J. K. J. K.* ſhould be contained in the firſt Part of the Sentence. So that the one Part contains that which the other does not contain, and it is all one ſame Land. Wherefore by the Preamble the Generality of the Words is reſtrained, as it is ſhewn before. And the Words declare that it was not the Intent of the Legiſlature to make a general Act for all Grantees of all Reverſions: And this is alſo declared by the Words *(be it therefore enacted)* which Word (*therefore*) is a relative Word, and has Relation to the Matter preceding, which is the Miſchief recited, viz. that the Grantees and Patentees of the King of the Reverſions of Lands belonging to religious Houſes, and their Grantees or Aſſigns might not enter for Conditions broken. So that it gives us juſt Cauſe to affirm that they intended only to make the Act particular for certain Reverſions, that is, thoſe recited in the Statute, and not for all. Then as to the Purview it goes in like Manner, and is divided into two Parts. The firſt Part comes under the Word *(as well)* and the ſecond comes under the Word *(as alſo)*. And the firſt Part which comes under the (*as well*) gives Remedy to thoſe who had or ſhould have any Gift or Grant of King *Henry* 8. by his Letters Patent of any Lordſhips, Manors, &c. or of any Reverſions of the ſame which belonged to any of the ſaid Monaſteries or other religious Houſes come to the Hands of the ſaid King after the ſaid 4th Day of *February*, or which at any Time before belonged to any Perſons, and afterwards came to the Hands of the ſaid King. So that this Part of the Purview extends only to the Patentees of the King, that is, thoſe named in the Patents, and who had Patents of the Reverſions of Land in one of theſe two Degrees, viz. of Land which was belonging to religious Houſes, and which came to the Hands of the King after the ſaid 4th Day of *February*, or which belonged to other Perſons, and afterwards came to the Hands of the ſaid King. And in ſuch Degree the Plaintiff here is not, for he is not the Patentee of King *Henry* 8. nor did this Land or the Reverſion thereof ever come to the Hands of the ſaid King, for *Pate* made the Leaſe, and afterwards granted the Reverſion to the Plaintiff, and ſo that Part of the Purview does not give Remedy to the Plaintiff, but the Plaintiff is quite left out of it. Then as to the ſecond Part of the Purview, viz. that which comes under the *(as alſo)*, it extends to two Manner of Perſons. The firſt Sort of Perſons are other Patentees of the King not named before, for the Patentees of the King ſpecified in the firſt Part of the Sentence were Patentees of the Land which belonged to religious Houſes, and after the ſaid 4th Day of *February* came to the Hands of King *Henry* 8. or they were Patentees of Land which belonged to others, and afterwards came to the Hands of the ſaid King. But if the Land did not come from others to the King, then was it out of the Words, as the Land which was the ancient Land of the Crown, and the Land which he had by Deſcent, as the Land of the Dutchy of *Lancaſter*, and ſuch other Lands, the Patentees whereof are now contained in this ſecond Part of the Sentence, who were not contained in the firſt Part. The ſecond Sort of Perſons contained in the ſecond Part of the Purview are all other Perſons being Grantees or Aſſignees to or by any other Perſon or Perſons than the ſaid King; and it is to be obſerved that the Act does not ſpeak nor ſhew of what Lands, and therefore they ſhall be intended Grantees or Aſſignees of the Lands ſpoken of before, and not of any other Land, for if it ſhould be of any other Land, then it ought to be expreſly ſaid ſo, or elſe it ſhall not be intended of any other Land not mentioned in the Act, eſpecially where the Sentence is good and perfect in meaning the ſame Land before mentioned, as it is here. For the firſt Part of the Purview contains only the Perſons named in the Letters Patent of the Lands ſpoken of in the ſaid firſt Branch. And if they that are named in the Letters Patent have granted over the Reverſions, theſe ſecond Grantees are not contained in the firſt Part of the Purview, and therefore this laſt Part of the Purview was inſerted, in which Caſe the Grantees or Aſſignees of the Patentees are contained. And ſo the firſt Part contains thoſe named in the Patents, and this laſt Part of the ſecond Part contains their Grantees, and the Grantees of thoſe Grantees, but the whole is intended of the Lands before ſpecified, viz. of the Lands which belonged to religious Houſes, and after the ſaid 4th Day of *February* came to the Hands of the ſaid King, or which belonged to ſome other, and afterwards came to the King's Hands. And the Sentence ſo taken agrees with the Preamble, and as a further Proof hereof the Concluſion of the Purview may be conſidered, which ordains that *the Grantees of Reverſions ſhall enter for Conditions broken, as the Leſſors might, in like Manner and Form as if the Reverſion of ſuch Tenements had not come to the Hands of the ſaid King, or as the ſaid King his Heirs or Succeſſors might have had or enjoyed in certain Caſes by virtue of an Act made at the firſt Seſſion of this Parliament, if no ſuch Letters Pa-*

tent had been made by his Highneſs. Which Words (if there had been any great Doubt in the Conſtruction of the Senſe of the ſaid former Words) would have cleared up the ſame. For if the Grantees ſhall enter for Conditions broken, as the Leſſors might, in like Manner as if the Reverſion had not come to the Hands of the King, and no otherwiſe, from thence it follows that the Makers of the Act intended ſuch Lands as once came to the King's Hands, and no other, for the ſaid Words are Part of the Sentence, and the whole Sentence is protracted and continued unto them, and they are added as the Concluſion of both the Parts of the Sentence, and make all the reſt of the Sentence to be clearly taken as it is ſhewn before. [a] And hereupon the Caſe in 4. *H.* 7. was alledged, where a Man was attainted by Parliament of High Treaſon, and the King granted his Lands to another, and this Attainder was afterwards repealed by Parliament, and the Perſon attainted was reſtored, and the Words of the Act were that the Attainder ſhould be void as if no Act had been made, and afterwards the Patentee brought an Action of Treſpaſs againſt him that was reſtored for Treſpaſs done upon the Land before the Reſtitution, and by the better Opinion the Action does not lie, for the firſt Act was repealed as if it had not been made, and if the Act had not been made the Party had not been a Treſpaſſor, and therefore the (*as if*) there being the Concluſion of the Act declares the Manner of the Repeal, and the manifeſt Intent of the Makers of the Act. So in our Caſe the Words (*in like Manner and Form*) being the Concluſion of the Act, declare fully how he ſhall enter, and manifeſtly ſhew the Intent of the Makers of the Act to be, to provide for ſuch Reverſions as came to the Hands of King *Henry* 8. And as to the laſt Branch of the Act, it was ſaid, perhaps it will be ſaid that it is a general Branch, and provides that all Farmers and Leſſees of Lands whatſoever ſhall have their Advantage and Remedy for any Covenant broken, or other Agreement expreſſed in the Indenture of Leaſe againſt the Grantees of Reverſions whatever, as they might againſt the Leſſors, in which Caſe perhaps it will be ſaid that the Makers of the Act would not have been ſo unreaſonable as to give Leſſees their Remedy for the Covenants and Agreements of the Leſſors to be performed by them in the Reverſion, if they had not intended that they in the Reverſion ſhould have their Remedy and Advantage againſt the Leſſees for Conditions broken, for to give Remedy to the Leſſees againſt the Grantees of the Reverſion, and not to the Grantees of the Reverſion againſt the Leſſees, would be great Injuſtice, which is not to be preſumed in a Parliament: To this, Sir, it may be anſwered that none ought to preſume any ſuch Thing, and therefore we ought to intend the Remedy as large for the Grantees of the Reverſion againſt the Leſſees, as for the Leſſees againſt the Grantees. But in taking it ſo we ought not to conſtrue the laſt Clauſe to extend to all Leſſees againſt all Grantees of Reverſions, but only againſt thoſe Grantees who came in by the King, and againſt their Grantees and Aſſignees, for the Remedy is given againſt thoſe Perſons *who have or ſhall have any Gift or Grant of the King, or of any other Perſon or Perſons of any Reverſions of the ſame Lands.* And the Lands recited in the Clauſe are general, viz. *all Farmers of Lordſhips and Manors, &c.* and therefore it ſhall be intended of ſuch Lands whereof Mention is made in the reſt of the Statute before, and theſe Words in the ſaid Clauſe, viz. (*of any other Perſon or Perſons*) may well be taken as before, viz. thoſe who come under the Letters Patent, and not named in the Letters Patent. And ſo every Part of the Statute ſtands together, and this laſt Clauſe aids them whom the firſt Part of the Act puniſhes, and therein it is agreeable with Reaſon. And ſo the Plaintiff being the Grantee of *Pate* is not within the Purview of the Act, and conſequently his Entry upon the Defendant for the Condition broken is not lawful.

[a] T. 4. H. 7. 10. pl. 6. Fitz. Bar. 134. Bro. Parlement 41. Relation 44. Treſpaſs 270. Lane 37.

On the contrary it was argued by the ſaid Serjeants who were of Counſel for the Plaintiff, and alſo by all the Juſtices. And they ſaid that altho' a great Part of the Lands in this Kingdom within the Time limited came into the King's Hands, and a great Part thereof was granted over, and it was very likely that the ſame would be afterwards granted over to the King's Subjects, yet the Impediment which hindered their Entry was in the Law in ſuffering the Miſchief. And altho' the Miſchief was greater where a greater Quantity of Land came, yet it was a Miſchief before, and the Miſchief was but one altho' many happened in it. For altho' a Miſchief is greater by the Multitude of Things that happen under that Miſchief, or by the Multitude of People that are affected by it, yet it is a Miſchief in each of the Things divided by itſelf from the other, and to each Perſon diſtinct from the other; and it is the Part of them that took it in hand to reform the Miſchief, and to reform it in every Part, and utterly to extirpate and root it out, ſo that neither many nor any Individual ſhould be grieved by it. And accordingly the Parliament have done here, [b] for they intended to deliver all other Grantees of Reverſions of Lands from this Miſchief, as well as the Grantees of ſuch Reverſions as came to the King's Hands. And to this Purpoſe they have ordered their Words, which (altho' they are obſcure) yet they tend moſt plainly to illuſtrate this Point. And therefore in the Beginning the Act recites, *whereas before this Time divers as well temporal as eccleſiaſtical and religious Perſons have made ſundry Leaſes, &c.* Which Word (*temporal*) implies that they did not take the Miſchief to be only in Reverſions of Lands of religious Houſes, (for ſuch are included in eccleſiaſtical Perſons) but they took the Miſchief alſo to be in Leaſes made by temporal Perſons whatever, who are *the others* whom the Counſel for the Defendant here conſidered in the Preamble. And in the ſame Light the Preamble goes on, and after reciting the Miſchief in that Strangers to Conditions ſhould not take Advantage of them by the

E contra for the Plaintiff.

[b] M. 4. M. 1. Bro. Entry congeable 139. B. N. C. § 483. Co. Litt. 215. a.

the Common Law, ſays further, *by Reaſon whereof as well all Grantees of Reverſions, as alſo all Grantees and Patentees of the King of ſundry Manors, Lordſhips, &c. late belonging to Monaſteries, and other religious Houſes come to the Hands of the King after the 4th Day of* February, *&c. have been excluded of their Entry againſt the Leſſees, &c.* Which Words (*Grantees of Reverſions*) are general and abſolute, and not referred to Manors and Lands after mentioned; but Grantees and Patentees of the King are referred to Manors and Lands after mentioned, and the other Words, viz. *all Grantees of Reverſions* are ſpoken abſolutely, and contain thoſe that are ſpecified in the Argument for the Defendant, as alſo all others, for they contain all Grantees of Reverſions of all other Lands not named in the Act. And ſo this Word (*all*) is a general Word, than which there is none more large and extenſive, and it is not reſtrained by Relation to the Sentence after. And where the Words are further, *be it therefore enacted*, this Word (*therefore*) has Relation to the Cauſes before written, and that is, to the Miſchief which reſtrained all Grantees of Reverſions, as well as Grantees and Patentees of the King and their Aſſignees. And then as to the Purview, the laſt Part of the Sentence coming under the (*as alſo*) that is to ſay, *all other Perſons being Grantees or Aſſignees to or by our Sovereign Lord the King, or to or by any other Perſon or Perſons than the King's Highneſs*, contains generally all Grantees of Reverſions of all Lands. For when it ſays *all other Perſons being Grantees or Aſſignees*, there is no Word more large or general than (*all*) to expreſs the Generality. And as to the Concluſion of the Sentence, viz. *in like Manner and Form, &c.* theſe are not Words of Neceſſity, for the Sentence is full and perfect before them, and they are but Words of Abundance affirmatively put without any Effect. And if they were of Effect, yet may they well be referred to Grantees or Patentees of the King only; for ſince it gives the Benefit of Re-entry as well to all Grantees of Reverſions as to Patentees of the King, *in like Manner and Form as if the Reverſion of ſuch Lands had not come to the Hands of the King*, the Words (*in like Manner and Form*) cannot be referred to all, but to parcel, that is, to ſuch parcel with which it agrees, viz. to Grantees of Reverſions of Lands which are come to the King's Hands, and ſo the Concluſion and the Premiſſes of the Act ſtand together without Contradiction. And that the reſt of the Act before is general to all Grantees of Reverſions, it is ſtrongly proved by the laſt Branch which gives to *all Farmers and Leſſees of Lordſhips, Manors, &c. their Remedy againſt all Perſons who have any Gift or Grant of the King, or of any other Perſon or Perſons of the Reverſion of the ſame Manors, Lands, &c.* Which Branch may not be expounded to be but particular, for it gives Remedy to all Farmers of Lordſhips, Manors, &c. againſt thoſe who have any Grant of the Reverſion of them, and does not ſpeak of any particular Lands. But when the Act gives the Remedy to all Farmers of Lands, that is to be underſtood of all Lands whatſoever, and may not be applied to any particular ones. And forasmuch as Remedy is given to all Leſſees of all Lands againſt the Grantees of the Reverſion, thereby it is to be collected that the Legiſlature intended to give Remedy to all that are in the Reverſion againſt the Leſſees, for elſe there would not be any Equity or Reaſon in the Act. And ſo this Branch explains the reſt of the Act, and it is as reaſonable to take the laſt Part of the Act to explain the firſt, as the firſt Part to explain the laſt. And therefore the Plaintiff being the Grantee of the Reverſion of *Pate* ſhall take Benefit of the Act, and may enter upon the Defendant for the Condition broken. To which the whole Court agreed, and it was afterwards ruled accordingly, as hereafter appears by the Judgment.

Curia.

5 Point. Whether the Patentee of a Reverſion of King *Edward* 6. may enter for a Condition broken by the Statute of 32 *H.* 8. *cap.* 34. under the Words *Patentee of the King.*

The fifth Point alſo aroſe upon this Statute; and it was whether or no the Plaintiff, being the Grantee of King *Edward* 6. of the Reverſion of the Meadow which belonged to the Monaſtery, might by the ſaid Statute enter into the Meadow for the Condition broken, as well as he might if he had been the Grantee of King *Henry* 8. And it was ſaid by thoſe who argued for the Defendant that he might not. For in the Preamble and in the Purview, and in the End of the Act Mention is made only of the Patentees of the then King, which was King *Henry* 8. and no Mention is made of his Heirs or Succeſſors, and therefore the Act ſhall not here extend to the Patentees of his Heirs or Succeſſors. [a] And yet it was ſaid, when a Thing is ſpoken by the King, or names the King, in many Caſes it ſhall contain his Heirs or Succeſſors. As the Statute *de religioſis*, which prohibits Mortmain, ſays, that if the Lords immediate don't enter within the Time limited, *we* will immediately take ſuch Lands and Tenements into our Hands, and thereof infeoff others. So the Statute of *Magna Charta cap.* 17. ſays, *No Sheriffs, &c. nor any other our Bailiffs ſhall hold Pleas of our Crown.* And the Statute *de Prerogativa Regis*, which in ſome Points is a Statute, and in ſome not, ſays, *the Lord the King ſhall have*, &c. And ſo the Statute of *Magna Charta cap.* 11. which ſays, *Common Pleas ſhall not follow our Court, &c.* and ſuch other Statutes, whereof there are an infinite Number that ſpeak of the King only, have been expounded to extend to his Heirs and Succeſſors, to give them Benefit or to bind them. And the Reaſon is becauſe the King is a Body politic, [b] and when an Act ſays, *the King*, or ſays, *we*, it is always ſpoken in the Perſon of him as King, and in his Dignity Royal, and therefore it includes all thoſe who enjoy his Function. But in our Caſe here the Act firſt names the King in the Preamble with a ſpecial Mark of Diſtinction adapted to himſelf, for it ſays, *as alſo all Grantees and Patentees of the King our Sovereign Lord, of ſundry Manors, &c. late belonging to Monaſteries, &c. come to the Hands of the King's Majeſty after the 4th Day of* February *in the 27 Year of his Reign*; where this Addition of the Monaſteries coming to his Hands is as ſtrong and lively a Demonſtration of King *Henry* 8. as if a Man was to point him out with his

For the Defendant.

[a] See Co. Litt. 9. b. 2 Inſt. 742. 3 Inſt. 6. 89. 4 Inſt. 352. Jenk. 124. pl. 50. 209. pl. 41. 224. pl. 84. 2 *Vent.* 345. pl. 89. Yelv. 15. 1 Finch 56. Vin. Abr. tit. Prerogative Z. d. *per totum.*

[b] Poſt 458. *Per Saunders* Ch. B.

Finger.

Finger. And then in the Purview afterwards, when it ſpeaks of the Patentees of the King, it ſays in every Place, *our ſaid ſovereign Lord*, and concludes *in like Manner and Form as if the Reverſion of* ſuch *Lands had not come to the Hands of our ſaid ſovereign Lord*, which Word *(ſaid)* has Relation to the King beforementioned, and that is, the King to whoſe Hands the Monaſteries came after the 4th Day of *February* in the 27th Year of his Reign, which is King *Henry* 8. only. So that the ſaid Words added to the King mentioned in the Act is a Demonſtration what King is intended. As the Statute of 37. *H.* 8. which gave Power to the King to make Commiſſions to Perſons by him to be appointed to enter upon Chauntries, Colleges, and ſuch like, and them to ſuppreſs to his own Uſe, did not extend to his Heirs or Succeſſors, for if it had, it would have been in vain to have made a new Act in the 1. *Edw.* 6. for the Preamble and the reſt of the Words in the Act declare that it was the Intent of the Makers of the Act to give King *Henry* 8. alone the Power of ſuppreſſing them. So here the Words of the Act give every one good Cauſe to ſay that both the Words and Intent of the Act of 32. *H.* 8. extend to the Patentees of King *Henry* 8. but not to the Patentees of his Succeſſors. Wherefore the Patentees of King *Edward* 6. cannot be contained under the *Patentees of the King* mentioned in the Act. And perhaps it will be ſaid, that although the Patentees of King *Edward* 6. might not be contained in the Words aforeſaid, yet King *Edward* may be contained in the other Words, *viz.* in the Clauſe coming in the Purview under the *(as alſo)* concerning *other Perſons*; for (perhaps it may be ſaid) King *Edward* was *another Perſon*, and as ſuch contained under thoſe Words, and ſo ſince the Meadow in our Caſe was belonging to a Monaſtery, the Plaintiff is here by that Means enabled to take Benefit of the Condition by Deed. In Anſwer to this it may be ſaid, that King *Edward* 6. cannot be contained under the Words *(other Perſons)*, for thoſe Words contain only a Body natural, and the King, as King, is a Body politic, which cannot be contained under the Term of a Body natural. Alſo in the ſaid Clauſe the Words are, *as alſo all other Perſons being Grantees or Aſſignees to or by our ſaid Sovereign Lord the King, or to or by any other Perſon or Perſons than the King's Highneſs, &c.* ſo that in the Clauſe of *other Perſons* the King is excepted. And, Sir, this Exception extends to the Heirs and Succeſſors of the King, for the Heir or Succeſſor of the King is King, and this Term *(Highneſs)* may well be added to him, for Grace, Majeſty, Highneſs, and ſuch like Terms, may be well applied to the Predeceſſor, or to the Heir or Succeſſor of the King, and in ſpeaking now they may properly enough be applied to him who ſhall be Succeſſor; wherefore the Heir or Succeſſor ſhall be excepted. But if the Act had ſaid, "others than the King's Highneſs aforeſaid," then the ſaid King *Henry* 8. only had been excepted, but as it is, it is general, and may extend to the Heir, and ſo out of the general Words *(other Perſons)* King *Edward* 6. was excepted. And therefore his Patentee in our Caſe is not within the Purview of the Act, and conſequently might not enter into the Meadow for the Condition broken.

On the contrary it was argued by the ſaid Serjeants on the Part of the Plaintiff, and alſo by *Staunford*, *Saunders*, and *Brown* Juſtices, [a] that the Patentees of King *Edward* 6. are contained within the Letter of the Act, and that in the firſt Part of the Purview coming under the *(as well)* *viz. as well all Perſons who ſhall have any Gift or Grant of our ſaid Sovereign Lord, by his Letters-patent, of any Lordſhips, &c.* which Words *(our ſaid ſovereign Lord)* may well be referred to the Heir or Succeſſor of the King. For the Heir or Succeſſor may have the Term of *ſovereign Lord*, and may be called *our ſovereign Lord*, and although the Word *(ſaid)* is referred to King *Henry* 8. yet is it referred to him, as King. [b] And *King* is a Name of Continuance, which ſhall always endure as the Head and Governor of the People (as the Law preſumes) as long as the People continue, *quia ubi non eſt gubernator, ibi diſſipabitur populus*, and in this Name the King never dies. [c] And therefore the Death of him who is the King is in Law called the Demiſe of the King, and not the Death of the King, becauſe thereby he demiſes the Kingdom to another, and lets another enjoy the Function, ſo that the Dignity always continues. And then when the Act gives Remedy to the Patentees of our ſaid Sovereign Lord, and *Henry* 8. is mentioned before to be the King, and ſo the Relation is to him, as King, he as King never dies, although his natural Body dies, but the King in which Name it has Relation to him does ever continue, and therefore (and the rather becauſe it ſeems to be the Intent of the Legiſlature by the reſt of the Act to have the Purview continue always) the Word *(King)* ſhall extend to King *Edward* 6. And the Statute of *Purveyors* made in 25. *Ed.* 3. has the Style thus, that *the Parliament was ſummoned in the Year of his Reign of England the* 25. *and of France the* 12. and contains, that *our ſaid ſovereign Lord by the Aſſent, &c. hath ordained and eſtabliſhed the Things under-written*; and when the Treaſons are there recited, the Act ſays, *and of ſuch Treaſon the Forfeiture of the Eſcheats belongs to our ſovereign Lord, as well of the Lands and Tenements holden of others as of himſelf*; and although the Act there and in divers other Places ſays, *our ſovereign Lord*, and the King is before named in whoſe Reign it was of *England* the 25. and of *France* the 12. which was only King *Edward* 3. yet it extends to all his Heirs and Succeſſors, and ſo has it ever been put in uſe. From whence we may ſee that where a Thing is referred to a particular King by the Name of King, in that Caſe it may extend to his Heirs or Succeſſors, where the Intent was that the Thing ſhould always continue. And ſo here the Patentees of King *Edward* 6. ſhall be contained under the ſaid Words; and herein the ſaid three Juſtices agreed. And ſome held, that if King *Edward* 6. ſhould not be contained in the Words *ſupra*, he ſhould be contained in the other Words, *viz. (to or by any other Perſon or Perſons)* well enough, and then the Exception in the Act ſhould extend to *Henry* 8. only. And *Staunford* Juſtice ſaid, that if he was not within the Words, he ſhould not be within the Equity of it, becauſe the Condition is to take away another's Entry, which ſhall be taken ſtrictly.

E contra for the Plaintiff.

[a] M. 4. M. 1, Bro. Entry congeable 139. B. N. C. § 483. Dy. 131. pl. 70. Co. Litt. 215. a. Ante 34 (d).

[b] Co. Litt. 9. b. 2 Inſt. 742. a. 6 Co. 27.

[c] Moor 177. 1 Freem. 70. 1 Finch 56. 2 Finch 83. Poſt 234, 457.

As the Statute of *Pernors of Profits* by which it was enacted that a Recovery in Aſſize againſt the *Ceſtuy que uſe* ſhould be good, was not extended by Equity to a Writ of Entry, becauſe it was to take away the Land of another, *viz.* the Land of the Feoffee. But *Saunders* was againſt him in this Point, becauſe the Act was *pro bono publico*.

Brook C. J. *Brook* Chief Juſtice argued that the Words *(the Patentees of our ſaid ſovereign Lord)* could not extend to the Patentees of other Kings than *Henry* 8. and that the other Clauſe could not contain the Patentees of *Edward* 6. and that the Patentees of *Edward* 6. were out of the Words of the ſaid Statute. But he argued that the Patentees of *Edward* 6. ſhould be taken within the Equity of the ſaid Statute. For, he ſaid, the Statute was made to remedy the Miſchief generally, and there is no Reaſon to ſay that the Patentees of King *Henry* 8. and the Grantees of all other Perſons ſhould be aided by this Statute, and not the Patentees of the Heirs or Succeſſors of the King, for it is to be preſumed that *Henry* 8. would permit a great Part of the Lands to deſcend to his Heirs or Succeſſors, who might be ſuppoſed to part with ſome of them; and therefore there is no Colour of Reaſon to induce one to believe but that the Makers of the Act intended to aid the Patentees of the Heirs of *Henry* 8. as well as his own Patentees, and to make the Proviſion general, and not to ſuffer a Miſchief in equal Degree to remain unremedied. And therefore he ſaid, we may frequently ſee that where an Act is made to remedy any Miſchief, there in order to aid Things in like Degree one Action has been uſed for another, one Thing for another, one Place for another, and one Perſon for another, notwithſtanding that in ſome Caſes the Thing is penal. [a] As an Action of Waſt is given by the Statute of *Glouceſter*, *cap.* 5. againſt a Termor for Years, yet by Equity of that Statute a Man ſhall have it againſt him that holds but for half a Year, notwithſtanding the Statute is penal. [b] So the Statute of *Weſtminſter* 2. *cap.* 11. gives an Action againſt the Goaler that lets out of his Priſon him that is committed to his Cuſtody for Arrears of Account, yet if one is committed to him upon Condemnation in Debt, and he lets him go at large, the Party ſhall have an Action of Debt againſt him, notwithſtanding the Act is penal. [c] So the Statute of *Weſtminſter* 2. *cap.* 3. gives an Action of *cui in vita* to the Wife after the Coverture diſſolved by Death, yet if the Coverture is diſſolved by Divorce, the Wife ſhall have a *cui ante divortium* by the Equity of the Statute. [d] And a *Formedon* is given againſt the Pernors of Profits by the Statute of 1. *H.* 7. *cap.* 1. yet to execute a Remainder in Tail a Man may have a *ſcire facias* out of a Fine againſt the Pernor of the Profits by the Equity of the ſaid Statute. So one Thing ſhall be taken for another, [e] as an *Elegit medietatem terræ ſuæ* is given by the Statute of *Weſtminſter* 2. *cap.* 18. yet by an *Elegit* he ſhall have the Moiety of a Rent, by the Equity thereof. So one place ſhall ſometimes be taken for another, [f] as the Statute of *Magna Charta cap.* 12. gives Power to Juſtices of Aſſize to adjourn Aſſizes before them *in itinere ſuo*, or for difficulty, into the common Bench, yet it is adjudged in 12. *H.* 4. that by the Equity of the ſaid Statute they may adjourn Aſſizes before themſelves at *Weſtminſter*, which is out of their Circuit. So is it with regard to Perſons, [g] as an Action of Treſpaſs *de bonis aſportatis* is given to Executors by the Statute of 4. *Ed.* 3. *cap.* 7. yet an Adminiſtrator ſhall have the Writ by Equity thereof. [h] So one of the Adminiſtrators coming by Diſtreſs ſhall anſwer by the Equity of the Statute of 9. *Ed.* 3. *cap.* 3. which gives it againſt Executors. [i] So the Statute of *Glouceſter cap.* 3. ordains that the Iſſue of the Wife ſhall not be barred by the Warranty of the Huſband Tenant by the Curteſy except with Aſſets, yet it is extended by Equity to the Iſſue in Tail. [k] So where the Statute of *Weſtminſter* 1. *cap.* 39. ſays that it ſhall be a good Counterplea of Voucher to ſay that his Anceſtor whoſe Heir he is was the firſt that abated, by the Equity of the Statute it is taken a good Counterplea to ſay that his Predeceſſor was the firſt that abated. [l] So the Statute *de donis conditionalibus* ordains, *that they, to whom the Land was given under ſuch Condition, ſhall have no Power to alien the Land ſo given, but that it ſhall remain to the Iſſue of them to whom it was given, after their Death*, yet by the Equity of the Statute it is taken that the Iſſue of the Donees are reſtrained from aliening the Tenements to Bar their Iſſues, as well as the Donees to whom the Lands were firſt given. [m] So the Statute of 25. *Ed.* 3. ordains, that the Incumbent ſhall anſwer to the King's Title; and by the Equity of that Statute he ſhall plead againſt all other Patrons. To conclude then, foraſmuch as Statutes heretofore made to relieve [n] the people from Trouble, and to take away Miſchief from them, have been enlarged by Equity, ſo that one Action has been extended further, or taken for another, one Thing for another, one Place for another, and one Perſon for another, why then ſhould not our Act here, being made to relieve the People from Trouble, and to remove a Miſchief that was ſuffered at the common Law, be extended by Equity? And why ſhall not the Iſſue of the King be taken within the Equity of this Statute which ſpeaks of his Father, as well as the Iſſue of the Donee in Tail is taken within the Equity of the Statute *de donis conditionalibus* which ſpeaks of his Father? And why ſhall not all Perſons, Patentees of the Son of the King, be contained within the Equity of this Statute which was made touching the Patentees of the King, and their Termors, as well as all perſons are contained within the Equity of the ſaid Statute of 25. *Ed.* 3. made touching the King and his Incumbents? Certainly (he ſaid) I know no Reaſon to the contrary, for there is as great Cauſe for them to be taken within the Equity of the ſaid Statute, as there are in the other Caſes. For which reaſon it ſeems to me that *Hill* the Patentee of King *Edward* 6. may have Benefit of this Statute. And he held that he ſhould be aided by the Equity, and not by the Words, and the other three Juſtices held that he ſhould be aided by the Words of the Act. So that all of them agreed in this, that the Plaintiff was within the Remedy of the Statute.

And

[a] Bro. General Brief 15. Litt. § 67. 2 Inſt. 302. 2 Rol. Abr. 828. pl. 11. 2 Rol. R. 323. Hardr. 210. Bac. Max. reg. 12.

So if he holds but for 20 Weeks Poſt 467. by the Reporter.

[b] H. 15. Ed. 4. 20. b. *Per Choke.* Bro. Parlement 19. Swinb. 386.

[c] See Ante 58 (c) and the Books there cited.

[d] See Ante 59 (o) and the Books there cited.

[e] Bro. Elegit 13. Expoſition 16.

[f] P. 12. H. 4. 20. a. b. Fitz. Adjournment 4. Bro. 4.

[g] H. 14. H. 7. 13. b. *Per Tremail.* et 18. b. *Per Wood.* Kelw. 101 b. Hardr. 211. Cro. E. 38. pl. 7. Swinb. 386. Godolph. Orph. Leg. 160.

[h] Litt. R. 157. 4. Bac. Abr. 649. Ante 36. (h). and the other Books there cited.

[i] See Ante 127 (b), and the Books there cited.

[k] 40. Aſſ. pl. 2. Fitz. Counterplea de Vouch. 98. Bro. 43. 2 Inſt. 242. Vin. Abr. tit. Voucher Q. a. fo. 103.

[l] Bridgm. 23. Ante 13. (†) and the other Books there cited.

[m] P. 13. H. 8. 13. b. *Per Pollard*, et 14. a. *Per Brudnel.* T. Jones 62. Sed Contra P. 44. Ed. 3. 12. pl. 18. *Per omnes Juſticiarios* Bro. Encumbent 3.

[n] See Kelw. 96. pl. 6.

And afterwards becauſe the Plea in Bar as to the Treſpaſs in the Meſſuage and Land was good, and the Replication of the Plaintiff as to it was good, and gave the Plaintiff good Cauſe to avoid the Leaſe made of the Meſſuage and Land, and was a ſufficient Title to the Plaintiff for the Cauſes ſhewn, and the Defendant demurred without Cauſe, it was awarded that the Plaintiff, as to the Treſpaſs in the Meſſuage and Land, ſhould recover his Damages. And as to the Treſpaſs in the Meadow, foraſmuch as the Plea in Bar as to it was good, and the Replication was ſufficient to avoid the Leaſe thereof for the Cauſe ſhewn, and the Rejoinder was a ſufficient Rejoinder to the Replication, and contained a direct Traverſe to the Matter of the Replication, *viz.* to the Plaintiff's being upon the Land, and to the Demand of the Rent alledged by the Replication, as is before recited in the Argument, and foraſmuch as the Plaintiff by his Surrejoinder demurred in Law where he ought not to have done ſo, becauſe the Traverſe was ſufficient, but he ought to have joined Iſſue, for that his Replication was traverſed, as is ſhewn before in the Argument, and by that Demurrer he refuſed the Iſſue which was receivable, for this Reaſon it was awarded that the Plaintiff, as to the Treſpaſs in the Meadow, ſhould be barred, which Judgment was as follows.

The reſt of the Record.

At which Day here came as well the aforeſaid *William Hill*, as the aforeſaid *John Grange* by their Attornies aforeſaid, and thereupon as well the aforeſaid Plea of the aforeſaid *William* above by replying pleaded to the Treſpaſs aforeſaid done in the aforeſaid Meſſuage and 100 Acres of Land with the Appurtenances, as the aforeſaid Plea of the aforeſaid *John* above by rejoining pleaded to the Treſpas aforeſaid done in the aforeſaid 100 Acres of Meadow with the Appurtenances, being ſeen, heard, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here that the aforeſaid Plea of the aforeſaid *William* in Manner and Form aforeſaid above by replying pleaded to the Treſpaſs aforeſaid done in the aforeſaid Meſſuage and 100 Acres of Land with the Appurtenances is ſufficient in Law for the ſaid *William* to have and maintain his Action aforeſaid thereof againſt the aforeſaid *John*; wherefore it is conſidered that the ſame *William* do recover againſt the aforeſaid *John* his Damages by reaſon of the Treſpaſs aforeſaid done in the aforeſaid Meſſuage and 100 Acres of Land with the Appurtenances, beſides his Coſts and Expences by him about his Suit in this behalf laid out, to the Value of 100 *s.* and for the ſaid Coſts and Expences to the Value of five Marks with the Aſſent of the ſaid *William* by the Court here to be taxed: And that the aforeſaid *John* be taken, *&c.* And alſo it ſeems to the ſame Juſtices here, that the aforeſaid Plea of the aforeſaid *John* in Manner and Form aforeſaid above by rejoining pleaded to the Treſpaſs aforeſaid done in the aforeſaid 100 Acres of Meadow with the Appurtenances, is ſufficient in Law to preclude the ſaid *William* from having his Action aforeſaid thereof againſt the aforeſaid *John*; wherefore it is conſidered that the aforeſaid *William*, as to the aforeſaid Treſpaſs done in the aforeſaid 100 Acres of Meadow with the Appurtenances take nothing by his Writ aforeſaid thereof, but that he be in Mercy for his falſe Claim therein, and that the aforeſaid *John* go thereupon without Day, *&c.*

Judgment.

So note (Reader) that each of the five Points is warranted by the ſaid Judgment; for if the Bar had been inſufficient to convey the Land to the Defendant by the Leaſe made by Pate, *then the Demurrer being upon the Replication made to the Bar, as it is here, the Judgment thereupon ought to be that the Parties ſhould replead as to the Land.* †*For if the Bar is naught, and a Replication is made to it, and a Demurrer is upon the Replication, the Judgment ought to be that they ſhall replead. But the Judgment here being that the Plaintiff ſhall recover, proves the Bar good, and the Replication alſo. And if the Replication is proved by the Judgment to be good,* ergo *the Judgment proves that* Hill *ſhall have the Rent due at* Michaelmas *for the Meſſuage and Land, and alſo that he ſhall enter for the condition broken. And the other Judgment, viz. as to the Meadow, proves the Replication good for the ſame, and proves that* Hill *being the Patentee of King* Edward 6. *may enter into it for the Condition broken, for if he might not, from thence it would follow that the Replication was inſufficient as to the Meadow. And if the Replication had been inſufficient as to the Meadow, ſeeing that the Demurrer as to it is upon the Rejoinder, the Judgment ought to have been that the Parties ſhould* * *replead,* cauſâ qua ſupra. *But foraſmuch as the Judgment is that the Plaintiff ſhall be barred, from thence it follows that the Replication as to the Meadow is taken by the Judgment to be good, and the Rejoinder alſo. And if the Rejoinder is good, from thence it follows that the Plaintiff's being upon the Land at the Time mentioned by him and his Demand is ſufficiently denied, and that the laſt Inſtant of the tenth Day is ſufficient for the Leſſee to be upon the Land to tender the Rent, although he was not there from the riſing until the ſetting of the Sun. Wherefore the Judgment warrants each of the five Points to be as it is before reported.*

Nota bene by the Reporter.

† M. 7. H. 7. 4. Fitz. Repleader 21. Bro. 31.

* Heath's Max. 175 *dubitatur*, for that at this Time it is greatly doubted whether Judgment ſhall not be given againſt him that pleads the firſt ill Plea, for by the greater Opinion there is no Repleader after Demurrer.

In

In the Month of Auguſt *in the* third *and* fourth *Years of the Reign of King* Philip *and Queen* Mary, Gawdy *and* Richard Catline *Serjeants, both of the County of* Norfolk, *died, upon whom this Epitaph was made.*

Munere *Gaudæo* junctus, virtute, labore,
Temporibus, patria, fortuna, moribus, annis,
Funere conjunctus, terras *Catilina* reliquit.
Felices ambo, pariter quos vita beatos
Fecerat, et ſimili pariter mors funere merſit.
Corpore major eras, *Gaudæe*, minuſque timebas,
Cætera cum ſocio ſocius *Catilina* tenebat.
Orbis ſuis lugit *Norfolcia* mœſta Patronis,
Et dolet amiſſas geminato vulnere vires.
Hos *Mariæ* regni florentes viderit annus
Tertius, Auguſtus conjunxit funere menſis.
Vos, quibus eſt juris noſtratis propria cura,
Vivite juſtitiæ memores, mortiſque futuræ:
Gratia non violet, non ulla potentia, leges,
Ut *Catilina* jacet, ſic cætera turba jacebit.

A Report of a Judgment given in the King's Bench *in the Term of* St. Hillary *in the* fourth *and* fifth *Years of the Reign of King* Philip *and Queen* Mary, *upon a Demurrer in Law on a Declaration by Bill upon the Caſe exhibited by* Richard Norwood *Plaintiff againſt* Thomas Norwood *and* Edward Read, *Executors of the Teſtament of* Thomas Gray, *Defendants. The Record is to be ſeen amongſt the Records of* Eaſter *Term* 3 & 4. P. & M. Rot. 188. *and is as follows.*

Declaration. BE it remembered, that on *Wedneſday* next after fifteen Days of *Eaſter* this ſame Term before the Lord the King and Lady the Queen at *Weſtminſter* came *Richard Norwood* by *Francis Sandbach* his Attorney, and produced here in the Court of the ſaid Lord the King and Lady the Queen then there his certain Bill againſt *Thomas Norwood* the elder and *Edward Read*, Executors of the laſt Will and Teſtament of *Thomas Gray*, in the Cuſtody of the Marſhal, *&c.* of a Plea of Treſpaſs upon the Caſe; and there are Pledges of proſecuting, *viz. John Doe* and *Richard Roe*, which ſaid Bill follows in theſe Words. *London*, to wit, *Richard Norwood* complains of *Thomas Norwood* the elder and *Edward Read*, Executors of the laſt Will and Teſtament of *Thomas Gray*, in the Cuſtody of the Marſhal of the Marſhalſea of the Lord the King and Lady the Queen before the ſaid King and Queen being, for this, *viz.* whereas the aforeſaid *Richard Norwood* in the Lifetime of the aforeſaid *Thomas Gray*, *viz.* the *ſecond* Day of *April* in the *ſecond* and *third* Years of the Reign of the Lord the King and Lady the Queen now, at *London* in the Pariſh of *St. Sepulchre* in the Ward of *Faringdon* without, at the ſpecial Inſtance and Requeſt of the aforeſaid *Thomas Gray* had delivered to the ſame *Thomas Gray* to the proper Uſe and Behoof of him the ſaid *Thomas Gray* forty Shillings of lawful Money of *England*, the ſame *Thomas Gray* in conſideration of the ſame forty Shillings to him, as is aforeſaid, paid, then and there to the aforeſaid *Richard Norwood* faithfully promiſed and aſſumed upon himſelf that he the ſame *Thomas Gray* his Executors or Aſſigns ſhould well and faithfully deliver to the aforeſaid *Richard Norwood* at *Ramſgate* in the Iſle of *Thanet* in the County of *Kent*, ſixty Quarters of Wheat of full Meaſure in Manner and Form following, *viz.* on the Feaſt of *St. Andrew* the Apoſtle then next following, or within three Weeks next following after the ſame Feaſt, twenty and five Quarters of Wheat of full Meaſure, and on the Feaſt of the *Annunciation* of the bleſſed Virgin *Mary* then next following, other twenty-five Quarters of Wheat of full Meaſure, being the Reſidue of the aforeſaid fifty Quarters of Wheat, for thirty and three Pounds, ſix Shillings, and eight Pence of lawful Money of *England* to be paid to the ſame *Thomas Gray* his Executors or Aſſigns by the aforeſaid *Richard Norwood* in Manner and Form following, *viz.* ſixteen Pounds, thirteen Shillings, and four Pence thereof to be paid immediately after the Delivery of the aforeſaid twenty-five Quarters of Wheat to be delivered on the aforeſaid Feaſt of *St. Andrew* the Apoſtle, or within three Weeks next following after the ſame Feaſt, as is aforeſaid, and other ſixteen Pounds, thirteen

thirteen Shillings, and four Pence, being the Reſidue thereof, to be paid immediately after the Delivery of the aforeſaid twenty-five Quarters of Wheat to be delivered on the aforeſaid Feaſt of the *Annunciation* of the bleſſed Virgin *Mary*, as is aforeſaid, nevertheleſs the aforeſaid *Thomas Gray*, who after the aforeſaid Feaſt of the *Annunciation* of the bleſſed Virgin *Mary* next after the Aſſumption aforeſaid was alive at the Pariſh of *St. Peter* in the Iſle of *Thanet* in the ſaid County of *Kent*, his Promiſe and Aſſumption aforeſaid not regarding, but the aforeſaid *Richard Norwood* in this Behalf craftily and ſubtily intending to deceive and defraud, the ſame fifty Quarters of Wheat, or any Part thereof to the aforeſaid *Richard Norwood* (although the ſame *Thomas Gray* was often requeſted thereunto by the aforeſaid *Richard*, and although the aforeſaid *Richard* at the ſeveral Times aforeſaid on which the ſaid Wheat ſhould have been delivered in Form aforeſaid was ready at *Ramſgate* aforeſaid to receive the ſaid Wheat ſo (as is aforeſaid) ſeverally to be delivered, and to pay to the ſame *Thomas* the aforeſaid ſeveral Sums of Money which he ought to pay immediately after the ſeveral Receipts of the Wheat aforeſaid in Form aforeſaid) hath not delivered, but the ſame to deliver to him wholly refuſed in his Lifetime; and alſo the aforeſaid *Thomas Norwood* and *Edward Read*, Executors of the Teſtament of the ſame *Thomas Gray* (to whoſe Hands the Money, Goods and Chattles which belonged to the aforeſaid *Thomas Gray* at the Time of his Death, ſufficient to ſatisfy as well all the Debts which the ſame *Thomas Gray* owed to any Perſon or Perſons at the Time of his Death, as to ſatisfy the ſame *Richard* for the true Value of the aforeſaid fifty Quarters of Wheat in Manner and Form aforeſaid to be delivered, after the Death of the ſame *Thomas Gray* came, and were in their Hands at the Time of obtaining this Bill) after the Death of the ſaid *Thomas Gray* have wholly refuſed, and yet do refuſe to deliver the ſame to the ſaid *Richard Norwood*; by reaſon whereof the ſame *Richard Norwood* in his Credit with divers Subjects of the ſaid Lord the King and Lady the Queen now, and eſpecially with *Ralph Manning* and *Criſtopher Stranſham*, to whom the ſame *Richard Norwood* had ſold the ſaid fifty Quarters of Wheat, and to whom the ſame *Richard Norwood*, relying upon the faithful Performance of the Promiſe and Aſſumption aforeſaid, had promiſed to pay and content the ſame fifty Quarters of Wheat at a certain Time now paſt, is greatly hurt and damnified, and has Damage to the Value of 200 Marks, and therefore he brings the Suit, *&c.*

And the aforeſaid *Thomas Norwood* and *Edward Read* by *John Goldwell* their Attorney come and defend the Force and Injury when, *&c.* and ſay that the aforeſaid *Richard* his Action aforeſaid againſt them ought not to have or maintain, becauſe they ſay that the Declaration aforeſaid of the aforeſaid *Richard* is inſufficient in Law, to which the ſame *Thomas Norwood* and *Edward Read* have no Neceſſity, nor are by the Law of the Land in any wiſe bound to anſwer. Wherefore for want of a ſufficient Declaration in this behalf, they pray Judgment, and that the aforeſaid *Richard* may be precluded from having his Action aforeſaid againſt them the ſaid *Thomas Norwood* and *Edward Read*, *&c.* Defendants demur to the Declaration.

And the aforeſaid *Richard* ſays that his Declaration aforeſaid is good and ſufficient in Law to have and maintain his Action aforeſaid againſt the ſaid *Thomas* and *Edward*, which ſaid Declaration the ſame *Richard* is ready to verify, whereunto the ſaid *Thomas* and *Edward* do not anſwer, nor the ſame hitherto in any wiſe deny; wherefore the ſame *Richard* prays Judgment, and his Damages aforeſaid by reaſon of the non-Performance of the Aſſumption and Promiſe aforeſaid to be adjudged to him, *&c.* And becauſe the Court of the Lord the King and Lady the Queen here are not yet adviſed of giving their Judgment of and upon the Premiſſes, Day therefore is given to the Parties aforeſaid before the Lord the King and Lady the Queen at *Weſtminſter* until *Friday* next after the Morrow of the Holy *Trinity*, to hear their Judgment of and upon the Premiſſes, *&c.* becauſe the Court of the Lord the King and Lady the Queen here thereof not yet, *&c.* Joinder in Demurrer. Continuance.

The Plaintiff declares that the ſaid Teſtator, in conſideration of 40 *s.* to him paid by the Plaintiff, promiſed and aſſumed to deliver to the Plaintiff fifty Quarters of Wheat at a certain Place, and at two certain Days, for 33*l.* 6*s.* 8*d.* to be paid him by the Plaintiff by equal Portions immediately after the Delivery, that is to ſay, at each of the Days of Delivery 16*l.* 13*s.* 4*d.* And he declares further that the Teſtator lived until after the laſt Day; and that although the Plaintiff was ready at the Place and Days to receive the ſaid Wheat, and to have paid his Money for it, yet the Teſtator did not deliver to him the Wheat nor any Part thereof at the Days and Place, *&c.* according to the ſaid Aſſumption; and alſo that the Defendants themſelves, (to whoſe Hands the Money, Goods, and Chattles which belonged to the Teſtator at the Time of his Death, ſufficient as well to ſatisfy all the Debts which he owed to any Perſon whatever, as to ſatisfy the Plaintiff himſelf for the ſaid Wheat in Manner and Form aforeſaid to be delivered, came, and were in their Hands at the Time of exhibiting the Bill,) after the Death of the Teſtator have not delivered the ſame to the Plaintiff, but wholly refuſe to deliver them, to the Damage of the Plaintiff 200 Marks. And upon this Declaration the Defendants demur in Law.

And it was argued in *Michaelmas* Term in the *fourth* and *fifth* Years of the Reign of the preſent King and Queen by *Loveleſs* and *Gerard* on the Part of the Defendants, and by *Foſſet* and *Manwood* on the Part of the Plaintiff, (as I heard, for I was not preſent at all.) And it was debated whether or no an Action on the Caſe lay againſt the Executors upon ſuch an Aſ-

The CASE. Action on the Caſe lies againſt an Executor upon a ſimple Contract of the Teſtator. S. P. adjudged 4 Co. 93 *Slade*'s Caſe. 9 Co. 87 *Pinchon*'s Caſe. 10 Co. 77. a. Godb. 176 *Kercher*'s Caſe. Cro. J. 47 *Fiſher v. Richardſon*. 1 Rol. R. 266 *Saunders v. Eſterby*. 1 Sid. 333 *per Cur.* 1 Lev. 201 *arguendo*. Theol. Dig. lib. 4. cap. 9. § 20. Swinb. 398, 399, 400. Godolph. Orph. Leg. 196, §1. Wentw. Off. of Exec. 121. Nelſ. Lex. Teſ-

tam. 44, 45, 46. Law of Teſtaments, &c. 359. Sed Contra Yelv. 20 by all the Judges of *England*. See Stat. 29. Car. 2. cap. 3. § 4.

For the Defendants.

ſumption of the Teſtator, which Aſſumption (it was ſaid for the Defendants,) was no other than a ſimple Contract, and if the Executors ſhould be charged by ſuch a Contract, by the ſame Reaſon they ſhould be charged by every Contract executory, as well for Debt as for other Things. For every Contract executory is an * *aſſumpſit* in itſelf, and it would be inconvenient to charge them as well by Contracts made by Parol *in pais*, as by Specialties, for of the former they cannot have Knowledge. And further it was ſaid, that there are divers Precedents in this Court, which have been ſhewn to you (my Lords), that in ſuch Actions as our's is here brought againſt Executors, the Executors have pleaded in Bar, and upon the Pleas tried for the Plaintiffs they have recovered, yet this does not prove the Law againſt us in our Caſe, we having demurred in Law. [a] For the Book of 13. *H.* 6. ſays that in an Action of Debt brought againſt Executors upon a ſimple Contract, or the like, wherein the Teſtator might have waged his Law, if the Executor will not demur at firſt, but will plead ſome other Plea in Bar, which is found againſt him, he ſhall not take advantage of it in Arreſt of Judgment or by Writ of Error; and therein the Book agrees with Reaſon, for when the Executor anſwers to the Debt, and avoids it by another Plea, he has loſt the Favour given him by the Law, which would not force him to anſwer to it at all, becauſe it preſumes that he could not have Knowledge of it, being only a Contract, and therefore for the Ignorance which the Law preſumes in Executors, it will not compel them to anſwer to the Debt; but when they plead other Matter in diſcharge of it, thereby they take upon them Knowledge of the Contract, and go about to diſcharge it by other Matter than by Ignorance, and therefore by taking upon them Knowledge of the Contract, they have loſt the Advantage which they might have taken in reſpect of the Preſumption in Law of their Ignorance of it. And ſo the Precedents ſhewn to you ſtand well with the ſaid Book, and do not make againſt us, for we have demurred in Law, by which we don't take upon us any Knowledge of the Contract, but pray to have the Benefit which the Law has given us for the Preſumption of Ignorance, or for ſome other Cauſe. And there is no Caſe ruled touching our Matter but one, which is the Caſe in [b] 12. *H.* 8. where one brought an Action upon the Caſe againſt Executors upon a Promiſe made by the Teſtator, that if one who bought ſome Goods of the Plaintiff did not pay the Plaintiff for them, he (the Teſtator) would pay him for them; and it was adjudged (as it is there reported) that the Plaintiff ſhould recover againſt the Executors upon this Action. But it does not appear there whether the Defendants demurred in Judgment or not, for perhaps they pleaded ſome Matter in Bar to it after they had heard the Opinion of ſome of the Judges, and if they did ſo, and it was tried againſt them, then is the Caſe in Point with what is mentioned above. And admitting that Judgment was there given upon Demurrer, yet pleaſe to hear what *Fitzherbert* ſays in [c] 27. *H.* 8. concerning the ſame Caſe, for he ſaith thus, "I was of Counſel "with one *Clement* of *London* in an Action upon the Caſe brought againſt Executors upon the "like Matter, *viz.* upon a Contract without Specialty, and the Caſe was adjudged with me by "*Fineux* and *Coniſby* againſt the Executors; but I hold the Law to be clearly otherwiſe, and that "they gave that Judgment without any Advice, but only upon their own Opinions." And when one told him that this Caſe was in the Report of 12. *H.* 8. above-mentioned, *Fitzherbert* ſaid, "put that Caſe out of your Books, for it is not Law without Doubt." So that (it was ſaid) the Authority of the ſaid Caſe in 12. *H.* 8. is impeached by *Fitzherbert*, who was of Counſel therein for the Plaintiff, for whom the Judgment was given, which he held to be erroneous, and he was a Judge of great Fame. And indeed the Judgment there ſeems to be againſt the Principles of Law, becauſe ſuch an Aſſumption is but a Contract *in pais*, as a Contract of Debt is.

And further it was ſaid, that if the ſaid Book of 12. *H.* 8. was Law, yet the Declaration here is not good. For in the Book of 12. *H.* 8. the Plaintiff ſurmiſed in his Declaration that the Teſtator had left to his Executors Aſſets to pay all Debts and all Legacies, and to content him alſo, but here the Plaintiff has only averred that the Executors have Aſſets to pay all Debts, and to ſatisfy him, and has omitted to aver that they have Aſſets to pay the Legacies, and it is reaſonable that Legacies ſhould be paid before ſuch a Duty as this is here; and for this Cauſe alſo, it was ſaid, the Bill is inſufficient.

E contra for the Plaintiff.

On the other Side it was ſaid that the Teſtator could not have * waged his Law in this Caſe, [d] and where he could not do that, an Action lies againſt his Executors by the Rule of the common Law. † For it is not reaſonable that if they have Aſſets to pay the Debts and Legacies, and alſo to ſatisfy the Plaintiff himſelf, that they ſhould retain the reſt of the Goods to their own Uſe. And to pay this is no Way prejudicial, but charitable and beneficial for the Soul of the Teſtator, but to leave it unpaid is good to none but the Executors, and they ought not to have the Benefit of it, for that was not the Intent of the Teſtator, and they are no more than [e] Miniſters and Diſtributors of the Goods of the deceaſed, and by applying the Benefit of his Debts to themſelves they are guilty of a Breach of that Truſt which the deceaſed repoſed in them. [f] And the ſaid Judgment in 12. *H.* 8. being given by the Court is not ſo eaſily to be rejected by the ſaying of *Fitzherbert*. And as to the Objection, *viz.* that the Plaintiff has omitted in the Declaration to aver that the Executors have Aſſets over and above paying the Legacies alſo, the Juſtices have more Cauſe to ſtay upon this than upon the principal Matter, and they would do well to order the Record of the ſaid Caſe in 12. *H.* 8. to be ſearched and ſhewn to them; which was done accordingly. [g] And the Caſe was entered in *Mich. Term Anno* 12. *H.* 8. *Rot.* 40. and it was between *Oliver Cleymond* Plaintiff, and *Robert Vincent* and *Thomaſin* his Wife, Executrix of the Teſtament of *Penſon*, Defendants, and it was not demurred in Law upon the Caſe, but the Defendants pleaded in Bar, as appears by the Record: and the Record was not [h] as the Book of Report

* 4 Co. 94. a. Moor 657. pl. 916

[a] Fitz. Executors 21. M. 10. H. 6. 25. a. *Per Cott.* Theol. Dig. lib. 4. cap. 9. §3. 2 Keb. 151. Vaugh. 97, 98, 99, 100. Poph. 32. Cro J. 47, 294. Yelv. 56. 1 Sid. 333. Law of Teſtaments, &c. 359. Nelſ. Lex Teſtam. 49, 50. Cro. E. 425, 426, *Per Fenner et Popham* J. But Moor 366, pl. 500. reports S. C. contrary, and ſays that the Matter here urged was denied to be Law; to which agrees the Judgment in *Hughſon's* Caſe. Cro. E. 121, pl. 12. But the Law is now ſettled agreeably with the Argument here.

[b] M. 12. H. 8. 11. pl. 3. Bro. Action ſur le Caſe 106. Executors 171. Vin. Abr. tit. Executors J. a. pl. 6. See 1 Keb. 385. 1 Sid. 114. where it is ſaid that this was the firſt Precedent of an Action on the Caſe againſt Executors upon the *aſſumpſit* of the Teſtator, and that it was adjudged upon great Reaſon.

[c] T. 27. H. 8. 23. pl. 21. Bro. Action ſur le Caſe 4. B. N. C. § 301.

[d] 9 Co. 88. b. Cro. J. 294. Poph. 32. Wentw. Off. of Exec. 118.

* In an Action on the Caſe Wager of Law does not lie, Bro. Ley Gager 22. Co. Litt. 295. a. 9 Co. 88. b. Vaugh 101. 1 Finch 321. 2 Finch 424. Wentw. Off. of Exec. 121. Nelſ. Lex. Teſtam. 45. Contra 2 Rol. Abr. 108. G. pl. 1.

† That an Executor may not convert the Reſidue of the Teſtator's Goods to his own Uſe, 2 Inſt. 33. 9 Co. 88. b. 90. a. Swinb. 382, 467.

[e] 9 Co. 88 b. Wentw. Off. of Exec. 88.

[f] 9 Co. 89. b.

[g] See the Record of the Caſe recited at large 9 Co. 89. a.

[h] So it is ſaid 9 Co. 90. b. 2 Brownl. 138.

port

Port is, as to the Point of Averment of Aſſets to pay Legacies, but the Averment of Aſſets in the Record was only to pay all Debts, and to content the Plaintiff alſo, and there was no Averment of Aſſets to pay Legacies contained in the Record. Wherefore all the Juſtices agreed that the Declaration was good, and that the Executors ſhould be chargeable to the Plaintiff, and without ſolemn Argument they gave Judgment for the Plaintiff, and that he ſhould have a Writ to enquire of the Damages, as appears hereafter by the Record.

In an Action on the Caſe againſt an Executor upon a ſimple Contract of the Teſtator, the Plaintiff needs not to aver that the Defendant has Aſſets to pay Legacies. S. P. Exec. 155, 313.

1 Rol. Abr. 921. J. pl. 1. 9 Co. 90 b. 2 Brownl. 138. See Wentw. Off. of

At which Day before the Lord the King and Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid, and becauſe the Court of the Lord the King and Lady the Queen here is not adviſed of giving their Judgment of and upon the Premiſſes, Day is given to the Parties aforeſaid before the Lord the King and Lady the Queen at *Weſtminſter* until *Saturday* next after the Octave of *St. Michael* to hear their Judgment thereon, becauſe the Court of the Lord the King and Lady the Queen here thereof not yet, *&c.* At which Day before the Lord the King and Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid, whereupon the Declaration aforeſaid, and all and ſingular the Premiſſes contained in the ſame being ſeen, and by the Court of the Lord the King and Lady the Queen here more fully underſtood, and mature Deliberation being had thereupon, for that it ſeems to the ſame Court of the Lord the King and Lady the Queen here that the ſame Declaration is good and ſufficient in Law, therefore it is conſidered that the aforeſaid *Richard Norwood* do recover his Damages by reaſon of the Premiſſes againſt the aforeſaid *Thomas* and *Edward* †. But becauſe it is unknown to the Court of the Lord the King and Lady the Queen here what Damages the aforeſaid *Richard* has ſuſtained as well by reaſon of the Premiſſes, as for his * Coſts and Charges by him about his Suit in this Behalf laid out, therefore it is commanded to the Sheriffs of *London* that by the Oaths of twelve good and lawful Men of their Bailiwick they ſhould diligently enquire what Damages the aforeſaid *Richard* has ſuſtained, as well by reaſon of the Premiſſes, as for his Coſts and Charges by him about his Suit in this Behalf laid out; and that they return the Inquiſition which they ſhould take thereupon, under their Seals, *&c.* and the Seals, *&c.* to the Lord the King and Lady the Queen at *Weſtminſter* on *Monday* next after the Morrow of the *Purification* of the bleſſed *Mary*, together with the King's Writ thereupon to them directed. The ſame Day is given to the aforeſaid *Richard* there, *&c.*

The reſt of the Record.

Judgment.

† *Note* here the Judgment is given againſt the Defendant generally, as if he had not been Executor, not fixing it upon the Teſtator's Goods; and the Debt itſelf is included in the Damages. See Wentw. Off. of Exec. 193.

* See 2 Bac. Abr. 446. Hardr. 165.

It has been greatly doubted ſince the ſaid Caſe in 12. H. 8. *was ruled, if the Action here would lie by Law, and if the ſaid Caſe in* 12. H. 8. *was well adjudged, or not.* ‖ *And it has been the Opinion of many wiſe and learned men in our Law, that by the ancient Law the Action was not maintenable againſt the Executors in the Caſe* ſupra, *but that Conſcience has encroached this Caſe upon the common Law. But it ſeems to be otherwiſe, and alſo it ſeems that the Action ſhall be maintenable againſt the Executors, without ſurmiſing that they have Aſſets to pay Debts, and to ſatisfy the Plaintiff alſo. For it does not appear to the Court that there was any Debt due by the Teſtator, and if there was any Debt due by Specialty to another, and the Executor had not Aſſets over and above it to pay the Plaintiff, the Executor might plead it in Bar. And to prove both theſe Points, note the Caſe in* * 3. Ed. 3. in Itinere North: *which appears there as follows, viz.* " Robert de T. *brought a Bill of Debt againſt the Exe-*
" *cutors of one D. and the Bill recited that the ſame D. their Teſtator was bound to the aforeſaid*
" Robert *in* 20*s. by Reaſon that one* Geffery *was bound to the ſaid* Robert *in the ſaid Money for*
" *ten Quarters of Wheat ſold to him, of which* Geffery *the ſame* Robert *on a certain Day, Year,*
" *and Place demanded the Money aforeſaid in the Preſence of the ſame D. whoſe Executors they (the*
" *Defendants) are, at which Time he the ſame D. granted to pay the ſame Money at a certain Day for*
" *the ſame* Geffery, *at which Day he requeſted him to pay it, and he to pay, &c. And it was ſaid*
" *on behalf of the Executors, that* Robert *demanded this Debt of them by force of a Grant, and*
" *ſhewed nothing for it, wherefore they demanded Judgment if to this Bill they ought to anſwer.* Ro-
" bert *ſaid that this Grant (whereof he counted) was not without Cauſe, but that it was by reaſon of*
" *the Debt of* Geffery *who was bound to us in this Debt for a certain Cauſe alſo, as our Bill ſup-*
" *poſes, and therefore it ſeems to us that you ſhall be driven to anſwer to this Grant upon ſuch Cauſe.*
" *The Executors ſaid that they were entire Strangers to the Cauſe, and their Teſtator likewiſe, and*
" *therefore there was nothing to compel them to anſwer but the Grant, which was inſufficient thereto,*
" *as they were adviſed. Notwithſtanding they were put to anſwer.*"

Nota bene by the Reporter.

‖ Crompt. J. C. 66. a. b.

* 9 Co. 89. a.

A Re-

A Report of the Opinions of the Juſtices of both Benches in an Action of Debt brought by Thomas Woodward *Plaintiff againſt the Lord* Darcy *of* Chich *and others Defendants, which Opinions were declared in* Trinity *Term in the* fourth *and* fifth *Years of the Reign of King* Philip *and Queen* Mary.

How a Creditor being Executor to his Debtor may retain Goods to pay himſelf. Vide Dy. 2. a. b. Kelw. 59. a. 63. a. Co. Litt. 264. b. 3 Bulſt. 7. Salk. 304. 11 Mod. 40. 3 Danv. Abr. 418. pl. 8. 2 Bac Abr. 378. 4 Bac. Abr. 268. Swinb. 360, 362, 459. Godolph. Orph. Leg. 115, §2, 3. 147, § 7. 185, § 10. 216, § 2. Wentw. Off. of Exec. 31, 141, 142, 148. Nelſ. Lex. Teſtam. 202 503. Law of Teſtaments, &c. 358.

IT appears amongſt the Records of the Common Bench of *Hillary Term* 3 & 4 *P. & M. Rot.* 305. that one *Thomas Woodward* ſued an Action of Debt in *London* upon an Obligation for 140 *l.* made to him by Sir *John Luttrell* Knight, againſt *Thomas* Lord *Darcy* of *Chich*, Sir *John Chicheſter* Knight, and *Humphry Coles* Eſquire, Executors of the Teſtament of *Thomas Windham*, who was Executor of the Teſtament of the ſaid Sir *John Luttrell*. *Coles* pleaded *never Executor, nor ever adminiſtered as Executor*. The other two pleaded in Bar that the ſaid Sir *John Luttrell* in his Lifetime was bound to the ſaid *Windham* in a Recognizance of the Force of a *Statute-Staple* according to the Statute for Recovery of Debts, in 200 *l.* to be paid at a certain Day, at which he did not pay it, nor at any Time afterwards in his Life. And after the Death of the ſaid Sir *John Luttrell*, Goods and Chattles to the Value of 200 *l.* came to the Hands of the ſaid *Thomas Windham* as Executor of the ſaid Sir *John Luttrell*, which Goods and Chattles the ſaid *Windham* in his Lifetime retained in his Hands for the Satisfaction of the ſaid 200 *l.* due and owing to him by the ſaid Sir *John Luttrell*. And further they ſaid, that the ſaid *Thomas Windham* in his Lifetime had fully adminiſtered all the other Goods and Chattles of the ſaid Sir *John Luttrell*, beſides the ſaid Goods and Chattles to the Value of the ſaid 200 *l.* And thereupon they demanded Judgment *ſi actio*.

Trin. Term 4 & 5. *P. & M.*

For the Plaintiff. a P. 21. Ed. 4. 3. pl. 4. Fitz. Executors 38. H. 20. Ed. 4. 17. a. *Per Brian.* Bro. Executors 114. Theol. Dig. lib. 1 cap. 18. §21. N. Bend. 38 Hutt 128. W. Jones 345. Salk. 300 *Per Gould* J. Ibid. 302 *Per Powel* J. Swinb. 360, 361. 2 Bac. Abr. 379. 4 Bac. Abr. 268. 1 Rol. Abr. 934. pl. 3. Godolph. Orph. Leg. 113. Wentw. Off. of Exec. 30, 31. Law of Teſtaments, &c. 356.

And whether or no this was a ſufficient Bar, was put to the Juſtices of the Common Bench, and alſo to the Juſtices of the King's Bench, as well this preſent *Trinity* Term in the ſaid 4 & 5 Years of the Reign of *Philip* and *Mary*, as oftentimes in ſeveral other Terms before. And it was ſaid, that the Law would not permit the Debtee Executor to retain in his own Hands the Goods of the Teſtator his Debtor for the Debt which the Teſtator owed him, for two Cauſes. The one is, for that when the Debtee takes upon him the Adminiſtration of the Goods of the Teſtator, and ſo aſſents to the Executorſhip, as it is here confeſſed by the Record *Windham* had done, thereby the Law has extinguiſhed the Action of the Debtee for ever, and it ſhall be taken that the Debtee was content to have his Debt remitted, for he might have refuſed the Executorſhip, and might have brought his Action againſt the Ordinary, or other Perſon to whom the Ordinary had committed the Adminiſtration, which bringing of the Action would have been a Diſagreement to the Executorſhip, and by ſuch Action he might have recovered his Debt well enough. [a] And therefore it was ſaid, there is a Diverſity taken in 21. *Ed.* 4. *viz.* if the Debtee makes the Debtor and another his Executors, although the Debtor never adminiſters, yet his Action is gone for ever, which is agreed to by all the Juſtices, according to the Report. And the Reaſon thereof is good, [b] for the other cannot bring an Action without naming him who does not adminiſter, notwithſtanding his Refuſal; and they two cannot ſue one of themſelves as Executors for a perſonal Thing. [c] And therefore in the ſame Caſe the Action is extinguiſhed, although the Debtor who does not adminiſter but diſagrees dies firſt, and the other ſurvives him. [d] For a perſonal Action once in Suſpence by the Act of the Party intitled to it is always extinguiſhed. [e] But if the Debtor makes the Debtee and another his Executors, and the Debtee does not adminiſter, but dies, there his Executors ſhall have an Action againſt the ſurviving Executor, as the Book purports, and ſo is the Diverſity. * But if he adminiſters, there his Executors ſhall never have an Action againſt the ſurviving Executor, which being the principal Caſe there, Iſſue was taken whether he adminiſtered in his Life or not, which ſhews that the meddling with the Adminiſtration is a Diſpenſation of his Action for ever. [f] And in 11. *H.* 4. the Court took the Law to be, that if the Debtee takes to Wife one of the Executors of the Debtor, who adminiſters, his Action is gone, but if ſhe does not adminiſter, his Action continues, becauſe he may have an Action againſt the others who have adminiſtered, without naming his Wife. And foraſmuch as in our Caſe *Windham* knew that the Adminiſtration extinguiſhed his Action, (for Ignorance of the Law ſhall not be aſcribed to any one, but we are to preſume that he knew the Law, and was well content with the Rule of it) this gives us Cauſe to judge that *Windham* was well ſatisfied that his Action for this Duty ſhould be loſt for ever. For if *Windham* had died inteſtate, and the Ordinary had committed the Adminiſtration of the Goods of Sir *John Luttrell* to one, and of the Goods of *Windham* to another, yet the Adminiſtrators of *Windham* ſhould not have had an Action for the Debt againſt the Adminiſtrators of *Luttrell*, for a perſonal Action once ſuſpended by the Act or Agreement of the Party is always extinct, and then if a perſonal Thing cannot be had but by Action, if the Action is extinguiſhed, the Thing itſelf is extinguiſhed. [g] As if one is bound to a Feme ſole and to a Man in 20 *l.* and afterwards the Obligor takes the Woman to his Wife, and afterwards ſhe dies, the Duty is extinguiſhed. So here foraſmuch as the Action is extinct, which was the Means to come at the Duty, the Duty itſelf is alſo extinct. And then *Windham* might not retain the Goods of the Teſtator in Satisfaction of a Duty which was extinct.

M. 2. R. 3. 20 b *Per Starkey.* et 22. a *Per Vavaſor.* Bro. Executors 168. M. 35 H. 6. 36. b *Per Priſot.* Fitz. Executors 26. M. 15. Ed. 3. Fitz. Ibid. 80. M. 41. Ed. 3. 22. pl. 10. Fitz. Ibid. 63. H. 20. Ed. 4. 17. a. Theol. Dig. lib. 2. cap. 11. § 2. 9 Co. 37. a. 1 Rol. R. 176. W. Jones 345. Salk. 307. Perk. § 485. 1 Finch 409. 2 Finch 171, 295. Swinb. 324. Godolph. Orph. Leg. 115, § 2. 136, § 3. 141, § 3. Went. Off. of Exec. 10, 41, 293. Nelſ. Lex. Teſtam. 162. Law of Teſtaments, &c. 370. Touch. of Preced. 29.

[c] S. P. Salk. 308 *Per Holt* C. J. 4 Bac. Abr. 269. Godolph. Orph. Leg. 114. § 1, 2.

The ſecond Cauſe why he might not retain the Goods in Satisfaction of his Duty (it was ſaid) is, for that the Debt which *Luttrell* owed was a Choſe in Action, to have which *Windham* ſhould have been driven to his Suit if *Luttrell* had been alive. And then

Wentw. Off. of Exec. 31. Swinb. 360, 361. Nelſ. Lex. Teſtam. 204. Ante 36 (c). Yet it was agreed contrary in *Croſman* and *Read*'s Caſe, 1 Leon. 320, viz. that an Action of Debt lay for the ſurviving Co-Executor againſt the Executors of the Debtor. And ſo is Kelw. 122. b. *Per Keble.* But the Law ſeems clearly otherwiſe.
[d] See Ante 36 (b) and the Books there cited. [e] S. P. W. Jones 345 *Per Curiam.* Swinb. 361. Godolph Orph. Leg. 114. § 1. 115, § 2. Wentw. Off. of Exec. 32. Vin. Abr. tit. Executors H. b. pl. 4. J. b. pl. 4. * 1 Finch 300. 2 Finch 294. Nelſ. Lex. Teſtam. 202. Law of Teſtaments, &c. 358. Poſt 185 (†).
[f] T. 11. H. 4. 83. pl. 32. Fitz. Executors 58. Bro. 57. Dette 65. Godolph. Orph. Leg. 113. Wentw. Off. of Exec. 31. Nelſ. Lex. Teſtam. 204, 205, 352. 1 Finch 300. 2 Finch 294. Vin. Abr. tit. Executors J. b. pl. 3. [g] P. 8. Ed. 4. 3. a *Per Pigot & Litt.* Bro. Dette 156. 1 Rol. Abr. 934. B. pl. 4. Co. Litt 264. b. 8 Co. 136. a. Cro. C. 373. 1 Finch 29, 300. 2 Finch 41, 294.

when *Windham* being Executor to *Luttrell* repreſented the Perſon of *Luttrell*, and in his own Perſon was as a diſtinct Perſon from him whom he repreſented as Executor, from thence it follows that the Debt due to his own Perſon could not be in any other Degree than it was when *Lutrell* was alive, and that was in Action, and not executed. [a] And therefore it was ſaid, in the Caſe of *T.* 4. *H.* 7. b. where *Reynold Sands* as Executor to one brought an Action of Debt upon an Obligation againſt *Peers Peckham*, and *Peckham* pleaded that the Teſtator made him Executor by one Teſtament, and the Plaintiff claimed to be Executor by another Teſtament, and by Delegacy of the *Pope* the Teſtament by which *Sands* claimed to be Executor was annulled, and *Peckham* was adjudged Executor, by Reaſon whereof he adminiſtred, and paid the Debt in Demand to one of whom the Teſtator had received ſo much for Uſury, in Diſcharge of the Teſtator's Conſcience, and afterwards by another Delegacy of the *Pope* the firſt Sentence was repealed, and *Sands* was adjudged Executor, and he demanded Judgment *ſi actio*, and this Plea of *Peckham* was held inſufficient, and it was adjudged that *Sands* ſhould recover the Debt. And one of the Exceptions there taken to the Plea, and which was, as it ſeems, one of the Cauſes of the Judgment, was becauſe the Debt was a Choſe in Action, and the Teſtator himſelf could not have given it to another without recovering it by way of Action, no more might *Peckham* being his Executor. Wherefore (it was ſaid) as it appears there that the Executor might not pay a Choſe in Action to another, ſo here by the like Reaſon *Windham* Executor cannot pay himſelf by retaining this Debt which was in Action to him. For which Cauſes (it was ſaid) it ſeems too hard that the Plea in Bar ſhould be good. And of this Opinion was *Brook* Chief Juſtice of the Common Bench.

[a] Poſt 282.

E contra for the Defendants.

On the other Hand it was ſaid by the other Judges, and by others at the Bar, that Teſtaments are much favoured, and the Will of the Teſtator is benignly reſpected by the Law. And if the Teſtator ſhould appoint one to be his Executor in whom he had the greateſt Confidence of all others, as Teſtators commonly do, and he that is ſo appointed has a Debt due to him by the Teſtator, if the meddling with the Adminiſtration ſhould be an Extinguiſhment of his Debt, the Conſequence of it would be that the Executor, rather than loſe his Debt, would refuſe the Executorſhip, and thereby the Confidence and Truſt of the Teſtator would be diſappointed, and the Will would be left unperformed. And beſides it cannot be ſuppoſed but that the Teſtator, who requires that his Debts ſhould be paid to every Man, intended that his Debt to his Executor ſhould be paid, and that more eſpecially than others, becauſe it is to be preſumed he was his chief Friend, in that he repoſes his greateſt Confidence in him by making him his Executor. So that if the Execution of the Adminiſtration ſhould extinguiſh the Debt, this would be derogatory to Teſtaments, and to the Souls of Teſtators. To Teſtaments, for that Executors would refuſe rather than loſe their Debts, [b] and without an Executor a Will is null and void: And to the Souls of Teſtators, for that if the Executor takes upon him the Adminiſtration which is an Act of Charity, then thereby the juſt Debt due from the Teſtator to the Executor would remain for ever unpaid, which would be dangerous for the Soul of the Teſtator. So that ſuch a Law would induce a Man to omit Charity and Friendſhip, or if he did execute it, he would be ungratefully requited with the Loſs of a juſt Debt due to him, and would be forced to pay all the other Debts of the Teſtator, and to leave the Teſtator's Debt due to himſelf unpaid. But our Law is not ſo unreaſonable or uncharitable, [c] for the Executor may retain Aſſets to pay himſelf, notwithſtanding he may not bring an Action to recover it, [d] for true it is that the Action is gone by the Act of Adminiſtration. † And therefore the Books of 21. *Ed.* 4. and 11. *H.* 4. are good Law, that the Action is gone by the Adminiſtration, notwithſtanding the Executor Debtee firſt dies, and the other ſurvives. But the Reaſon why the Action is loſt for ever is, [e] becauſe in Judgment of Law he is ſatisfied before, for if the Executor has as much Goods in his Hands as his own Debt amounts to, the [f] Property of thoſe Goods is altered and veſted in himſelf, that is, he has them as his own proper Goods in Satisfaction of his Debt, and not as Executor. So that there is a Tranſmutation of Property by the Operation of Law without Suit and Execution, for inaſmuch as *Windham* here could not have an Action againſt himſelf as Executor, nor have Execution againſt himſelf as Executor, the Operation of the Law is equivalent to a Recovery and Execution for him, and the Property is as ſtrongly altered as it could be by Recovery and Execution. So that the Reaſon why the Action is gone is, becauſe he has full Satisfaction by the Alteration of the Property. And altho' the Debt was a Choſe in Action, yet it is not ſo in him as Executor, for his Action is totally gone for the Reaſon aforeſaid, in which Reſpect the Choſe in Action is become converted into a Choſe in Poſſeſſion, and a Satisfaction executed. Wherefore *Windham* might well retain Goods to ſatisfy his own Debt. [g] And to prove this the Caſe of 12. *H.* 4. was cited, where in Debt upon an Obligation againſt the Heir, he pleaded that the Plaintiff was Executor to his Anceſtor, whoſe Deed he ſhewed forth, and adminiſtred certain Goods to the Value of the Debt, and more, retaining the ſame Sum towards paying himſelf, and *Hull* ſaid, if he did not retain to pay himſelf, he might have retained, and therefore it ſhall be ſaid his Folly that he did not, *et hæc opinio quorundam*, wherefore the Plaintiff took Iſſue that he adminiſtred no Goods of the deceaſed, *&c. et alii e contra*. By which Caſe it appears that they then took the Law to be, that an Executor might retain Goods of the Teſtator to ſatisfy his own Debt, notwithſtanding the Reaſon which has been given, viz. that the Debt was a Choſe in Action; and it ſeems alſo by the ſame Caſe, that if the Goods which he adminiſtred had not amounted to his own Debt, his [h] Action would have lain againſt the Heir. So that the Adminiſtration of the Executor is not an Extinguiſhment of his Action, unleſs he has in his Hands ſufficient Goods of the deceaſed to ſatisfy his own Debt. [i] For he cannot retain Goods for Part of his Debt, and for the reſt have an Action againſt the Heir, for he cannot apportion his

[b] 37. H. 8. Bro. Teſtament 20. B. N. C. § 300. Swinb. 7, 238. Godolph. Orph. Leg. 3, § 2. 12, § 4. Went. Off. of Exec. 3, 260. Law of Teſtaments &c. 2. 347. 1 Finch 148. 2 Finch 167, 168.

[c] See the Books cited Ante 184 at the Head of the Caſe.

[d] P. 13. H. 8. 15. a. *per Brudnel.* Co. Litt. 264. b.

† See Ante 184 (*) and the Books there cited.

[e] Salk. 304. 11 Mod. 40 *per Powel* J.

[f] Kelw. 59. a. 63. a. 3 Bulſt. 7. But Wentw. Off. of Exec. 31, 32, 89. ſays that unleſs the Executor either has in his Hands Money of the Teſtators, (of which it is eaſy to make a proportionable Change) or unleſs the Sum owing to him from the Teſtator amounts to the full Value of all the Teſtator's Goods in his Hands, or exceeds the ſame, there can be no Alteration of the Property by the Act and Operation of Law, until ſome Election or Declaration made by the Executor, which Part of the Goods not exceeding the Debt due to him he will have to be his own: For where the Teſtator's Goods exceed the Debt due to him, the Property of all cannot be changed, and of what Part ſhall the Law adjudge the Change till choice by the Executor?

[g] P. 12. H. 4. 21, pl. 11. Fitz. Bar 188. Bro. Dette 68. Executors 50. Poſt 545.

[h] S. P. Salk. 304 11 Mod. 40 *per Powel* J. 3 Danv. Abr. 418. pl. 8. in Margine. Godolph. Orph. Leg. 115, § 3. 190, § 7. Wentw. Off of Exec. 32, 93. Law of Teſtaments, &c. 358.

[i] S. P. Wentw. Off. of Exec. 32. 93. Godolph. Orph. Leg. 115, § 3. 199, § 7. Law of Teſtaments, &c. 358. 3 Danv. Abr. 387. pl. 4. Vin. Abr. tit. Executors M. a. pl. 5.

Debt, but he ought to retain Goods for the whole, or have an Action for the whole againſt the Heir. And ſo upon a Conſideration or Satisfaction Property ſhall be altered by the Law in ſeveral other Caſes. [a] And therefore in the Caſe between *Dive* and *Langſton* in 19. *H.* 7. which (it was ſaid) appears in a ſpecial Report thereof extant, where in Debt againſt *Dive* and his Wife Executrix of one *Redy* they pleaded *fully adminiſtred*, and upon the Evidence it appeared that the Defendants had in their Hands certain Goods which were the Teſtator's, but they had [b] paid to the Value of them in their own Money to others to whom the Teſtator was indebted, and whether or no theſe Goods ſhould be Aſſets was demurred in Law upon the Evidence; and it was adjudged that they were not Aſſets, for the Property of theſe Goods was altered by the Law upon the Election of the Defendants, towards Satisfaction of their own Money which they had laid down and defrayed about the Debts of the Teſtator; which Caſe is grounded upon the ſame Reaſon with the principal Caſe, as it is ſhewn before. [c] The like Reaſon is in the Caſe of 2. *H.* 7. where the Clerk of the Parliament brought a Writ of *Liberate* current to the Clerk of the Hanaper, to deliver to him a certain Sum due to him for his Fee as Clerk of Parliament, and there it is held that if he delivers to him the *Liberate*, and offers him an Acquittance, and the Clerk of the Hanaper has ſo much in his Hands, he is preſently become Debtor to him that delivered the *Liberate*, ſo that if the Clerk of the Hanaper die, an Action of Debt lies againſt his Adminiſtrators for the Sum: For altho' the Property of the Money in the Hands of the Clerk of the Hanaper was the King's, yet by the *Liberate* and Acquittance the Property was altered and became the proper Money of the Clerk of the Hanaper, in reſpect of his being chargeable to the Party. [d] From whence it appears that the Property of Money or Goods upon Satisfaction or Conſideration ſhall be altered in the Hands of him that has it, without Parol, without Contract, and without Suit of Law or Execution, and all by the ſole Operation of Law. And therefore *Windham* might retain the Goods of the Teſtator for the Debt due to himſelf, and that ſhall be a Payment in Law, and thereby the Property ſhall be altered for the Satisfaction of the Debt; and this is grounded upon Reaſon and good Conſcience. [e] And it was ſaid if the Debtee of 20 *l.* makes the Debtor and another his Executors, and he has no other Goods but the ſame Debt, the Executor Debtor ſhall be charged of the ſame 20 *l.* to others to whom the Teſtator was indebted, by *Danby* and *Choke* in 8. *Ed.* 4. ſo that by the making of him Executor the Duty was not extinct tho' the Action was gone, and he ſhall be charged to account for the ſame 20 *l.* before the Ordinary, *quod Moile ibi conceſſit*. By the Opinion of which Judges it ſeems, that notwithſtanding the Action for the Duty is gone, and it was a Choſe in Action, yet the Duty is not extinguiſhed, but it ſhall be Aſſets in his Hands. And by the ſame Reaſon in the principal Caſe the Debt of 20 *l.* which was a Choſe in Action is not gone, altho' the Action for it be gone, but it ſhall be in *eſſe* to be ſatisfied, as in the other Caſe it ſhall be in *eſſe* to be paid to others. Wherefore *Windham* might well retain the Money to ſatisfy his own Debt which was a Choſe in Action, and ſo the Plea in Bar is good. And this was the clear Opinion of all the Juſtices of the one Bench and of the other, except *Brook* who was ſtrongly of Opinion againſt them, and it was the Opinion of all the Serjeants alſo, as well of the reſt of them as of *Catline* at laſt, who was of Counſel for the Plaintiff. Wherefore the Plaintiff having before replied *Aſſets at London beſides the* 200 *l.* (and becauſe it was the clear Opinion of the Juſtices and Serjeants, except *Brook*, that the Parties ought not to plead *de novo*, but that the Bar was good and the Replication alſo, and there was no misjoining of Iſſue, nor could there be any Repleader) the Plaintiff (ſeeing no other Remedy) took a *Venire Facias* to try the Iſſue. And afterwards the Writ and the Plea abated * by the Death of the Lord *Darcy*, who died in the latter End of the ſaid *Trinity* Term.

[a] T. 19. H. 7. Rot. 330. Dy. 2. pl 3. in Margine.

[b] S. P. 20. H. 7. 2. pl. 5. *per Frowick* C. J. Dy. 2. pl. 7. 1 Rol. Abr. 923. pl. 2. N. Bendl. 11. pl. 8. 2 Leon. 31. 2 Show. 403, 404. Godolph. Orph. Leg. 147, § 7. 186. § 12. 202, § 10. 216, § 2. Swinb. 460. Nels. Lex. Teſtam. 503.

[c] H. 2. H. 7. 8. pl. 1. Fitz. Bar 124. 5 Mod. 47, 61, 62. 1 Finch 148. 2 Finch 181. Wentw. Off. of Exec. 122. Vin. Abr. tit. Executors P. a. pl. 41. Ante 36 (f).

[d] Vin. Abr. tit. Property G. pl. 1.

[e] P. 8. Ed. 4. 3. a. Fitz. Executors 32. Bro. 113. 1 Rol. Abr. 920. pl. 12, 13. Yelv. 160 *Flud v. Ramſey*. Cro. C. 373. Salk. 303, 304 *per Powel* J. Ibid. 306 *per Holt* C. J. Wentw. Off. of Exec. 30. Swinb. 364. Nels. Lex. Teſtam. 97, 208. Law of Teſtaments, &c. 355, 356, 390. 4 Bac. Abr. 269. 1 Chan. Rep. 138. Toth. 115 *Aſkwith v Chamberlain*. 1 Chan. Cas. 292.

* *Note*, in Actions of Debt, Account, or upon a Contract againſt Executors, the Death of one abates the Writ, as appears H. 37. H. 6. 16. pl. 7. Fitz. Brief 133. Bro. 232. P. 2. H. 4. 18. pl. 8. Bro. Brief 96. Executors 123. Theol. Dig. lib. 12. cap. 2. § 34. Hardr. 114, 161. And ſo was it adjudged in Point upon the Authority of this Caſe Paſch. 17. Car. 2. B. R. *Worral v. Brand*. 1 Lev. 165. 1 Sid. 259. T. Raym. 131. 1 Keb. 302, 906, 925. Wentw. Off. of Exec. 362, 363. See the Statute of 8 & 9 W. 3. cap. 11. § 7.

FH
MVSEVM
BRITANNICVM

A brief

A brief Report of a Case argued by the Serjeants in the Common Bench *in* Trinity *Term in the* first *Year of the Reign of Queen* Elizabeth, *and in* Michaelmas *Term next following, and by the Judges in* Hillary *Term next afterwards, between* Richard Wrotesley *Plaintiff, and* Richard Adams *and* Elizabeth *his Wife Defendants, in an* Ejectione Firmæ *brought by the said Plaintiff against them. And the Record was as follows.*

Trin. Term 4 & 5. P. & M. Rot. 341. Salop. Declaration. Same Precedent Rast. Entr. 253. b.

Richard Adams late of *Brosley* in the County aforesaid Yeoman and *Elizabeth* his Wife were attached to answer *Richard Wrotesley* Gentleman of a Plea, wherefore with Force and Arms into one Messuage, 60 Acres of Land, 20 Acres of Meadow, and 100 Acres of Pasture, with the Appurtenances in *Brosley*, which *John* late Prior of the Monastery of *St. Milburgh* of *Great-Wenlock* now dissolved, and the then Convent of the same Place demised to the aforesaid *Richard Wrotesley* for the Term of 63 Years, within the said Term they entered, and the same for a long Time occupied, and the said *Richard Wrotesley* hindered from taking the Profits of the Tenements aforesaid with the Appurtenances according to the Form of the Demise aforesaid, and him from his Farm aforesaid within the Term aforesaid ejected; and other enormous Things to him did, to the great Damage of the said *Richard Wrotesley*, and against the Peace of the Lord the King and Lady the Queen now, &c. And whereupon the same *Richard Wrotesley* by *Thomas Newman* his Attorney complains, that whereas one *Thomas* late Prior of the aforesaid late Monastery was seized of the Tenements aforesaid with the Appurtenances in his Demesn as of Fee in right of his Monastery aforesaid, and being so seized thereof, the same then Prior and the then Convent of the same Place by their certain Writing indented, bearing Date on the Feast of the Nativity of *St. John* the Baptist in the 22d Year of the Reign of Lord *Edward* the *fourth* late King of *England*, and made at *Great-Wenlock* aforesaid between the same then Prior and the then Convent of the same late Monastery of the one Part, and one *John Bailey* and *Joice* his Wife of the other Part, and sealed with the Convent Seal of the same late Prior and Convent, by their unanimous Assent and Consent demised, granted, and to Farm let to the aforesaid *John Bailey* and *Joice* the Tenements aforesaid with the Appurtenances, to have and to hold to the same *John* and *Joice* and their Assigns from the Feast of *St. Michael* the Archangel then next following unto the End and Term of 80 Years thence next ensuing, and fully to be compleat. By Force of which Demise the same *John Bailey* and *Joice* were possessed of such Title, Interest, and Term of Years of and in the Tenements aforesaid with the Appurtenances, and being so thereof possessed, after the aforesaid Feast of *St. Michael* the Archangel then next following they entered into the Tenements aforesaid with the Appurtenances, and were thereof possessed, and being so thereof possessed, the same *John* died, and the aforesaid *Joice* survived him, and held herself in the Tenements aforesaid with the Appurtenances, and was thereof sole possessed by Right of Survivorship, &c. And the same *Joice* being so possessed thereof took to Husband one *Roger Wilcox*, whereby the same *Roger* and *Joice* were possessed of the Tenements aforesaid with the Appurtenances, and being so thereof possessed, the aforesaid *Joice* died, and the aforesaid *Roger* survived her, and was sole possessed of the Tenements aforesaid with the Appurtenances; and the said *Roger* being so possessed of the Tenements aforesaid with the Appurtenances, and the Reversion of the same Tenements with the Appurtenances belonging to the aforesaid *Thomas* late Prior and his Successors, the same *Thomas* late Prior died. After whose Death one *Richard* was duly elected and made Prior of the Monastery aforesaid, whereby the same *Richard* was seized of the aforesaid Reversion of the Tenements aforesaid with the Appurtenances as of Fee and Right, in right of the late Monastery aforesaid, and the same *Richard* being so seized thereof afterwards likewise died; after whose Death one *Rowland* was duly elected and made Prior of the Monastery aforesaid, whereby the same *Rowland* was seized of the Reversion of the aforesaid Tenements with the Appurtenances as of Fee and Right, in right of the Monastery aforesaid, and the same *Rowland* being so seized thereof afterwards likewise died; after whose Death one *John* was duly elected and made Prior of the Monastery aforesaid, whereby the same *John* late Prior was seized of the aforesaid Reversion of the Tenements aforesaid with the Appurtenances as of Fee and Right, in right of the Monastery aforesaid. And the aforesaid *Roger* being possessed of the Tenements aforesaid with the Appurtenances, the Reversion thereof belonging to the aforesaid *John* late Prior, and to the Convent, and his Successors, as in right of the Monastery aforesaid, the same *John* then Prior and the then Convent of the same late Monastery afterwards, viz. the *fourth* Day of *September* in the 26th Year of the Reign of Lord *Henry* late King of *England* the *Eighth* from the Conquest, at *Great-Wenlock* aforesaid, by their certain Writing indented made between them the said *John* then Prior of the Monastery aforesaid and the then Convent of the same Place of the one Part, and the aforesaid *Richard Wrotesley* of the other Part, (one Part whereof, sealed with the common Seal of the aforesaid *John* then Prior and the Convent, the same *Richard Wrotesley* produces here in Court, the Date whereof is the same *fourth* Day of *September* in the 26th Year aforesaid) by their unanimous Assent and Consent granted and to Farm let to the same *Richard Wrotesley* the Tenements aforesaid with the Appurtenances, by the Name of the Reversion of all their Farm in *Brosley*, and by the Name of one other Tenement there with all the Lands, Leasows, Pastures, and Meadows to the same belonging, and with all and singular their Appurtenances then in the Tenure and Occupation of the aforesaid *Roger Wilcox*. To have and to hold to the same *Richard Wrotesley* and his Assigns from the End and Expiration of the aforesaid Term of Years demised to the aforesaid *Roger Wilcox* unto the

End and Term of 63 Years from thence next following, and fully to be compleat, with this, that the aforesaid *Richard Wrotesley* will aver, that the aforesaid 60 Acres of Land, 20 Acres of Meadow, and 100 Acres of Pasture with the Appurtenances in *Brosley* aforesaid from Time whereof the Memory of Man is not to the contrary have always been demisable and demised with the aforesaid Farm and Tenements aforesaid, and let and occupied with the same. And afterwards the aforesaid *John* late Prior and the Convent of the aforesaid late Monastery by their Deed sealed with the common Seal of the said late Prior and Convent, and inrolled of Record in the Court of Chancery of the aforesaid late King *Henry* the *eighth* at *Westminster* in the County of *Middlesex*, bearing Date the 25th Day of *January* in the 31st Year of the Reign of the aforesaid late King *Henry* the *eighth*, granted the Reversion of the Tenements aforesaid with the Appurtenances amongst other Things to the aforesaid late King *Henry* the *eighth*, to have to him his Heirs and Successors for ever. By virtue of which Grant, and of a certain Statute made in a Parliament of the aforesaid late King *Henry* the *eighth* begun and holden at *Westminster* the 28th Day of *April* in the 31st Year of his Reign, the same late King *Henry* the *eighth* was seized of the Reversion of the Tenements aforesaid with the Appurtenances as of Fee and Right, in right of his Crown of *England*. And the same late King *Henry* the *eighth* being so seized of the Reversion of the Tenements aforesaid with the Appurtenances, by his Letters Patent bearing Date at *Westminster* the 27th Day of *September* in the 37th Year of the Reign of the same late King *Henry* the *eighth*, granted the Reversion of the Tenements aforesaid with the Appurtenances amongst other Things to one *William Pinnock* and *Elizabeth* his Wife, to have and to hold to them their Heirs and Assigns for ever. By Reason of which said Letters Patent the same *William Pinnock* and *Elizabeth* were seized of the Reversion of the Tenements aforesaid with the Appurtenances as of Fee and Right. And being so seized thereof, and the aforesaid *Roger Wilcox* being possessed in Form aforesaid of the Tenements aforesaid with the Appurtenances, the same *Roger Wilcox* afterwards at *Brosley* aforesaid made his last Will and Testament, and therein devised his Term, Estate, and Interest of and in the aforesaid Tenements with the Appurtenances to *Elizabeth* his Wife, and constituted the same *Elizabeth* Executrix of his last Will and Testament aforesaid, and there died, by Reason whereof, after the Death of the same *Roger Wilcox*, the aforesaid *Elizabeth* entered into the Tenements aforesaid with the Appurtenances, and was thereof possessed by virtue of the Legacy aforesaid. And the same *Elizabeth* being so thereof possessed took to Husband the aforesaid *Richard Adams*, whereby the same *Richard Adams* and *Elizabeth* were possessed of the Tenements aforesaid with the Appurtenances. And being so thereof possessed, and the aforesaid *William Pinnock* and *Elizabeth* being seized in Form aforesaid of the Reversion of the same Tenements with the Appurtenances, the same *William Pinnock* and *Elizabeth* his Wife afterwards, viz. the *tenth* Day of *May* in the *fourth* Year of the Reign of Lord *Edward* the *sixth* late King of *England*, at *Brosley* aforesaid demised to the aforesaid *Richard Adams* and *Elizabeth* his Wife the Tenements aforesaid with the Appurtenances, to have and to hold to the same *Richard Adams* and *Elizabeth* his Wife and their Assigns for Term of their Lives, and of the longest Liver of them, whereby the same *Richard Adams* and *Elizabeth* his Wife were seized of the Tenements aforesaid with the Appurtenances in their Demesn as of Freehold, and by Reason whereof the aforesaid Term of Years of the said *Richard Adams* and *Elizabeth* his Wife of and in the Tenements aforesaid with the Appurtenances was utterly ended and expired. And afterwards, viz. the last Day of *October* in the *second* and *third* Years of the Reign of the Lord the King and Lady the Queen now, the aforesaid *Richard Wrotesley* entered into the Tenements aforesaid with the Appurtenances, and was thereof possessed by virtue of the aforesaid Demise thereof made to him in Form aforesaid by the aforesaid *John* late Prior and Convent, until the aforesaid *Richard Adams* and *Elizabeth* his Wife, the *first* Day of *November* in the *second* and *third* Years of the Reign of the Lord the King and Lady the Queen now, with Force and Arms into the Tenements aforesaid with the Appurtenances entered, and the same occupied for a long Time, viz. from the aforesaid *first* Day of *November* in the *second* and *third* Years aforesaid, until the Day of obtaining the original Writ of the said *Richard Wrotesley*, that is to say, the 26th Day of *May* in the *third* and *fourth* Years of the Reign of the Lord the King and Lady the Queen now, and him the said *Richard* prevented from taking the Profits of the Tenements aforesaid with the Appurtenances, according to the Form of the Demise aforesaid, and him from his Farm aforesaid within the Term aforesaid ejected; and other Wrongs &c. to the great Damage, &c. and against the Peace, &c. Wherefore he says that he is damnified and has Damage to the Value of 20 *l.* and thereupon he brings Suit, &c.

Defendants pray eyer.

And the aforesaid *Richard Adams* and *Elizabeth* by *Humphry Dickens* their Attorney come and defend the Force and Injury when, &c. and pray *Oyer* of the Indenture aforesaid made between *John* Prior of the Monastery of *St. Milburgh* and the Convent of the same Place, and the aforesaid *Richard Wrotesley*. And it is read to them in these Words, viz. " This Indenture made the *fourth* Day of " *September* in the 26th Year of King *Henry* 8. Between *John* Prior of the Monastery of *St. Milburgh* " of *Much-Wenlock* and the Convent of the same Place of the one Part, and *Richard Wrotesley* of " the same Town Gentleman of the other Part, witnesseth that the said Prior and Convent of their " whole Assent and Consent have granted, demised, let, and by these Presents do to Farm set to the " said *Richard Wrotesley* the Reversion of all their Farm in *Brosley*, and also another Tenement there, " with all the Lands, Leasows, Pastures, and Meadows to the same belonging, and with all and sin- " gular their Appurtenances now in the Tenure and holding of one *Roger Wilcox*, to have and to hold " all the said Farm and Tenement, with all other as before is said, to the said *Richard Wrotesley* and to " his Assigns, from the End and expiring of the Term of Years granted to the said *Roger Wilcox*, to

the

" the End and Term of 63 Years then next and immediately enſuing, and fully to be com-
" pleat and ended. Yielding and paying therefore yearly to the ſaid Prior and his Succeſſors
" 40*s.* of good and lawful Money of *England*, to be paid at the Terms there uſed, with Suit of
" Court, Heriot, and all other Services after the Cuſtom of the Manor there, Teritry only ex-
" cept, becauſe of 12*d.* of Increaſe contained within the ſaid Rent of 40*s.* The ſaid *Richard*
" and his Aſſigns alſo, during the ſaid Term, the ſaid Farm in all Manner of Buildings to the
" ſame belonging well and ſufficiently ſhall ſuſtain and repair as often as ſhall be needful, upon
" their own proper Coſts and Expences, and in the End of their Term ſo ſhall leave. And the
" ſaid Prior and his Succeſſors ſhall deliver by their Bailiff there or their Aſſigns Timber there-
" unto. And the ſaid *Richard* and his Aſſigns during the ſaid Term ſhall have ſufficient Houſe-
" bote and Heybote. And if it ſhall happen the ſaid Rent of 40*s.* to be unpaid after any Feaſt
" wherein it is payable, by the Space of a Month, then it ſhall be lawful for the ſaid Prior and
" his Succeſſors into the ſaid Farm and Tenement with all other before rehearſed to re-enter, and
" the ſame to have and enjoy as in their former Eſtate, this Indenture in any wiſe notwithſtand-
" ing. The ſaid Prior and Convent and their Succeſſors the ſaid Farm and Tenement with all
" other before rehearſed to the ſaid *Richard* and to his Aſſigns during the ſaid Term againſt all
" Men ſhall warrant, acquit, and defend. In witneſs whereof the Parties aforeſaid to theſe pre-
" ſent Indentures interchangeably have ſet their Seals. Given at *Wenlock* in the Chapter-houſe there
" the Day and Year aboveſaid." Which being read and heard the ſame *Richard* and *Elizabeth* Demur to the Declaration.
ſay, that the Declaration aforeſaid in Manner and Form aforeſaid declared is inſufficient in Law for the aforeſaid *Richard Wroteſley* to maintain his Action aforeſaid againſt the ſaid *Richard Adams* and *Elizabeth*, and that they have no Neceſſity, nor are by the Law of the Land bound to anſwer the Declaration aforeſaid in Manner and Form aforeſaid declared: And this they are ready to verify, wherefore for want of a ſufficient Declaration of the aforeſaid *Richard Wroteſley* in this Behalf, the ſame *Richard Adams* and *Elizabeth* pray Judgment, and that the aforeſaid *Richard Wroteſley* may be precluded from having his Action aforeſaid againſt them, *&c.*

And the aforeſaid *Richard Wroteſley*, for that he has above declared ſufficient Matter in Law Joinder.
to have and maintain his Action aforeſaid againſt the aforeſaid *Richard Adams* and *Elizabeth*, which he is ready to verify, which ſaid Matter the aforeſaid *Richard Adams* and *Elizabeth* do not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſe to admit, prays Judgment, and his Damages by reaſon of the Treſpaſs and Ejectment aforeſaid to be adjudged to him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Continnance.
Judgment thereon, Day is given to the Parties aforeſaid here on the Octave of *St. Michael*, to hear their Judgment thereon, becauſe the Juſtices here not yet, *&c.*

The CASE.

A Prior leaſed a Farm to Huſband and Wife for Years, the Huſband died, the Wife took another Huſband, and died; the Prior leaſed the Reverſion of all the Farm to the Plaintiff for a Term of Years to commence *after the End and Expiration of the firſt Term of Years*, and afterwards the Prior by Deed enrolled granted the Reverſion to King *Henry* 8. who granted the Reverſion over in Fee; the ſurviving Huſband in Poſſeſſion of the firſt Leaſe died, leaving an after-taken Wife, to whom he deviſed the Term, who took to Huſband the Defendant, and they being ſo poſſeſſed of the Term, the Patentee of King *H.* 8. leaſed to them for Life, which Acceptance of the ſecond Leaſe during the firſt is a Surrender of the firſt in Law, whereupon the Plaintiff may enter by virtue of the Leaſe made to him, as well as if the Years had been ſpent by Effluxion of Time. S. C. Dyer 177. pl. 35. S. P. Co. Litt. 45. b. 1 Co. 153. b. 154. a. 1 Rol. Abr. 849. pl. 2. 2 Rol. Abr. 495. pl. 8. 2 Leon. 106. 3 Bac. Abr. 426. 4 Bac. Abr. 329. Vin. Abr. tit. Surrender F. pl. 26.

The Caſe was recited in this Manner. It appears by the Record that *Richard Wroteſley* has brought an *Ejectione Firmæ* againſt *Richard Adams* and his Wife, for one Meſſuage, 60 Acres of Land, 20 Acres of Meadow, and 100 Acres of Paſture with the Appurtenances in *Broſley*. And he counts that *Thomas* late Prior of the Monaſtery of *St. Milburgh* of *Great Wenlock* now diſſolved was ſeized of the ſaid Tenements in his Demeſn as of Fee, in Right of the ſaid Monaſtery. And that he being ſo ſeized and the Convent by Deed indented bearing Date on the Feaſt of *St. John Baptiſt* in the 22d Year of the Reign of King *Edward* 4. made a Leaſe thereof to *John Bailey* and *Joice* his Wife for 80 Years next enſuing after the Feaſt of *St. Michael* then next to come, and that after the ſame Feaſt they entered, and the Huſband died, and the Wife ſurvived, and took to Huſband *Roger Wilcox*, whereby the ſaid *Roger* and *Joice* were poſſeſſed of the ſaid Tenements; and afterwards *Joice* died, and *Roger* ſurvived her, and was ſole poſſeſſed of the ſaid Tenements. And he being ſo poſſeſſed, and the Reverſion belonging to the ſaid Prior and his Succeſſors, the ſaid Prior died, after whoſe Death one *Richard* was duly elected and made Prior of the ſaid Monaſtery, whereby he was ſeized of the Reverſion of the ſaid Tenements as of Fee and Right, in Right of his ſaid Monaſtery. And he being ſo ſeized died, after whoſe Death one *Rowland* was duly elected and made Prior of the ſaid Monaſtery, whereby he was ſeized of the Reverſion of the ſaid Tenements as of Fee and Right, in Right of the ſaid Monaſtery. And he being ſo ſeized died, after whoſe Death one *John* was duly elected and made Prior of the ſaid Monaſtery, whereby he was ſeized of the ſaid Reverſion of the ſaid Tenements as of Fee and Right, in Right of the ſaid Monaſtery. And the ſaid *Roger* being poſſeſſed of the ſaid Tenements, and the Reverſion thereof belonging to the ſaid *John* Prior and his Succeſſors, the ſame *John* Prior and the Convent of the ſame Monaſtery afterwards, *viz.* the 4th Day of *September* in the 26th Year of the Reign of King *Henry* 8. by their Deed indented, (one Part whereof is here ſhewn forth) leaſed to the Plaintiff the ſaid Tenements with the Appurtenances, by the Name of the Reverſion of all their Farm in *Broſley*, and alſo by the Name of another Tenement, with all the Lands, Leaſows, Paſtures, and Meadows to the ſame belonging, and with all and ſingular their Appurtenances, then in the Tenure and Occupation of the ſaid *Roger Wilcox*, to have and to hold to the ſame Plaintiff and to his Aſſigns from the End and Expiration of the ſaid Term of Years demiſed to the aforeſaid *Roger Wilcox*, unto the End and Term of 63 Years thence next enſuing; with this, that the Plaintiff will aver that the aforeſaid 60 Acres of Land, 20 Acres of Meadow, and 100 Acres of Paſture with the Appurtenances in *Broſley* aforeſaid from Time immemorial have been always demiſable and demiſed with the Farm and Tenement aforeſaid, and let and occupied with the ſame. And afterwards the aforeſaid *John* late Prior and the Convent by their Deed inrolled in the Chancery, bearing Date the 25th Day of *January* in the 31ſt Year of the Reign of King *Henry* 8. granted the Reverſion of the ſaid Tenements a-

mongſt other Things to the ſaid late King *Henry* 8. his Heirs and Succeſſors for ever, by virtue of which Grant, and of a certain Statute made in a Parliament of the ſaid late King *Henry* 8. begun and holden at *Weſtminſter* the 28th Day of *April* in the 31ſt Year of his Reign, the ſaid King *Henry* 8. was ſeized of the Reverſion of the ſaid Tenements as of Fee and Right, in Right of his Crown. And afterwards the ſame King by his Letters-patent bearing Date at *Weſtminſter* the 27th Day of *September* in the 37th Year of his Reign, granted the Reverſion of the ſaid Tenements with the Appurtenances to *William Pinnock* and *Elizabeth* his Wife, and to their Heirs. And afterwards the ſaid *Roger Wilcox* being poſſeſſed *ut ſupra*, made his Teſtament, and thereby deviſed all his Term, Eſtate, and Intereſt in the ſaid Tenements to *Elizabeth* his Wife, and made her his Executrix, and died, and *Elizabeth* his Wife entered into the ſaid Tenements, and was thereof poſſeſſed by Force of the ſaid Legacy, and took to Huſband the ſaid *Richard Adams* one of the Defendants, by Reaſon whereof he and his ſaid Wife were poſſeſſed of the ſaid Tenements. And they being ſo poſſeſſed, the ſaid *William Pinnock* and his ſaid Wife the 10th Day of *May* in the 4th Year of the Reign of King *Edward* 6. demiſed the ſaid Tenements to the Defendants for their Lives, whereby the ſaid Defendants were ſeized thereof in their Demeſn as of Freehold, and by Reaſon whereof the ſaid Term of Years which the Defendants had in the ſaid Tenements was utterly ended and expired. And afterwards, *viz.* the laſt Day of *October*, in the 2d and 3d Years of the Reign of King *Philip* and Queen *Mary*, the ſaid Plaintiff entered into the ſaid Tenements, and was thereof poſſeſſed by virtue of the ſaid Demiſe in Form aforeſaid made to him by the ſaid late Prior and Convent, until the ſaid Defendants the *firſt* Day of *November* in the 3d and 4th Years of the Reign of the ſaid King and Queen ouſted him. And he counts to his Damages of 10*l.* And the Defendants demand *Oyer* of the ſaid Deed of Demiſe made to the Plaintiff by the ſaid late Prior and Convent, and it was read to them, and entered *de verbo in verbum*. And the Deed was, that they had granted and demiſed to the Plaintiff the Reverſion of all their Farm in *Broſley*, and alſo another Tenement, with all the Lands, Leaſows, Paſtures, and Meadows to the ſame belonging, with all and ſingular their Appurtenances, then in the Tenure of one *Roger Wilcox*, to have and to hold all the ſaid Farm and Tenement with all others, as is before rehearſed, to the ſaid *Richard Wroteſley* and his Aſſigns from the End and Expiration of the Term of Years granted to the ſaid *Roger Wilcox* to the End and Term of 63 Years then next and immediatly enſuing, and fully to be compleat and ended. And upon this the Defendants demur in Judgment.

And on their Part it was argued in *Trinity* Term by *Walle* Serjeant, and in the ſaid Term of *St. Michael* by *Southcote*, *Walſh*, and *Carus* Serjeants. And on the Part of the Plaintiff it was argued in the ſaid *Trinity* Term by *Harper* Serjeant, and in the ſaid Term of *St. Michael* by *Cholmley*, *Corbet*, and *Weſton* Serjeants. And in the ſaid Term of *St. Hillary* it was argued by the Court, *viz.* by *Weſton* then being a Judge, and by *Anthony Brown* Juſtice, and *Dyer* Chief Juſtice, but Sir *Humphry Brown* who was then one of the Juſtices did not argue at all, becauſe he was ſo old that his Senſes were decayed, and his Voice could not be heard. And divers Exceptions were taken to the Count by them that argued for the Defendants. The firſt was, that where the Plaintiff, in order to ſhew the firſt Leaſe, commences at the Seizin of *Thomas* the firſt Prior mentioned, he there ſays that *Thomas late Prior of the Monaſtery*, &c. in which Caſe he has improperly called him *late* Prior, becauſe he has ſhewn that there were three Priors after him, *viz.* *Richard*, *Rowland*, and *John*. But he ought to have called him *(quondam) ſometime* Prior, for *late* contains the Time juſt paſt, and *ſometime* may be referred to any Time but the Time juſt paſt, wherefore inaſmuch as by ſhewing three Succeſſors he has falſified the *late*, and ſo has made a Repugnancy in his Declaration, which ought to be uniform, the Declaration ſhall for that Reaſon abate. To which it was anſwered, that *ſometime* Prior would have been more proper than *late*, but yet that *late* is proper enough, and is frequently uſed in the Senſe of *ſometime*, as well as *ſometime* in the Senſe of *late*. As in Writs of Forcible Entry ſued at this Day upon the Statute of 8. *H.* 6. the Words are, *whereas in the Statute made in the Parliament at Weſtminſter in the eighth Year of the Reign of King Henry the Sixth* late *King of England*, &c. So that the Form of the Writ at this Day calls King *Henry* 6. *late* King of *England*, although there have been eight Kings and Queens ſince his Time. And in the Writ of Dower *unde nihil habet* the Words are, *Command A. that juſtly*, &c. *he render to B. who was the Wife of C. her reaſonable Dower which is come to her, of the Freehold which was of and belonging to the aforeſaid C.* ſometime *her Huſband.* &c. So that although her Huſband died but a little while before, yet the Writ ſays *ſometime her Huſband.* From whence we may ſee that *ſometime* is in ſome places put for the Time juſt paſt, and *late* for the Time paſſed * long ſince, for which reaſon *late* uſed in the Senſe of *ſometime* may be well permitted, and eſpecially in Counts, † which if they have Matter of Subſtance ſhall never abate. And therefore the Exception was diſallowed by the Rule of the Court.

Exceptions taken by the Defendants to the Declaration. 1.

* Lane 84 *Per Bromley*, *late* may be intended 100 Years ago.

† Ante 83 (E).

Exception 2. Another Exception taken was, *viz.* that the Place is not ſhewn where *John Bailey* died, nor the Place where *Joice* took *Wilcox* to Huſband, nor the Place where *John* the Prior who made the Leaſe was elected: For to ſhew the Certainty of the Commencement of the Leaſe claimed by the Plaintiff, he ſhews the Conveyance of the firſt Leaſe, in order to reduce the ſame to an End, for the End of the firſt Leaſe makes the Commencement of the ſecond Leaſe. And if *John Bailey* was not dead, then it follows that *Joice* could not have the whole Term ſolely by Survivorſhip: and if *Joice* was not married to *Wilcox*, thence it follows that *Wilcox* could not have the Term by the Marriage and Survivorſhip of the Wife: and if *John* (who is ſhewn to be the laſt Prior) was not elected and made Prior, from thence it follows that his Leaſe made to the Plaintiff is not good. So that each of theſe Things by itſelf is traverſable, and if any one of them be traverſed and found, it deſtroys the Plaintiff's Action, for which reaſon the Place where the Things

were done ought to be shewn, because the *Venue* shall come from thence if the Things be traversed. [a] As in Debt upon an Obligation the Place where the Obligation was made ought to be shewn in the Count; [b] or if Attornment be alledged, the Place where it was made ought to be pleaded; and in other such like Things which may be traversed the Place where the Thing was done ought to be shewn, for the better Certainty of the Trial. To which it was answered, that the first Lease, and the Death of *Bailey*, and *Joice*'s taking of *Wilcox* to Husband, and the Election of *John* to be Prior who made the Lease, is but Matter of Conveyance in order to shew the certain Commencement of the second Lease, for the second Lease and the Ejectment of the Plaintiff out of it is the Effect and Substance of the Suit. And the first Lease and the other Circumstances thereof are only Conveyance and Inducement to the second Lease, [c] which Conveyance and Inducement needs not be so certainly alledged as the principal Matter. [d] And it is the common Form of Entries to plead the Election *ut supra*, without shewing any Place where it was done; wherefore this Exception, as to the Incertainty of the Place, was disallowed by the Rule of the Court.

[a] H. 6. Ed. 4. 11. a. Bro. Lieu 55. Pleadings 97. P. 4. Ed. 4. 14. pl. 23. P. 5. H. 7. 24. pl. 6. *Per Fairfax*. M. 3. H. 4. 4. pl. 20. Dy. 15. pl. 78. 39. pl. 62. Heath's Max. 151.

[b] S. P. Ante 149 (l). M. 18. Ed. 4. 16. b. *Per Catesby*. M. 2. R. 3 13. pl. 33. *Per Cur.* Sed contra Dy. 28. pl. 185. And M. 39. H. 6. 32. a. Bro. Lieu 45. P. 5. H. 7. 24. Max. 151, 152.

pl. 6. Fitz. Bar 146. Bro. Lieu 50 seem contrary, but the Reporter puts a *Quære* in both Books.

[c] See Ante 65 (k)

[d] Heath's Max. 151, 152.

Another Exception taken was, in that it is alledged that *Joice* took to Husband *Roger Wilcox*, whereby the said *Roger* and *Joice* were possessed, &c. whereas he ought to have said that they were possessed as in [e] Right of the Wife, for it is a Chattle-real, [f] and the Wife surviving her Husband shall have it again, and not the Executors, and therefore by the Espowsals it is not [g] devested out of the Wife, but remains in her, for which reason the Plaintiff ought to say that the Husband and Wife were possessed as in Right of the Wife, as they should have pleaded if it had been a Freehold in the Wife. But this Exception was also disallowed by the Rule of the Court, [h] for true it is that the Husband and Wife were possessed, and the Mean and Manner how they were possessed is shewn, so that if the whole be put together, the Manner of the Possession appears, and therefore it is sufficient.

Exception 3.

[e] S. P. 1 Finch 30. 2 Finch 43.

[f] Dr. & Stud. lib. 1. cap. 7. Dy. 6. b. pl. 5. 7. a. pl. 6. Co. Litt. 46. b. 351. a. 1 Finch 30. 2 Finch 43.

Another Exception taken was, that after the Election of each of the Priors, it is said, "by force "whereof he was seized of the Reversion of the Tenements as of Fee and Right," where it ought to have been said, "in his Demesn as of Fee." [i] For he should have an Assize if the Termor was ejected, and in such Things whereof a Man shall have an Assize he shall say in his Count Countant that he was seized in his Demesn as of Fee. But if the Reversion had been dependant upon an Estate for Life, he should say *ut supra*, but here he ought to say "in his Demesn as of "Fee." To which it was answered by the Court, [k] that true it is he might have said so, and it would have been good, and yet the other Form of pleading is good also. For when a Man has made a Lease for Years, he cannot of right meddle with the Demesn, nor the Fruits thereof, but he has the Reversion, and the Things incident to it, as Fealty. And the Reversion cannot properly be said to be in Demesn, but Demesn is properly so called when a Man has the Thing in Possession, for which reason a Man may say of a Reversion dependant upon an Estate for Years, as well as dependant upon an Estate for Life, that he was seized as of Fee. And therefore this Exception was also disallowed by the Rule of the Court.

Exception 4.

[g] 1 Rol. Abr. 342. E. pl. 1. Wentw. Off. of Exec. 196. Post 192 (f). 418 (c).

[h] Vin. Abr. tit. Baron and Feme D. b. pl. 20. See Lutw. 1007 *arguendo* it is said that this was a hard Shift to make this Plea good.

Another Exception taken was, that the second Lease was made by the Name of the Reversion of all their Farm in *Brosley*, and of another Tenement, with all the Lands, Leasows, Pastures, and Meadows to the same belonging, and with all and singular their Appurtenances then in the Tenure and Occupation of the said *Roger Wilcox* at the Time of the second Lease, for if it was not, then (it was said) the same shall not pass, for the whole Sentence is protracted until that Part comes, and rests upon it, so that nothing is demised but what was in the Tenure and Occupation of *Roger Wilcox*. As if a Man leases all his Lands lying in such a Parish, or which descended to him on the Part of the Mother, he that claims the Lease ought to aver that the Thing claimed lies in such a Parish, or descended on the Part of the Mother, for the End of the Sentence rests in that. And so is it in the principal Case. To which it was answered and argued by the Court, [l] that the Averment is not here necessary to be made, for the Lease is *of all their Farm in Brosley*, which Word *(Farm)* is a capital Messuage and all the Lands lying to it, and signifies the chief House and the Lands belonging to it, and not a common House, and so has a Certainty in itself. And when it goes further and says, *in the Tenure and Occupation of Roger Wilcox*, this is of no Effect, [m] for if it was not in his Tenure and Occupation, yet it should pass, for there is a Certainty in the Thing demised, *viz.* the Farm in *Brosley*, and so another Certainty put to a Thing which was certain enough before is of no Manner of Effect. [n] And therefore there is a Diversity where a Certainty is added to a Thing that is incertain, and where to a Thing certain. [o] For if I release all my Right in all my Lands in *Dale* which I have by Descent on the Part of my Father, and I have Lands in *Dale* by Descent on the Part of my Mother, but no Lands by Descent on the Part of my Father, there the Release is void; for if the Releasee will aid himself by the Release, he ought to [p] aver that I had such Lands in *Dale* by Descent on the Part of my Father, to which the Release extended, and the same is issuable, and if he cannot aver this, then the Release is void. And so the Words of the Certainty, *viz.* which I have by Descent on the Part of my Father, being added to the general Words which were incertain, are of Effect. [q] But if the Release had been in *White-Acre* in *Dale*, which I have by Descent on the Part of my Father, and I had it not by Descent on the Part of my Father, but otherwise, yet the Release is good, and the Releasee shall not be compelled to take any Averment, for the Thing was certainly expressed by the first Words, in which Case the Addition of another certainty is not necessary, but superfluous, and therefore he shall not there take an Averment upon a Thing which is of no Effect, be the same true or false. [r] And upon this *Dyer* Chief Justice put the Case in 20. *Ass.* where in an Assize of 20 Cart-loads of Wood the Plaintiffs shewed forth a Deed, by which one *H.* Tenant of the Wood had granted out of it the 20 Cart-loads of Wood to one *J.* in Fee, of which the aforesaid *J.* had 16 by the Grant of *Richard* the Father of the aforesaid *H.* for Housebote and

Exception 5.

[i] H. 15. H. 7. 4. b. *Per Brian*. Bro. Assize 83. Damages 81.

[k] Vin. Abr. tit. Seizin K. pl. 21

[l] Heath's Max. 161.

[m] Cro. C. 473. 10 Co. 113. a.

[n] 2 Rol. R. 377. 2 Co. 10. a. Vin. Abr. tit. Grants H. 4. pl. 1.

[o] M. 2. Ed. 4. 29. b. Fitz. Release 11. Bro. 49. Grants 92. Pleadings 92. Dy. 50. pl. 7, 8. 2 Co. 33. b. 34. a. Cro. C. 548. Heath's Max. 161. Vin. Abr. tit. Release Z. 3. pl. 2. Post 395 (c).

[p] Kelw. 7. b. Dy. 87. pl. 100. Palm. 94. Vin. Abr. tit. Release X. a. pl. 6.

[q] Dy. 87. pl. 101. Bridgm. 101, 102. Post 395 (c).

[r] 20 Ass. pl. 8. Fitz. Assize 217. Bro. Grants 69. Dy. 87. pl. 101. Palm. 94. Heath's Max. 161.

and *Heybote*, and alſo they ſhewed forth another Deed of Grant made over to them the ſaid Plaintiffs by the ſaid *J.* And the Plaint was challenged, becauſe by the firſt Deed it was ſuppoſed that the 16 Cart-loads commenced by another Deed which they did not ſhew; and the Plaint was there held good, without ſhewing the Deed of the firſt Grant of the 16 Cart-loads, becauſe the Grant of *H.* Tenant of the Soil was ſufficient for the 20 Cart-loads; and although it was ſaid in the Deed that the 16 were by the Grant of his Father, this was not Matter of Subſtance, for there was Subſtance and Certainty enough before. [a] And hereupon he alſo put the Caſe of *Margery Parker* in 9. *H.* 6. where the Queen had granted to her for Term of her Life 20*l. percipiendum* [b] *de quadam ſumma pecuniæ aſſignatæ in partem dotis ipſius Reginæ de magna Cuſtuma de London*, by the Hands [c] of the Collectors of the ſame Cuſtom, and ſhe brought a Writ of Annuity for the 20*l.* againſt the Queen, and the Writ was adjudged maintenable; for it is there held, that if the Queen had [d] not any Sum of the Cuſtom aſſigned to her, yet the Grant was good, becauſe there was ſufficient Subſtance and Certainty in the Grant before the Words *percipiendum de quadam ſumma, &c.* So that if the Thing has Subſtance and Certainty enough, there needs no other Words of Certainty; and therefore the Averment that it was in the Tenure and Occupation of *Wilcox* ſhall be to no Purpoſe, ſeeing it is not material whether it was ſo or not. And as to what was ſaid, that the Demiſe is alſo by the Name of another Tenement with all the Lands, *&c.* which Words *(another Tenement with, &c.)* are not of themſelves ſo certain as the Word *(Farm)* is, but are utterly incertain, and becauſe of that Incertainty an Averment ought to be taken; Sir, as to this it is to be conſidered whether or no the Words *(another Tenement with, &c.)* are material to make the Leaſe good, and if they are not, then an Averment is not requiſite. And it was ſaid that they are not of Subſtance to make the Leaſe good; and becauſe this is Part of the principal Matter, the Validity of theſe Words is diſcuſſed and cleared up in the Argument of the principal Matter afterwards, where it appears more at large. Wherefore (it was ſaid) it is not neceſſary, for the Declaration is in this Manner, *viz.* "And the ſaid "*Roger* being poſſeſſed of the ſaid Tenements, the Reverſion thereof belonging to the ſaid *John* "Prior and his Succeſſors, the ſame *John* Prior and the Convent afterwards, *viz.* the 4th Day "of *September*, *&c.* leaſed to the Plaintiff, *&c.*" Which Words contain that *Wilcox* was poſſeſſed at the Time of the new Leaſe made, for the Words *(the ſaid Roger being poſſeſſed)* being ſpoken in the ablative Caſe abſolute, are of the ſame Effect, by the Converſion of the Participle *(being)* into the Verb *ſum*, as if it had been ſaid, "when the aforeſaid *Roger was* poſſeſſed "the Abbot and Convent demiſed," *&c.* in which Caſe it is affirmed that *Wilcox* was poſſeſſed when the Abbot and Convent demiſed. And the Word *(afterwards)* in *Latin (poſtea,)* being in the Sentence, is referred to the Time before ſpoken of, *viz.* to the Election and Seizin of *John* the Prior. And then the Senſe is, *viz.* after that *John* was elected and made Prior, and ſeized of the Reverſion, and when *Wilcox* was poſſeſſed, the Prior and Convent demiſed, *&c.* And ſo the Poſſeſſion of *Wilcox* at the Time of the new Leaſe being affirmed and ſhewn by the Plaintiff once, it is not neceſſary to be ſhewn and affirmed again; and therefore the Exception was diſallowed by the Rule of the Court.

Exception 6. Another Exception taken was, that in the Count it is ſhewn that the Reverſion of the Farm is demiſed before the *habendum*, and nothing is there expreſſed in the *habendum*, by which Means it is referred by the Law to the Thing beforementioned, *viz.* to the Reverſion of the Farm, and in the Leaſe recited in the Record *de verbo in verbum* it appears that the *habendum* is of all the Farm, *&c.* and is not of the Reverſion of the Farm, as it ſhould be taken by the Count, ſo that there is a Variance between the Thing in the *habendum* intended by the Count, and the Thing in the *habendum* expreſſed in the Leaſe. To which it was anſwered, that if there be any Diverſity in Law between the *habendum* the Farm from the End of the firſt Leaſe, and the *habendum* the Reverſion of the Farm from the End of the firſt Leaſe, then is there a Variance in Fact, for which the Count ſhall abate; but if it is all one in Effect in Judgment in Law, then there is no Variance at all. So that this reſts upon the Judgment of the Law, and is one of the Points of the principal Matter; and therefore it is referred to the Argument of the principal Matter.

Exception 7. Another Exception was taken to the Count, becauſe the ſecond Leaſe is made to commence after the End and Expiration of the ſaid Term of Years demiſed to the aforeſaid *Roger Wilcox*, whereas in Truth the firſt Demiſe was made to *Bailey* and his Wife, and the Term was conveyed to *Wilcox* by the Marriage of the Wife and her Death, by the Act and Operation of Law. [e] For if a Woman poſſeſſed of a Term for Years takes Huſband, and the Wife dies, although during her Life the Term was not [f] deveſted out of her, yet by her Death it is veſted in the Huſband, and is given to him by the Act of the Law, *quod Curia conceſſit*, becauſe it is a Thing in Poſſeſſion and not in Action. Then it was ſaid, that foraſmuch as it is given to the Huſband by the Act of Law, it cannot be ſaid that the ſaid Term of Years was demiſed to *Wilcox*. To which it was anſwered, that although the Count is, after the End and Expiration of the ſaid Term of Years *demiſed to Wilcox*, and the Leaſe itſelf ſays, *granted to the ſaid Wilcox*, and although it is in Fact conveyed or given to *Wilcox* by the Act of the Law, [g] yet the Words are proper enough to limit the certain Commencement of the ſecond Leaſe, for it is not to be taken by the Words *demiſed to Wilcox*, that it muſt of Neceſſity be intended that the firſt Leaſe was made to *Wilcox*, for the Words *demiſed to Wilcox* may properly enough be uſed when the Term was firſt made to another, and granted or aſſigned over to *Wilcox*. So that *demiſed* may well be taken for *left* to another, or *granted over* to another, or *demiſed over* to another. [h] And therefore if a Leaſe for Years is made to *A.* who grants over his Term to *B.* and the Leſſor brings an Action of Waſt againſt *B.* the Form of the *Regiſter* is, that *B.* did Waſt in Land which he held *by the Demiſe of A. to whom* the Plaintiff *demiſed*. So that a Grant over of a Term may be called a Demiſe. And whether the Grant over of a Term be by Act in Deed, or by Act in Law, it may properly enough be called a Demiſe. Wherefore this Exception was alſo diſallowed by the Rule of the Court.

Another

[a] T. 9. H. 6. 12. Bro. Annuity 3. Grants 4 Dy 87. pl. 101. Hutt. 33.

[b] See Salk. 58, that an Annuity granted by the King muſt be out of ſome Part of his Revenue, or not good, becauſe his Perſon is not chargeable as that of a Subject is, *Per Barones Scacca.*

[c] So it muſt be expreſſed in every Grant of an Annuity by the Crown F. N. B. 152. l.

[d] S. P. in Caſe of a common Perſon F. N. B. 152. l, in margine. Owen 3.

[e] Dr. & Stud. lib. 1. cap. 7. Dy. 251. pl. 90. Co. Litt. 46. b. 1 Rol. Abr. 345. pl. 8. Hob. 3. Lutw. 1007. Gilb. Eq. Rep. 234. 1 Finch 31. 2 Finch 44.

[f] See Ante 191 (g).

[g] S. P. Accord. Dy. 178. pl. 37. 6 Co. 36. a. Litt. R. 145. Cart. 149. 3 Danv. Abr 213 pl. 14. Vin. Abr. tit. Eſtate U. a. pl. 3.

[h] Regiſt. 74. a.

Another Exception taken was, that in the Count the Plaintiff has alledged that the Prior and Convent by Deed enrolled granted the Reversion to King, &c. and has not alledged that the Prior was then seized of the Reversion. And this he ought to do, inasmuch as he removes the Reversion out of the Prior to the King in order to convey it to *Pinnock* and his Wife, and so on to the Defendants, to drown the first Term. And that which shall be devested at a certain Time ought to be shewn to be at the same Time in him out of whom it shall be devested, and it shall not be intended to continue in him without being shewn. [a] And therefore in 7. *H.* 7. in Trespass for cutting and carrying away Trees the Defendant said that such a one before the Trespass supposed made a Feoffment to the Use of one *Alice*, *prætextu quorum* the said *Alice* gave him (the Defendant) the Trees, and this Plea was adjudged insufficient, because it is not shewn that the Feoffee was seized to the Use of *Alice* at the Time of the Gift, for it shall not be intended to continue in him without being specially shewn. So in the Case here where a Conveyance is made of the Inheritance out of the Prior, the Plaintiff ought to have shewn that the Thing conveyed out of him by the Grant was in him at the Time of the Grant, and especially as it is in a Count, which ought to contain Certainty to all Purposes, and shall not be taken by Intendment. And because the Plaintiff has not shewn certainly that the Reversion was in the Prior at the Time of the Grant to the King, the Count is vicious; and of this Opinion was *Dyer* Chief Justice. But the other Judges were of the contrary Opinion, because a Fee Simple or other certain Estate conveyed to one shall be intended to [c] continue in the Person, in whom it is reposed, always during the same Estate, if it be not shewn how it is otherwise devested, and especially in Men of Religion, into whose Hands the Lands which come are said in the Law to come into *Mortmain*, so called (as *Weston* Justice said) by Resemblance [d] to a Man in his last Moments, who holds whatever he takes in his Hand *mortuo manu*, that is, so fast that he never quits it until he is dead. So that an Inheritance is supposed to continue in Men of Religion as long as the House itself continues. [e] And the Successor without any Seizin in him shall have an Assize of Novel-Disseizin for Rent upon the Seizin of his Predecessor, for Seizin once had continues in the House. And so Continuance of the Reversion is supposed in the Prior. And altho' by the Rule of Law [f] Declarations shall not be taken by Intendment, but ought to have Certainty, yet this Rule admits of an Exposition, and is to be thus taken, viz. where the Incertainty is so great that it stands indifferently which Way it be taken. [g] But where one Way is most strong, and the Intendment that Way exceeds much the Intendment the other Way, such Intendment shall be allowed, and Declarations shall be adjudged good according to such Intendment. [h] As in Debt against the Heir the Count shall be good notwithstanding the Plaintiff does not shew that the Executors have not Assets, because that shall be intended, for it shall be presumed that the Plaintiff would not else have brought his Action. And many other Cases were put hereupon; for which Reason the Exception was not good, according to their Opinions.

Exception 8.

[a] M. 7. H. 7. 3. Bro. Pleadings 79. Dy. 86. pl. 93. 2 Bulst. 204. *Note* that the Words *prætextu quorum* here were no precise Allegation, for in their Nature they neither increase nor diminish, See Ante 56 (h) and the Books there cited.

[b] See Ante 84 (c) and the Books there cited.

[c] Moor 219. 1 Rol. R. 441. O. Bendl. 165. Lutw. 357, 1226. Post 431 (a).

[d] Co. Litt. 2. b.

[e] M. 2. R. 3. 2. pl. 6. in fine. F. N. B. 179. c.

[f] See Ante 84 (e) and the Books there cited.

[g] That Declarations shall sometimes be held good by Intendment, See H. 3. H. 6. 35. P. 20. H. 6. 23. pl. 1. M. 38. H. 6. 13. b. 14. a. Heath's Max. 3, 4. good Matter hereupon

[h] Post 439.

Another Exception taken to the Count was, in that the Plaintiff has said therein that by Force of the Grant by Deed enrolled, and by Force of the Statute, King *Henry* 8. was seized of the Reversion of the said Tenements, &c. So that he has shewn that he was seized by two Means, whereas he might have omitted the Statute, and in shewing these two Ways of Seizin he has made his Count double. To which the Court said, that of Necessity he ought to shew the Grant by Deed enrolled, [i] for the Statute of 31. *H.* 8. does not give any Monasteries, nor any Lands or Tenements of Monasteries to the King. But the Statute has two Branches in it, the first of which enacts *that the said King shall have and hold to him his Heirs and Successors all Lands and Tenements of Monasteries which had come to his Hands after the 4th Day of* February *in the 27th Year of his Reign*; the other Branch enacts, *that not only the said Lands and Tenements come to his Hands since the said 4th Day of* February, *but also all other Monasteries which hereafter* (viz. after the first Day of the said Parliament) *shall be dissolved, surrendered, or by any Means come to the said King, and all Lands and Tenements appertaining to the same, whensoever they shall be dissolved, surrendered, or by any other Means come to the King's Hands, shall be vested, deemed, and adjudged by Authority of this Parliament in the actual and real Seizin and Possession of the said King his Heirs and Successors for ever, in the State and Condition they now be, &c.* So that the Statute does not give any Lands or Tenements of Monasteries to the King, but the first Branch shews how the King shall hold them that were then come to his Hands, and the other shews how those and the others which should afterwards come to him shall be adjudged in him. Wherefore the Statute does not give *de novo* any Lands to the King, but expresses the Manner of holding them which were already come, and which were to come to his Hands. For which Reason the first coming of Lands to the King's Hands ought to be expressed, and therefore the Court held that of Necessity the Grant by Deed enrolled ought to be shewn. And also they held that the Plaintiff ought of Necessity to make Mention of the Statute also, for the said second Branch of the Statute ordains *that those Monasteries and their Lands which are come, or shall come to the Hands of the King, shall be vested and adjudged by Authority of this Parliament in the actual and real Seizin and Possession of the King, &c.* And if the Statute has made them to be vested in the King, and to be adjudged in him by Force of the Statute, then of Necessity the Plaintiff ought to shew that which makes the Land to be adjudged in the King, viz. the Statute. So that the Grant by Deed enrolled and the Statute also ought

Exception 9.

[i] Dy. 111. pl. 43. by the Reporter.

to be ſhewn, for the Statute does not enure without the Grant, and the Grant without the Statute cannot be ſhewn, for when the Statute ſays that the Lands ſhall be adjudged in the King by Force of the Statute, it reſtrains all Men from ſaying that they ſhall be in him otherwiſe; and therefore altho' they come to the Hands of the King by the Grant, yet after they are come they ſhall be adjudged in him by the Statute, and all Men are reſtrained from ſaying the contrary. As if a Statute was made that all Lands which the Duke of *Somerſet* ſhould purchaſe ſhould be adjudged by the Statute to him and to his Heirs of the Body of his ſecond Wife begotten, this Act reſtrains all Men from ſaying that they ſhould be in him otherwiſe. So that the Grant to the King was not the only Cauſe of the Seizin of the King, but the Grant and the Statute together, and therefore both of them ought to be ſhewn; [a] and that which a Man is forced to ſhew cannot be ſaid to be double, nor ſhall it ever make the Plea double. And many Caſes were put hereupon, and ſo they held that the ſhewing of the Grant and the Act did not make the Plea double. But *Dyer* Chief Juſtice ſaid, that altho' the Plaintiff ought to ſhew both, yet he thought that the Plaintiff ought to conclude *virtute cujus ſtatuti* the King was ſeized of the Reverſion &c. omitting the Grant, for the Grant by Deed enrolled does not make the Seizin, but the Statute, as it is ſaid; and there is a Transformation of the Seizin, by the Words of the Act, from the Force of the Grant to the Force of the Act, and then he ought to ſhew the Grant and the Act, and ſay, "by Force of which Act of Parliament he was ſeized &c." So that the Concluſion of the Seizin is not good. For if the Grant by Deed enrolled had been before the Act, as here it is in Time after the Act, tho' in it's Operation it precedes the Act, then he ought to have ſaid, "by Force of which Grant the King was ſeized of the Reverſion, "&c. until the Day of the Act, at which Day the King was ſeized of the Reverſion, &c. by Force "of the Act," ſo that when the Force of the Act takes Place he ought to rely only upon the Act. So in the principal Caſe foraſmuch as the Act took Effect at the ſame Inſtant that the Grant took Effect, he ought to have relied upon the Act only; and therefore it ſeemed to him that the Concluſion might have been better than it was. But for another Reaſon he was of Opinion that the Plaintiff had not well concluded upon the Seizin, viz. becauſe he has not ſhewn that the Prior granted to the King as well the Monaſtery as the Reverſion. For the ſaid Statute does not extend to any Lands or Tenements of any Monaſtery, but to Lands or Tenements of Monaſteries diſſolved, ſuppreſſed, renounced, relinquiſhed, forfeited or ſurrendered, for the Words of the ſaid ſecond Branch are, *that not only the ſaid Monaſteries and other the Premiſſes immediately and preſently, but alſo all other Monaſteries, Abbies, Priories, &c. which ſhall happen hereafter to be diſſolved, ſuppreſſed, renounced, relinquiſhed, forfeited, ſurrendered, or by any other Means come to the King, and all the Sites, Circuits, Precincts, Lands, Tenements, &c. appertaining to the ſame, as ſoon as they ſhall be diſſolved, ſuppreſſed, &c. ſhall be veſted, deemed, and adjudged by Authority of this Parliament in the very actual and real Seizin and Poſſeſſion of the King, &c.* And here theſe Words *(appertaining to them)* ought to be referred *to them diſſolved, ſuppreſſed, ſurrendered, &c.* And ſo the Plaintiff ought to have ſhewn that as well the Priory as the Reverſion of the Farm came to the Hands of the King, for now it does not appear when the Monaſtery was diſſolved; but in the Count it is, *late Prior of the Monaſtery, &c. diſſolved*, which implies that it was diſſolved at the Time of the Pleading, but the Time when it was firſt diſſolved is incertain to us. Wherefore foraſmuch as the Plaintiff has not ſhewn that the Monaſtery was diſſolved in the Time of King *Henry* 8. or came to his Hands, but has only ſhewn the Reverſion granted to him, he has not well concluded that by Force of the Grant and of the Act the King was ſeized, but he ought to have ſaid that by Force of the Act he was ſeized, omitting the Grant, and he ought not to have relied upon both.

[a] Doc. Pla. 136. Ante 140 (e).

Exception 10.

Another Exception the Lord *Dyer* took to the Count, viz. for that it is alledged therein that the Woman one of the Defendants took to Huſband *Adams* the other Defendant, whereby *Adams* and his Wife were poſſeſſed of the ſaid Tenements, and they being ſo poſſeſſed, the ſaid *Pinnock* and his Wife demiſed the Tenements to them for their Lives. And this they could not do, for during the Time that *Adams* and his Wife were poſſeſſed by Force of the firſt Leaſe, the ſecond Leaſe could not take Effect, for they could not have [b] both the Leaſes at one ſame Time. Wherefore it is repugnant to ſay that the ſecond Leaſe was made to them when they were poſſeſſed of the firſt Leaſe. But the Plaintiff ought to have alledged a Surrender previouſly of the firſt Leaſe, or that *Pinnock* and his Wife with the Aſſent of *Adams* and his Wife entered upon the Land, and made them a new Leaſe. [c] And ſo was it accordingly done in the Caſe of *Chamberlain* and his Wife in 40. *Ed.* 3. in Aſſize of a Houſe brought by them againſt the Prioreſs of *Clerkenwel*, where they made their Title in this Manner, viz. they ſhewed that the firſt Huſband of the Wife was Tenant for Life of the Leaſe of the Prioreſs, and afterwards the Prioreſs entered into the Houſe by the Aſſent of the firſt Huſband, and delivered Seizin again to him and to his Wife (one of the Plaintiffs) for Term of their two Lives, which Entry with the Aſſent of the Huſband was a Surrender, and this Title was good, for there it was ſhewn that the firſt Leaſe was determined by the ſaid Surrender before the ſecond Leaſe was made. But here the Plaintiff has alledged that *Adams* and his Wife being poſſeſſed, *Pinnock* and his Wife made the ſecond Leaſe to them, which could not be, for there is a Priority of Time in this Caſe, that is to ſay, the End of the firſt Leaſe is prior in Time to the Commencement of the ſecond Leaſe, and conſequently the Commencement of the ſecond Leaſe is after the End of the firſt. And therefore altho' the End of the firſt Leaſe and the Commencement

[b] S. P. Ante 107 (b). *per Bromley* C. J.

[c] P. 40. Ed. 3. 23. b. Bro. Surrender 1. 40 Aſs. pl. 16. Fitz. Surrender 9. Bro. 35.

Commencement of the second Lease are made at one Time, yet in that Time there is a Priority, viz. first the End of the former Lease, and afterwards the Commencement of the new Lease. And because the Plaintiff has not divided the Time, and shewn first the End of the former Lease, and afterwards the Commencement of the second Lease, the Count is not good, according to his Apprehension, and yet, he said, it was a doubtful Point, and fit to be considered. But none of the other Justices spoke to it; for he, arguing last, moved the Exception, and none of them else took Notice of it.

The Argument upon the Matter in Law.

As to the Matter in Law, it was divided into three Points. First, what was the Thing demised to the Plaintiff; secondly, in what Degree the Thing demised was demised, viz in Reversion or in Possession; thirdly, when the Thing demised shall commence. And as to the first Point (it was said) it appears by the Count and also by the Deed of Demise, that the Demise is of the Reversion of all their Farm in *Brosley*, and also of another Tenement, with all the Lands, Leasows, Pastures, and Meadows to the same belonging, &c. Wherefore it is to be considered what is a *Farm*, and how much it contains. And by *Anthony Brown* Justice and *Dyer* Chief Justice, a [a] Farm is a collective Word consisting of divers Things collected together, whereof one is a Messuage, and the others are the Lands, Meadows, Pastures, Woods, Commons, and others Things lying or appertaining thereto. And the Messuage is not a common Messuage, nor are the Lands of the Quality of other Lands commonly lying to other Messuages in the same Town, but it is a capital Messuage in a Town, and the Lands lying to it are great Demesns, and more extensive in Quantity than the Demesns which lie to other Messuages. And yet all this does not make it to be called a Farm, if it has not another Thing also; and that is, [b] that it has been let or demised to another for Life, for Years, or at Will, for if it has been always reserved in the Hands of the Inheritor thereof, it has not the Name of a Farm. So that a Farm contains divers Things, as hath been said, as a [c] Grange does; and it is a capital Messuage and a great Demesn which have been let and demised, and so is it commonly taken in every Place. For which Reason the Law also says it is so, for the Law is the Custom in relation to Letters, Counts, Pleas, and Judgments, and the Common Law is nothing but common Use. And such is the Definition of a Farm as to the Lessor and the Lessee. But a Farm is oftentimes used in other Senses, for as to the Lessee only he may be said to be a Farmer of whatever Thing he has in Lease; and that which he holds may, as to him, be called his Farm. [d] And so the Statute of *Marlbridge* uses the Word, which says, *Also Farmers during the Time of their Farms shall not make waste, sale, nor exile of Houses, Woods, or Men, nor of any Thing belonging to the Tenements that they have to Farm*; so that it calls him a *Farmer* of Houses, Woods, and Villains, and says *the Tenements which they have to Farm*, and *during the Time of their Farms*, which is as much as to say during their Lease. And there Farmers are intended generally for Lessees. Also *Farm* has another Sense, viz. it is called a Rent reserved; and that is a common Sense of the Word. But the Sense of *Farm* in our Case is that which is first mentioned. And that Sense of the Word has been lately taken in this Court in *Bridge*'s Case, [e] where a Man made a Lease of a capital Messuage and of the great Demesns lying thereto, rendring Rent, and devised by his Testament to another all his Farm in such a Place, and it was here debated whether the Devisee should have the Rent only, or the Reversion and the Rent, and the Opinion of this whole Court was, that the Devisee should have the Reversion and the Rent also, for the Word (*Farm*) was taken in such Sense as it is first defined above: Wherefore when he devised the Farm, this is sufficient to make the Reversion thereof pass, and when the Reversion passes, the Rent shall pass as incident to it, and so he shall have the whole. For which Reason in our principal Case *Farm* being taken as before has certainty enough in itself, and contains a Thing certain. And then the Words in the Lease, viz. *with all the Lands, Leasows, Pastures, and Meadows to the same belonging*, are of no Effect as to the Farm, for the Word (*Farm*) contains all this in itself. And also the Averment that the said Land, Meadow, and Pasture from Time immemorial have always been demisable and demised with the Farm, &c. is unnecessary to be taken, because the Word (*Farm*) comprehends this, as it has been said. So that it contains certainty enough to all Intents. And therefore if it was not in the Tenure of *Wilcox*, it is not material, by reason of the sufficient Certainty in the Word (*Farm*), for which Reason the Count is good without any Averment that the Thing demised was in the Tenure of *Wilcox*, as it is declared before in the Exception taken to it; and so the Thing leased is sufficiently shewn before. And as to the other Words in the Demise before the *habendum*, viz. *by the Name of another Tenement, with all the Lands, &c. to the same belonging*) it was said by *Anthony Brown* that these would not aid the Lessee, nor make the Lease good the sooner, because when it is said (*by the Name of another Tenement*) which is in Latin *unius alius tenementi*, this Word (*alius*) implies that it is another than the Farm, and it is an Exception from the Farm. As if I give to one all my Lands in *Essex* other than in *Dale*, there this is in Sense an Exception of all my Lands in *Dale*. [f] And so in Acts of Parliament touching the Forfeiture of the Lands of Persons attainted of Treason, it is commonly used to put in, *saving the Right of all Men other than he that is attainted, and his Heirs*, there (*other than*) is an Exception of the Person attainted and his Heirs. So (*other Tenement*) here cannot be the Farm of *Brosley*. Wherefore the Thing demised is only the Farm, or only the Tenement and the Lands thereof. And that it is the Farm which is intended to be demised here, and which is also shewn to be demised here, appears in that the Plaintiff has brought his *Ejectione Firmæ* in *Brosley*, whereby

1. Point.

[a] See Lamb. Exposit. V. *Ferme*. Co. Litt. 5. a. Vin. Abr. tit. Parols J. pl. 3. in Margine.

[b] Moor 176.

[c] See Co. Litt. 5. a.

[d] Stat. Marlbridge cap. 23.

[e] S. P. cited 2 Leon. 43. Owen 89. Fitzgib. 73. Treat. of Wills 64. Vin. Abr. tit. Devise Z. a. pl. 3. J. b. pl. 2.

[f] S. P. Cart. 99. *per Archer* J. Curson 337.

whereby it muſt of Neceſſity be for a Thing in *Broſley*, and it is not expreſſed where the other Tenement lies. And alſo by the Quantity of the Land, Meadow, and Paſture it ſeems to be a Farm, and by the Certainty of the Demiſe to *Bailey* and his Wife, and the Conveyance of the whole to *Wilcox* it is apparent that the Plaintiff brought the Suit for the Farm, and that the Thing demiſed to *Bailey* and his Wife was a Farm. So that it appears that the Suit here is brought for that which might paſs by the Name of a Farm, and that the ſaid *other Tenement* is different from it. Wherefore the Thing demiſed to the Plaintiff is ſhewn and expreſſed to us to be demiſed only by the Name of the Farm of *Broſley*, and the Thing demiſed is certain enough, and paſſes by the Name of the Farm only. And ſo it appears what was the Thing demiſed.

2 Point. As to the ſecond Point, viz. in what Degree it is demiſed, whether in Reverſion or in Poſſeſſion; for the underſtanding hereof, the Court ſaid, it is neceſſary to conſider the Premiſſes of the Deed, the *habendum*, and the Limitation of the Commencement of the Leaſe made to the Plaintiff, and in the Diſcuſſion thereof it is the Office of the Court to make all the Parts ſtand together, if they may by Law, for it is impoſſible to form a Judgment upon one Part only without taking all the Parts into Conſideration; ſo that one Part ſhall anſwer to another, one ſhall miniſter to another, and the one ſhall not confound the other, * for every Expoſitor ought to preſerve the Text, and make ſomething of it, and not deſtroy it. And here the Premiſſes of the Deed is a Grant and Demiſe of the Reverſion of the Farm, and the Reverſion of the Farm (if one ſhould adjudge upon this only without Reſpect to any Thing elſe) is, according to common Acceptation, a Parcel of the Eſtate in the Farm, that is, [a] it is the Eſtate left in the Leſſor or Donor, where he has given or parted with the Poſſeſſion to another. And the Reverſion and Poſſeſſion cannot ſtand together at one ſame Inſtant, for it is a Reverſion in reſpect of the Poſſeſſion ſeparated from it, [b] and the Unity of the Poſſeſſion to the Reverſion makes the Reverſion no longer a Reverſion; ſo that the Reverſion of the Farm is a certain Eſtate in the Farm in a certain Degree, that is to ſay, it is that Eſtate in the Farm which the Leſſor hath after the Diviſion of it, viz. after the Poſſeſſion is conveyed to and veſted in another during a particular Eſtate: And to this Reverſion Fealty is incident, and if it is granted [c] Attornment ought to be made, and the Reverſion of a Thing comprehends in Law the Thing itſelf. For if a Man grants to another in Fee the Reverſion of the Land which ſuch a one holds for Life, and the Tenant attorns, and afterwards he dies, the Grantee may enter and have the Land by Force of the Grant; *ergo* the Reverſion of Land contains the Land itſelf, for elſe he could not have the Land afterwards by Force of the Grant of the Reverſion. But it contains the Land in a Degree which is diſtinct from the Poſſeſſion, and it bears and carries in itſelf an Expectancy of the Poſſeſſion, and it is certain to have the Poſſeſſion if it continues longer than the Eſtate in Poſſeſſion. So that it comprehends in itſelf a Converſion which is to happen hereafter, viz. from it's own Degree into another Degree, and from an Eſtate in Reverſion into an Eſtate in Poſſeſſion. And ſuch is a Reverſion according to the common and moſt uſual Acceptation of the Word. But there is another Senſe of it according to it's proper Definition, wherein it is ſometimes uſed, which is meerly contrary to the Degree wherein it is moſt commonly taken, and that is, [d] it is taken for the Land itſelf diſcharged of the particular Eſtate. For *Reverſion* is a Noun Subſtantive derived from the Verb *revertor*. [e] So that *reverſio terræ* is in Engliſh *the returning of the Land*, which (as the Lord *Dyer* defined it) is the ſame in Senſe with *the Land returning*. Wherefore (as it ſeemed to him) *reverſio terræ eſt terra revertens*, which is the Land in a certain Degree, viz. when it is diſcharged of the particular Eſtate, and when the Poſſeſſion thereof is coming where the Reverſion was. So that a Reverſion cannot be uſed in this Senſe when the particular Eſtate and Poſſeſſion continue in another, but only where the particular Eſtate is ended, and the Poſſeſſion is not in any other, but is coming to him who had the Reverſion. As if I would ſay that whereas A. hath an Eſtate and Poſſeſſion for two Years in an Acre, after which two Years the ſaid Acre is to return to me, I demiſe to you the ſame Acre when it is returning to me, or when it ſhall return to me, or if I ſay, when it is returning to me you ſhall have it, theſe Words and the Demiſe of the Reverſion of the Acre are all one, and of the ſame Senſe and Subſtance. So that a Reverſion of Land, according to the moſt common Acceptation, is taken and uſed when the Poſſeſſion is removed from it, and when the particular Eſtate endures; but according to the proper Definition of it, and according to the Senſe leaſt uſed, it is taken for the Land diſcharged of the particular Eſtate, and when the Poſſeſſion is coming to him that had the Reverſion, and in both theſe Caſes it contains the Land, but in ſeveral Degrees. Then here foraſmuch as the Grant and Demiſe is only of the Reverſion of the Farm, (for the other Tenement does not ſerve here for the Cauſe before ſhewn) and this Word (*Reverſion*) may be taken in two Senſes, it is further to be ſeen in which Senſe it ſhall be here uſed, and whether it may ſerve in both Senſes, or perhaps but in one Senſe only. And as to this the *habendum* and the Limitation of the Commencement of the Leaſe made to the Plaintiff are to be conſidered. And the *habendum* here contained in the Count is referred to the Thing before mentioned, viz. to the Reverſion of the Farm. For when a Man limits a Thing before the *habendum*, and afterwards ſays, *habendum* for Years, or for Life, or in Fee, and does not name the Thing in the *habendum*, it ſhall be referred to the Thing mentioned before the *habendum*, and it is not neceſſary to repeat the Thing again in the *habendum*. [f] For the Office of the Premiſſes of a Deed is to expreſs the Certainty of the Thing given, [g] and of the *habendum* to expreſs the Quantity of the Eſtate.

And

* *Mala eſt expoſitio quæ corrumpit viſcera textus.* Hardr. 149. Wing. Max. reg. 17.

[a] See Ante 157 (a). 158 (f). 160 (m) and the Books there cited. Curſon 80.

[b] Ante 151 (e). 163 (a). Curſon 80.

[c] This Ceremony is now taken away by Statute of 4 Ann. cap. 16.

[d] Ante 138 *per Dyer, arguendo.* 160 *per Staunford* J.

[e] Ibid.

[f] Co. Litt. 6. a. 2 Co. 55. a. 9 Co. 47. b. Pollexf. 150.

[g] See Ante 152 (f) and the Books there cited. Pollexf. 150.

‖ And the *habendum* is good enough without repeating the Thing, and shall be referred to the Thing beforementioned. And here it is not well to read *habendum* in the Count, but it ought to be *habenda*, for it is not put there *gerundivè*, but *passivè*, as the Lord *Dyer* said. So that all that which is disclosed by the Pleading and by the *per nomen* being put together is, that he demised the Reversion of the Farm, and the other Tenement with all the Lands, *&c. habenda eidem Richardo, &c.* but in the Deed it is *habendum*. Wherefore the Thing which is in the Premisses of the Grant appearing by the Count is the Reversion of the Farm, and the Thing contained in the *habendum*, as the Plaintiff has counted, is the Reversion also, but by the Deed recited the *habendum* is of the Farm, and not of the Reversion of the Farm, and so the Plaintiff has not demeaned himself in his Count according to the Deed. And (it was said) the Case as to this Point is the same in Effect with the Case of † *Throckmerton v. Tracy* adjudged in this Court in the Time of Queen *Mary*. But now inasmuch as by the Count the Grant is of the Reversion, *habendum* the Reversion from the End and Expiration of the first Term, *&c.* wherein there is some Variance from the Deed, it is to be seen whether the Thing contained in the *habendum*, *viz.* the Reversion, is of the same Effect and Substance in Law as if he had said, *habendum* the Farm itself from the End and Expiration of the first Term, *&c.* And as to this, forasmuch as the Word *(Reversion)* has two * Senses, as it is shewn before, and in each Sense it comprehends the Land, but in several Degrees, it is to be considered if the Word can serve here in the most usual Sense and Degree, as it is shewn before. And as to this, it was taken that it could not, if it be all considered together; but that in the Premisses of the Grant or Demise it might well enough serve in such Sense and Degree, or in the other Sense, as it might in the *habendum* also if it had not been limited at a Day to come, but presently, for if the Grant had been of the Reversion, *habendum* the Reversion for Years, for Life, or in Fee, this had been pursuant enough to the Premisses; and there he ought to have Attornment, and by reason of the Reversion he should have the Fealty and Rent, if any was incident to it. But when he goes further and says, "*habendum* the Reversion from the End "and Expiration of the first Term for 63 Years thence next ensuing," this cannot stand with the first Part, for the Nature of the Reversion here is taken in the most usual Sense, *viz.* to pass presently. [a] And it is contrary to the Law to vest in its proper Degree at a Day to come, for if it should vest at a Day to come, then the Grantor would in the mean time have a [b] lesser Estate in the Reversion of his own Creation than he had before. For if I make a Lease for Life to a Man, and afterwards I grant the Reversion to another, *habendum* to him and to his Heirs from the Feast of *St. Michael* the Archangel next coming, if the Grant should be good to the Lessee, and the Reversion take effect from the Feast of *St. Michael*, I who had a Fee in the Reversion before, after the Grant should have but a Chattlereal, *viz.* an Estate until the Feast of *St. Michael*. So that my Estate would be divided, and a small Part of it left in me, and I should be Tenant for Years of the Reversion of my own [c] Lease or making, which is a Thing the Law will not suffer, for in every Lease there ought to be a distinct Lessor, and a distinct Lessee. [d] For if I have a Rent in Fee, I cannot grant this to you from a Day to come, as it is held in 8. *H.* 7. for the Reason above given. [e] But if I have Land, I may grant a Rent *de novo* out of it to commence at a Day to come, for there I shall not have any particular Estate in it in the mean time, for it was not in *esse* before, but commenced *de novo*, and therefore I may appoint it to commence when I will. But in our Case the Reversion of the Farm is in *esse*, and he that has it cannot make his Estate less in it without first devesting the whole out of him. [f] And therefore a Reversion cannot pass in the Degree of a Reversion, according to the common Acceptation of it, at a Day to come. Also here it cannot vest as a Reversion in the Plaintiff after the End and Expiration of the first Lease for another Reason, *viz.* because then it is no Reversion. For then the Farm is in Possession, and so in another Degree than a Reversion, according to the common Acceptation of the Word. Yet the Nature of every Reversion is to come to the Possession of the Thing after the particular Estate ended, if it endures so long, but that is, when once it took Effect as a Reversion, and in the Degree of a Reversion, according to the common Acceptation of the Word, but to grant it in the Degree of a Reversion, and to take Effect at first in another Degree which is contrary to the Degree in which it was granted, is meerly repugnant in Law. Wherefore if the Reversion here should be taken in the most usual Sense and Degree, all the Parts of the Grant and Demise could not stand together, but the last would destroy the first. And it is the Office of Judges (as *Anthony Brown* said) to expound Things *ut res magis valeat quam pereat*, and to make all the Parts of a Deed and the Intent of the Parties also agree together, which cannot be here if the Grant and Demise of the Reversion should be taken according to its most usual Sense and common Acceptation. And therefore it is the most reasonable Way to reject such Sense and Degree of the Word *(Reversion)*, and to use it according to the other Sense and Degree, if it may be used therein, and if it being so used will satisfy the Intent of the Parties, and agree with the Law. And this (it was said) it may well enough, for the Reversion of the Farm, taken in the said other Sense and Degree, is the Farm reverting, or when it is reverting, and so it is the Thing itself void and discharged of all Leases and particular Estates, and in such Degree it is properly demisable. And the Word *(Reversion)* taken in such Signification stands well with the Premisses of the Demise pleaded, and with the *habendum*, and with the Limitation of the Commencement of the Lease, and so every part put together makes a good Demise of the Farm when it shall revert, and of the Possession when it shall accrue, and avoids all Sort of Repugnancy. [g] And therefore it is all one where the Party demises the Reversion of the Farm, *habendum* the Farm from the Time of the first Lease ended and expired, and where he demises the Reversion of the Farm, *habendum* the Reversion of the Farm from the Time of the first Lease ended and expired, for in both Cases it is in Sense a De-

‖ 9 Co. 47. b. 48. a.

† Ante 147.

* Ante 158 (f). 160 (m). 196.

a See Ante 155 (l). and the Books there cited.

b See Ante 155 (l). and the Books there cited.

c See Ante 155 (k).

d See Ante 152 (b). 155 (m). 156 (d). and the Books there cited.

e See Ante 156 (c). and the Books there cited.

f Supra (a).

g Vin. Abr. tit. Reversion H. pl. 1

[a] Ante 147. miſe of the Farm when it ſhall revert, and ſo is equivalent to the ſaid Caſe of [a] *Throckmerton v. Tracy*, which each of the Judges alledged, and referred themſelves to the Argument therein, and ſaid that the Senſe of the Reverſion there taken before the *habendum* ſerves here in the ſame Senſe both before the *habendum* and after it. And they here put many Caſes which were then put in the Argument of the ſaid Caſe of *Throckmerton v. Tracy*, which I have here omitted, becauſe I have reported them at large in the ſaid Caſe itſelf. Wherefore the Court took the Reverſion in the Premiſſes and in the *habendum* to be in the ſaid ſecond Degree, and ſo to agree here well enough.

3 Point. Then as to the third Point, *viz.* ſeeing that the Leaſe made to the Plaintiff is limited to commence after the End and Expiration of the firſt Term of Years, which Term of Years is now determined by the Leaſe made to the Defendants by *Pinnock* and his Wife, whether or no the Demiſe made to the Plaintiff ſhall take place preſenly upon that Determination: And it was objected that it ſhould not, for although the firſt Leaſe is determined, yet this Determination came by the Act of the Defendants in taking a greater Eſtate, which is only a Determination in Law, and not a Determination in Fact, which was intended by the Limitation of the Commencement of the Demiſe to the Plaintiff. For the End of the Term limited for the Commencement of the ſaid Demiſe to the Plaintiff was ſuch an End as was commonly preſumed, that is, by Effluxion of Time, and not by Act of the Law, or Abbreviation of the Party. And though a Man ſhould ſtretch the Word *(End)* to every Kind of End or Determination, yet he cannot do ſo with the other Word, *viz. Expiration*, for (it was ſaid) Expiration is a particular Word, peculiarly appropriated to Effluxion of Time. So that although it might be objected (as indeed it cannot) that *End* is a general Term not limited to any ſpecial Meaning, yet it cannot be ſo objected as to *Expiration*, which is a particular Term that cannot be drawn to any general Senſe out of its particular Signification. And therefore ſeeing the Limitation of the Commencement of the ſaid Demiſe made to the Plaintiff is appointed to be upon the End and Expiration of the firſt Term of Years, the Plaintiff ought to wait until both the Words preceding the Commencement of his Term are accompliſhed, and the Time of the Commencement thereof is not yet come. And although it be admitted that the taking of the Leaſe for Life ſhall be an End and Expiration of the firſt Term of Years as to the Defendants themſelves, yet as to a Stranger it is not ſo, [b] for if the Defendants had granted a Rent-charge to a Stranger out of the firſt Term, there notwithſtanding the Determination of the firſt Leaſe by the taking of the Leaſe for Life, they ſhould have held the Farm charged with the Rent-charge as to the Grantee, for he is a Stranger, and as to him the firſt Leaſe has Continuance. So the Plaintiff here is a Stranger, and againſt him the firſt Leaſe continues and ſhall continue until the Years are elapſed by Time, wherefore the Term ſhall not yet commence, and conſequently the Plaintiff's Suit is not maintenable.

[b] H. 5. H. 5. 8. b. *Per Roſſ.* Dy. 10. pl. 35. Co. Litt. 185. a. 338. b. 8 Co. 145 b. 9 Co. 107. b. Dal. 65. pl. 28. Davis 4. b. Poph. 40. 1 Rol. R. 310. 2 Rol. R. 10. Litt. R. 59, 336. W. Jones 62. Cro. C. 102. Ld Raym. 520. 1 Finch 19. 2 Finch 27. So if a Man who has a Rent acknowledges a Statute, and then releaſes to the Ter-tenant as to the Conuſee the Rent has Continuance, 7 Co. 37. b *Lillington*'s Caſe.

But the Court argued to the contrary. For where the Commencement of the ſecond Term is limited upon the End and Expiration of the firſt *Term of Years*, they ſaid it is proper to be ſeen what it is that ſhall be determined, *viz.* the Years, or the Eſtate in the Farm. And they ſaid it is the Eſtate, [c] for the *Term* contains all his Intereſt in the Land; [d] for if I grant to one all my Term in ſuch Land, this is as much as to ſay, all my Eſtate for Years which I have in the Land. So that a *Term* contains the Intereſt for Years which the Party has in it. And here the Emphaſis (as the Lord *Dyer* expreſſed it) is not upon the Word *(Years)* but upon the Word *(Term)*; and in pronouncing the Words *(from the End and Expiration of the ſaid Term of Years)* the Accent ought to be laid upon the Word *(Term)* as the moſt material Word, and not upon the Word *(Years)*. And it is not well written in the Record *a fine et expiratione prædicti termini annorum dimiſſorum*, but it ought to be *dimiſſi* in the ſingular Number, [e] referring the Word *demiſed* to the Term, and not to the Years. So that the Term, *viz.* the Eſtate which he has in the Farm for Years might be ended, and yet the Years not ended: Wherefore *(Term)* here is an Eſtate in Years or for Years, but it is not Years only without an Eſtate; and ſo if the Eſtate is ended, the Term is ended. And this is the Senſe of the Word *(Term)* here, although it has many other Meanings. And the Word *(Expiration)* is properly breathing up, or yielding up his Breath (as the Lord *Dyer* ſaid), and it is applied to Man, or other Things animate, and is uſed to expreſs the Death of a Man. For when he yields up his Breath, then he dies, for without his Breath he cannot live. And although it is properly uſed in Relation to Things animate which breathe, yet by a Similitude it is referred to Things inanimate. As in our Law we uſe the Word *(reverter)*, which is properly applied to Things animate which move of themſelves, but ſometimes we uſe it in our Law in relation to Things inanimate, as we ſay, when Tenant in Tail dies the Land ſhall *revert* to the Donor. And ſo *Expiration*, which is here uſed by Similitude to Things living, implies any End whatever. For as we ſignify by *Expiration* the Death of a Man, and his laſt End, whatever Way it happens, ſo the Word *Expiration*, being applied to an Eſtate for Years, may aptly enough ſignify the End of it, whatever way it be. So that the Expiration of an Eſtate for Years, and the End of an Eſtate for Years is all one; and it cannot be otherwiſe taken but that the Intent of the Leſſor and of the Plaintiff was, that the Plaintiff ſhould have the Farm when the firſt Leaſe was gone or determined, by whatever Means the ſame happened; and to this Purpoſe they uſed the Word *(Expiration)*. And as to what was ſaid, *viz.* that although it be determined as to the Defendants themſelves, yet it ſhall continue as to the Plaintiff being a Stranger, Sir, [f] a Stranger for his Advantage ſhall ſay that the Leaſe continues, and for his Advantage ſhall ſay that it is determined; [g] for if *Pinnock* had granted a Rent-charge out of the Reverſion, the Grantee after the Leaſe for Life made to the Defendants ſhould diſtrain for it, and if the Defendants would ſay that their Leaſe for Years had Continuance, and therefore he might not diſtrain, the Stranger ſhould ſay that it is determined. And ſo the Plaintiff being a Stranger ſhall for his Advantage take Benefit of the Determination of the firſt Eſtate, whether it be determined by Act of the Law, or by Act of the Party, or by Effluxion of Time. And therefore the firſt Eſtate for Years being abbreviated by the taking of the

[c] Co. Litt. 45. b. 1 Co. 154. a. Godb. 27. 2 Brownl. 159. 3 Bac. Abr. 426.

[d] 1 Co. 154. a.

[e] Dy. 178. pl. 37.

[f] 1 Finch 19. 2 Finch 27.

[g] S. P. Co. Litt. 338. b. 1 Finch 19. 2 Finch 27.

the Leaſe for Life trenches to the Advantage of the Plaintiff, and makes his Term to commence upon that Determination. And ſo the Opinion of all the Juſtices upon the Matter of Law was with the Plaintiff, *viz.* that his Leaſe was good, and that it ſhould commence [a] upon the Determination of the firſt Term of Years determined and ended by the taking of the new Leaſe for Life.

[a] See the Books cited Ante 189 at the Head of the Caſe.

And *Note*, *Anthony Brown* ſaid that the Writ was not good for two Cauſes. One was, for that the Words of the Writ were that the Prior and Convent demiſed to the Plaintiff, whereas the Convent are dead Perſons in Law, and cannot [b] demiſe any Thing, but it is the Demiſe of the Prior only. The other was, [c] for that the Form of the Writ in the *Regiſter* recites that *the Goods and Chattles of* (the Plaintiff) *to the Value, &c. found in the ſame Lands he took and carried away*, which Clauſe was here omitted, and ought to have been inſerted in his Opinion, altho' it were not true, becauſe the Form of the Writ in the *Regiſter* is ſo and not otherwiſe. But the Lord *Dyer* was againſt him in both theſe Points. For, as to the firſt, inaſmuch as it is apparent in Law that the Convent could not make a Demiſe, it is to be adjudged nothing but Surpluſage, [d] which ſhall not abate the Writ. And he cited a Precedent where ſuch a Writ was good. As to the other Point, if it was not true that the Defendant took the Goods, it would not be well done to charge him with it. And although the *Regiſter* has this Clauſe, as it has been ſaid, yet it is to be intended by the *Regiſter* that the Clauſe ought to be inſerted where the Truth of the Matter is ſo, and not otherwiſe.

[b] Dy. 40. pl. 1. 97. pl. 45. 3 Bac. Abr. 383.

[c] Regiſt 227. See Poſt 228, 229, the ſame Exception taken by the Counſel, and maintained by *A. Brown* J. but over-ruled by *Weſton* J. and *Dyer* C. J. See Gilb. Law of Ejectm. 6, 7.

[d] T. 4. H. 7. 15. a. *Per Euſſey.*

A brief Report of a Caſe argued in the Exchequer, *in* Eaſter *Term in the* ſecond *Year of the Reign of Queen* Elizabeth, *by the Counſel for the Parties, and by the Barons of the* Exchequer *upon a Writ of* Debt *brought there by Sir* Thomas Stradling *Knight Plaintiff againſt* Rowland Morgan *Defendant, and entered amongſt the common Pleas there. And the Record was as follows*, viz.

Glamorgan. Declaration. Same Precedent Raſt. Entr. 191. a.

Rowland Morgan of *Mahen* in the County of *Monmouth* Eſquire was attached by Writ of this Exchequer to be here now on the Octave of *St. Martin* in this Term, to anſwer *Thomas Stradling* Knight in a certain Plea of Debt, and now at the aforeſaid Octave of *St. Martin* came here the aforeſaid *Thomas Stradling* Knight by *Robert Leverton* his Attorney, and the aforeſaid *Rowland Morgan* by *Humphry Hatton* his Attorney likewiſe came here; whereupon the aforeſaid *Thomas Stradling* complains againſt the aforeſaid *Rowland Morgan* of this, that the aforeſaid *Rowland* render to the aforeſaid *Thomas Stradling* 17*l.* 6*s.* 8*d.* which he owes him, and unjuſtly detains; and for that whereas by a certain Act made at a Parliament of Lord *Edward* the *Sixth* late King of *England* begun and holden at *Weſtminſter* the firſt Day of *March* in the *ſeventh* Year of his Reign, by the ſaid Lord the King, and the Lords ſpiritual and Temporal, and the Commons in the ſame Parliament aſſembled, and alſo by Authority of the ſame Parliament amongſt other Things it is enacted, that if any Treaſurer, Receiver, or Miniſter Accountant, or their Deputy or Deputies, do take or receive of any Perſon or Perſons, any Sum or Sums of Money, or other Profit of and for the Payment of any Fees, Annuities, Penſions, Duties, or Warrants, more or otherwiſe than he or they may lawfully do by foreign Laws and Statutes therein then provided, that then the ſaid Treaſurer, Receiver, and Miniſter ſo offending ſhall forfeit and loſe for every Penny or Pennyworth ſo to be taken or received 6*s.* 8*d.* to the Party grieved, to be recovered in any of the King's Courts of Record by Bill, Plaint, or Action of Debt, in which Suit no Wager of Law, Eſſoign, or Protection ſhall be allowed, as in the Act aforeſaid amongſt other Things is more fully contained. And whereas the aforeſaid *Thomas Stradling* now complains, that the laſt Day of *October* in the *third* and *fourth* Years of the Reign of the now King and Queen *Philip* and *Mary*, and long before, by virtue of the Letters patent of Lord *Henry* the *Eighth* late King of *England* under his Great Seal, bearing Date at *More* the *nineteenth* Day of *September* in the *ſeventeenth* Year of his Reign, made to the ſame *Thomas* he was and yet is Bedel or Collector of the Rents, Revenues, and Profits iſſuing out of and to be received of and in the Lordſhips or Manors of *Miſkin*, *Glinrothney*, *Sighemith-Nether*, and *Sighemith-Over* in the County

County of *Glamorgan*, and taking annually for the Exerciſe of his Office aforeſaid 13*l.* 6*s.* 8*d.* as well by his own proper Hands, as by the Hands of the Receiver of the ſame Lordſhips or Manors, for Term of Life of the ſaid *Thomas*. Nevertheleſs the aforeſaid *Rowland Morgan*, the ſame laſt Day of *October* being Receiver of the Lordſhips or Manors aforeſaid, the Statute aforeſaid and the Penalty therein contained not regarding, the ſame laſt Day of *October*, at * *Cardiff* in the ſaid County of *Glamorgan*, in the aboveſaid *third* and *fourth* Years of the Reign of the ſaid Lord the King and Lady the Queen now, by the Hands of *John Jenkin* of *Landaff* in the County of *Glamorgan* aforeſaid Yeoman then Servant and Deputy of the ſaid *Rowland*, took and received of the aforeſaid *Thomas Stradling* Knight, by the Hands of *Dio Howell* then Servant of the ſame *Thomas*, for the Payment of 13*l.* 6*s.* 8*d.* as his Fee aforeſaid to the ſame *Thomas Stradling* then due for one whole Year ending at the Feaſt of *St. Michael* the Archangel then laſt paſt, by Colour of the ſaid Office of the aforeſaid *Rowland*, extortiouſly 4*s.* 4*d.* according to the Rate of 4*d.* for every twenty Shillings, more and otherwiſe than he might lawfully take or receive by any foreign Laws or Statutes in that behalf provided, contrary to the Form of the Statute aforeſaid; whereby an Action hath accrued to the aforeſaid *Thomas Stradling* to demand and have of the aforeſaid *Rowland Morgan* the aforeſaid 17*l.* 6*s.* 8*d.* And although the aforeſaid now Plaintiff hath often afterwards requeſted the aforeſaid now Defendant to pay him the aforeſaid 17*l.* 6*s.* 8*d.* nevertheleſs the ſaid *Rowland Morgan* now Defendant the aforeſaid 17*l.* 6*s.* 8*d.* or any Part thereof to the aforeſaid *Thomas Stradling* has not yet paid, but the ſame to pay has refuſed, and yet does refuſe; wherefore the aforeſaid Plaintiff ſays that he is damnified and has Damage to the Value of 100*s.* and therefore he brings the Suit, *&c.*

* Note here the Place ſpecified in the Declaration where the Extortion was committed. See 1 Leon. 96. Vin. Abr. tit. Extortion C. pl. 1.

Defendant prays *Oyer* of the Writ.

And the aforeſaid *Rowland Morgan* by his aforeſaid Attorney preſent, *&c.* defends the Force and Injury, Damages, and whatever, *&c.* and prays *Oyer* of the Writ aforeſaid, and it is read to him, *&c.* Which being heard, he ſays that at preſent he is not adviſed to anſwer the aforeſaid *Thomas Stradling* touching the Premiſſes; and prays Day to imparl thereon until the Octave of *St. Hilary*, within which, *&c.* which is granted to him by the Court, and the ſame Day is given to the aforeſaid *Thomas Stradling* here, *&c.* At which Day the Parties aforeſaid came here by their Attornies aforeſaid, and the aforeſaid *Thomas Stradling* prays that the aforeſaid *Rowland Morgan* may anſwer him touching the Premiſſes. And thereupon the ſame *Rowland Morgan* by proteſting ſays that the Declaration aforeſaid and the Matter therein contained is inſufficient in Law, to which he has no Neceſſity, nor is by the Law of the Land bound to anſwer, nevertheleſs for Plea the ſame *Rowland* ſays, that the aforeſaid *Thomas Stradling* his Action aforeſaid thereof againſt him ought not to have or maintain, becauſe he ſays that he did not take or receive the aforeſaid 4*s.* 4*d.* contrary to the Form of the Statute aforeſaid, in Manner and Form as the aforeſaid *Thomas Stradling* by his Writ and Declaration aforeſaid above againſt him has declared, and of this he puts himſelf upon the Country; and the aforeſaid *Thomas Stradling* likewiſe, therefore let a Jury come thereon. And becauſe the aforeſaid Town of *Cardiff* is in the County of *Glamorgan* in *Wales*, where a Sheriff of this Kingdom of *England* cannot intermeddle, therefore it is commanded to the Sheriff of the County of *Hereford* that he make to come here from the Day of *Eaſter* in *fifteen* Days twelve, *&c.* of the Neighbourhood of *Leominſter* in the ſaid County of *Hereford*, which is the Viſne next adjoining to the ſaid Town of *Cardiff*, every of whom, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* And the ſame Day is given to the Parties aforeſaid here, *&c.* At which Day the Parties aforeſaid came here by their Attornies aforeſaid, and the Sheriff of the ſaid County of *Hereford* hath not returned here the Writ, *&c.* Therefore it is commanded to the ſame Sheriff of the ſaid County of *Hereford*, as heretofore, that he make to come here on the Morrow of the Holy *Trinity* twelve, *&c.* of the Neighbourhood of *Leominſter* aforeſaid, in Form aforeſaid. And the ſame Day is given to the Parties aforeſaid here, *&c.* At which Day the Parties aforeſaid came here by their Attornies aforeſaid, and the Sheriff of the County of *Hereford* aforeſaid, *viz. Richard Monington* Eſquire, returned here the Writ of *Venire Facias Juratores* together with the Panel of the Names of the Jurors annexed to the ſame Writ. And the Jurors being called did not come, *&c.* Therefore it is commanded to the ſame Sheriff that he diſtrain the aforeſaid, *&c.* by their Lands, *&c.* ſo that, *&c.* on the Octave of *St. Michael*, or in the mean time before the Juſtices of the ſaid Lord the King and Lady the Queen aſſigned to take Aſſizes in the ſaid County of *Hereford*, if they ſhall firſt come, at *Hereford* in the ſaid County of *Hereford* on *Wedneſday* the 27th Day of *July* next coming, ſo that the Inquiſition thereof there diſtinctly and plainly taken before the aforeſaid Juſtices of the ſaid Lord the King and Lady the Queen for Aſſizes may be had here at the aforeſaid Octave of *St. Michael*; and it is ſaid to the Parties aforeſaid that they be ready there on the aforeſaid *Wedneſday* before the aforeſaid Juſtices of the ſaid Lord the King and Lady the Queen for Aſſizes; and that they be here at the aforeſaid Octave of *St. Michael* to hear their Judgment upon the Verdict of the Inquiſition aforeſaid, if, *&c.* At which Day the Parties aforeſaid came here by their Attornies aforeſaid, and the aforeſaid Juſtices of the ſaid Lord the King and Lady the Queen for Aſſizes delivered here the Tenor of this Plea, together with a certain Writ of *Diſtringas Juratores*, with the Panel of the Names of the Jurors fixed to the ſame Writ, and annexed to the ſame Tenor, which ſaid Tenor is indorſed thus, Afterwards at the Day and Place within contained before *Edward Saunders* Knight, and *Richard Harper* Eſquire aſſociated for this Purpoſe to the ſame *Edward* and *John Whiddon* Knight, Juſtices of the ſaid Lord the King and Lady the Queen aſſigned to take Aſſizes in the County of *Hereford*, the Preſence of the aforeſaid *John* not being expected, by virtue of the Writ of the ſaid Lord the King and Lady the Queen of *ſi non omnes*, by the Form of the Statute, *&c.* came as well the within named *Thomas Stradling* Knight, as the within ſpecified *Rowland Morgan* Eſquire, in their proper Perſons. Likewiſe the Jurors within ſpecified being called ſome of them came, and ſome of them did not come, as appears in the Panel, therefore, *&c.* wherefore it is commanded to the ſame Sheriff of the ſaid County of *Hereford*, as heretofore, that

Imparlance.

Traverſes the Receipt.

Iſſue.

Venire Facias to the next Engliſh County.

Sicut alias.

Return of the *Venire Facias.*

Diſtringas Juratores.

Poſtea.

Diſtringas Juratores ſicut alias.

that he diſtrain the Jurors aforeſaid by their Lands, &c. ſo that, &c. on the Octave of *St. Hillary*. The ſame Day is given to the Parties aforeſaid here, &c. At which Day the Parties aforeſaid came here, viz. the ſaid *Thomas Stradling* by his Attorney aforeſaid, and the aforeſaid *Rowland Morgan* by *Cuthbert Leverton* his Attorney. And the Sheriff of the ſaid County of *Hereford* hath not returned here the aforeſaid Writ of *Diſtringas Juratores ſicut alias, &c.* Therefore it is commanded to the ſame Sheriff, as oftentimes, that he diſtrain the Jurors aforeſaid by their Lands, &c. So, &c. from the Day of *Eaſter* in *fifteen* Days, or in the mean time before the Juſtices of the Lady *Elizabeth* the Queen now aſſigned to take Aſſizes in the ſaid County of *Hereford*, if they ſhall firſt come, at *Hereford* in the ſaid County of *Hereford* on *Monday* the *ſixth* Day of *March* next coming; ſo that the Inquiſition thereon there diſtinctly and plainly taken before the aforeſaid Juſtices of the ſaid Lady the Queen now for Aſſizes may be had here at the aforeſaid *fifteen* Days of *Eaſter*. And it is ſaid to the Parties aforeſaid that they be there ready at the aforeſaid *Monday* before the aforeſaid Juſtices of the ſaid Lady the Queen now for Aſſizes; and that they be here at the aforeſaid *fifteen* Days of *Eaſter* to hear their Judgment upon the Verdict of the Inquiſition aforeſaid, if, &c. At which Day the Parties aforeſaid came here by their Attornies aforeſaid, and the aforeſaid Juſtices of the ſaid Lady the Queen now for Aſſizes delivered here the Tenor of this Plea, together with a certain Writ of *Pluries diſtringas Juratores*, with the Panel of the Names of the Jurors fixed to the ſame Writ, and annexed to the ſame Tenor, and two Bills of Attorney likewiſe annexed to the ſame Tenor, the Tenor of which ſaid Record is endorſed thus; Afterwards at the Day and Place within contained before *Edward Saunders* Knight, and *Richard Harper* Eſquire aſſociated for this Time to the ſame *Edward* and *John Whiddon* Knight, Juſtices of the Lady the Queen aſſigned to take Aſſizes in the County of *Hereford*, the Preſence of the aforeſaid *John* not being expected, by virtue of the Writ of the ſaid Lady the Queen now of *ſi non omnes*, by the Form of the Statute, &c. came as well the within named *Thomas Stradling* Knight by *Edward Stradling* Eſquire his Attorney, as the within ſpecified *Rowland Morgan* Eſquire by *Philip Maddock* his Attorney, and the Jurors within ſpecified being called ſome of them came, and ſome of them did not come. And ſome of them now appeared, viz. *John Goodwin* Gentleman, *William Burghill* Gentleman, *George Cromp* Gentleman, *James Bithell*, *William Tranter*, and *John Hilleſley*, and were ſworn upon the ſaid Jury. And becauſe the reſt of the Jurors aforeſaid did not appear, therefore others of them that were ſtanding by being choſen for this Purpoſe by the Sheriff of the County aforeſaid, at the Requeſt of the aforeſaid *Thomas Stradling*, and by the Command of the Juſtices aforeſaid are newly added, whoſe Names are filed to the Panel within written, according to the Form of the Statute in ſuch Caſe lately made and provided; which ſaid Perſons ſo newly added being likewiſe called came, viz. *John Olme*, *William Beal*, *Thomas Genis*, *Richard Dobbins*, *John Pearl*, and *Thomas Colling*, and were ſworn upon the ſaid Jury together with the other Jurors before empannelled. Who to ſay the Truth of and upon the within Contents being choſen, tried, and ſworn, ſay upon their Oath that the aforeſaid *Rowland Morgan* took and received the within ſpecified 4 s. 4 d. contrary to the Form of the Statute within written, in manner and Form as the aforeſaid *Thomas Stradling* within againſt him hath alledged. Therefore, &c. And alſo the Tenors of the ſaid Bills of Attorney likewiſe follow in theſe Words, The within named *Thomas Stradling* Knight has put in his Place *Edward Stradling* Eſquire to loſe and gain touching the Action within ſpecified for him in his Place and Name. The within named *Rowland Morgan* Eſquire hath put in his Place *Philip Maddock* Gentleman to loſe and gain touching the Action within written for him in his Place and Name. And hereupon the aforeſaid *Thomas Stradling* by his Attorney aforeſaid prays his Judgment upon the Premiſſes. And becauſe the Court aforeſaid at preſent is not adviſed of giving their Judgment of and upon the Premiſſes, Day is therefore given to the Parties aforeſaid touching the Premiſſes in the ſame State wherein they are now, until the Morrow of the holy *Trinity* to hear their Judgment thereon here, &c.

Sicut pluries.

Pluries.

Tales de circumſtantibus.

Verdict for the Plaintiff.

The CASE.

The CASE was recited in this Manner. It appears by the Record that Sir *Thomas Stradling* Knight has ſued here an Action of Debt againſt *Rowland Morgan* for 17 *l.* 6 *s.* 8 *d.* and has declared that whereas it was enacted by a Statute made in 7. *Edw.* 6. that if any Treaſurer, Receiver, or Miniſter Accountant, or their Deputy or Deputies, do receive of any Perſon any Sum of Money, or any other Profit of and for the Payment of any Fees, Annuities, Penſions, Duties, or Warrants, more or otherwiſe than he lawfully may by foreign Laws and Statutes in ſuch Caſes provided, that then the ſaid Treaſurer, Receiver, and Miniſter ſo offending ſhall forfeit and loſe for every Penny or Pennyworth ſo taken or received 6 s. 8 d. to the Party grieved, to be recovered in any of the King's Courts of Record by Bill, Plaint, or Action of Debt, in which Suit no Wager of Law, Eſſoign, or Protection ſhall be allowed. And whereas the ſaid Plaintiff the laſt Day of *October* in the 3d & 4th Years of the Reign of King *Philip* and Queen *Mary*, and long before, by virtue of the Letters-Patent of King *Henry* 8. bearing Date at *More* the 19th Day of *September* in the 17th Year of his Reign, made to the ſame Plaintiff was Bedel or Collector of the Rents, Revenues, and Profits iſſuing and receivable of and in the Lordſhips or Manors of *Miſkin*, *Glinrothney*, *Sighemith Nether*, and *Sighemith Over* in the County of *Glamorgan*, and taking annually for the Exerciſe of his ſaid Office 13 l. 6 s. 8 d. as well by his own proper Hands as by the Hands of the Receiver of the ſaid Lordſhips or Manors for Term of his Life; The ſaid *Rowland Morgan* the ſame laſt Day of *October* being Receiver of the ſaid Lordſhips or Manors, not regarding the ſaid Statute, nor the Penalty therein, the ſame laſt Day of *October* at *Cardiff* in the ſaid County of *Glamorgan*, in

Eaſter Term. 2 *Eliz.*

The Plaintiff declares in the Exchequer upon the Statute of 7. *Ed.* 6. *cap.* 1. which enacts that Receivers ſhall not extort Fees upon pain of forfeiting 6 s. 8 d. for every Penny extorted, and that the Plaintiff had the Office of Bedel and Collector of the Rents of ſome Manors in the County of *Glamorgan* in *Wales*, and 13 l. 6 s. 8 d. Fee by Patent of *H.* 8. for it. And that the Defendant being Receiver of the ſame Manors extortiouſly took 4 s. 4 d. at *Cardiff* in the County of *Glamorgan*. The Defendant traverſed the Receipt, which was tried by *Niſi Prius* in the County of *Hereford*, being the next Engliſh County to the Place where the Receipt was, which is in *Wales*, and there found for the Plaintiff. But afterwards becauſe it was not alledged in the Declaration to whom the Manors belonged at the Time of the Extortion ſuppoſed, and becauſe the Statute of 7. *Edw.* 6 does not extend to Receivers of others than of the King, for theſe Faults in the Declaration, notwithſtanding the Verdict for the Plaintiff, Judgment was given for the Defendant. Vide Crompton J. C. 101, a, 107, a.

the 3d & 4th Years of the Reign of the ſaid King and Queen, by the Hands of *John Jenkin* Servant and Deputy to the ſame *Rowland*, took of the ſaid Sir *Thomas Stradling*, by the Hands of *Dio Howell* then his Servant, for the Payment of 13 l. 6 s. 8 d. being the Fee then due to the ſame Sir *Thomas Stradling* for one whole Year ending at the Feaſt of *St. Michael* then laſt paſt, by Colour of the ſaid Office of the ſaid *Rowland*, extortiouſly 4 s. 4 d. according to the Rate of 4 d. for every twenty Shillings, more and otherwiſe than he might lawfully take or receive by any foreign Laws and Statutes in ſuch Behalf provided, contrary to the Form of the ſaid Statute. And thereupon an Action has accrued to the Plaintiff to have of the ſaid *Rowland* the ſaid 17 l. 6 s. 8 d. To which the Defendant pleads that he did not take nor receive the ſaid 4 s. 4 d. contrary to the Form of the ſaid Statute, in manner and Form as the ſaid Plaintiff has declared. And upon this they were at Iſſue. And becauſe the Town of *Cardiff* is in the County of *Glamorgan* in *Wales*, where a Sheriff of this Kingdom of *England* cannot meddle, the *Venire Facias* was awarded to the Sheriff of *Hereford* to cauſe 12 Men, &c. to come from the Neighbourhood of *Leominſter* in the ſaid County of *Hereford*, which is the next adjoining Viſne to the ſaid Town of *Cardiff*. And by *Niſi prius* before the Juſtices of Aſſize in the County of *Hereford* it was found againſt the Defendant, viz. that he had received the 4 s. 4 d. contrary to the Form of the Statute, in manner and Form as the Plaintiff had declared.

And upon this Verdict the Plaintiff afterwards in the Exchequer demanded his Judgment. And it was ſaid on Behalf of the Defendant that the Plaintiff ought not to have Judgment. And hereupon divers Points were moved. Firſt, what was the Senſe of the Declaration, viz. whether thereby the Defendant ſhall be taken a Receiver of the King, or a Receiver to another: And if he ſhall be taken by the Declaration to be a Receiver to another, and not to the King, then, ſecondly, if he ſhall be within the Purview of the Statute: And if he ſhall, then, thirdly, if the Plaintiff might ſue for the Penalty elſewhere than in *Wales*: And if he might, then, fourthly, if this Suit taken by original Writ in the Exchequer ſhall be maintenable by the Plaintiff, who has not ſhewn any Cauſe why he was or ſhould be privileged there. And theſe Points were moved and argued in *Eaſter* Term in the *ſecond* Year of the Reign of Queen *Elizabeth* by an Apprentice of the Middle-Temple on Behalf of the Defendant, and by *Manwood* on Behalf of the Plaintiff; and the Barons alſo argued the ſame Term.

1 Point. And as to the firſt Point, it was argued by the Counſel for the Defendants, and alſo by all the Barons, that the Defendant ſhall be taken by the Declaration to be a Receiver to another than to the ſaid King and Queen; for the Declaration ſhews that the Receipt of the 4 s. 4 d. was the laſt Day of *October Anno* 3 & 4. *Philip* and *Mary*, and ſhews alſo that the Plaintiff was then Bedel or Collector of the ſaid Manors by Force of the Letters Patent of King *Henry* 8. made to him in the 17th Year of his Reign, and ſhews alſo that the Defendant was then Receiver of the ſame Manors, but does not ſhew to whom the Manors then belonged, whether to the King or to another; and altho' it were admitted that the Manors ſhould be intended to belong to King *Henry* 8. in the 17th Year of his Reign, becauſe he then made the Plaintiff his Bedel of them, yet it is not ſhewn that they [a] continued in him and his Heirs, which ought to be ſhewn preciſely. And if the Manors belonged to another the ſaid laſt Day of *October*, then the Defendant was Receiver to that other, and not to the King; and then if ſo be there is a Diverſity in Law where the Receiver to the King takes more for Payment of a Fee than he ought, and where the Receiver to a common Perſon takes more for the Payment of a Fee than he ought, or in other Words, if the one be within the Danger of the Statute, and the other not, then the Declaration ſhall be taken moſt ſtrongly againſt the Plaintiff, viz. that the Defendant was ſuch a Receiver as ſhall be out of the Danger of the Act. For Declarations ought fully and preciſely to ſhew the Grievance of the Plaintiff, and that cannot be where in the ſubſtantial Part there is Incertainty, and ſuch too as ſtands indifferent to make the Defendant a wrong Doer or not, in which Caſe it is not reaſonable to puniſh one that is not preciſely charged. [b] Wherefore inaſmuch as Declarations impeach the Party, and force him to anſwer, and are the Foundation whereupon the Court is to give Judgment, it is reaſonable that they ſhould be certain, ſo that the Party may know what he is to anſwer to, and the Judge upon what he is to give Judgment. For which Reaſon if the Declaration is not certain to every Intent, [c] but has two Intendments, one of which makes for the Plaintiff and the other againſt him, it is reaſonable to take it in that Senſe which makes againſt him, for if his Complaint lies in the other Point it is his Folly that he did not ſhew it preciſely, ſeeing he might have done it; and ſince he has not, it ſhall be taken in the Senſe againſt him, and ſo ſhall abate, becauſe, it being taken in that Light, there is no Offence committed by the Defendant. [d] As if a Man brings an Action of Waſt againſt Tenant for Life, and declares that J. S. made the Leaſe for Life, and afterwards granted the Reverſion to him, and that the Tenant for Life attorned, and that he has done Waſt to the Diſheriſon of the Plaintiff; this Declaration is not good, becauſe he has not ſhewn that the Waſt was done after the Attornment, which he ought to do, as appears by the *Book of Entries*, for if it was done before the Attornment, then it was not to his Diſheriſon, nor is it any Offence to him, and if it was done after the Attornment, then it is to his Diſheriſon, and is an Offence to him. And becauſe by taking it one Way the Matter is for him, and the other Way againſt him, it ſhall be taken the Way that makes againſt him, and therefore it ſhall be inſufficient. [e] So in Aſſize of Land, if a Man makes Title in his Plaint, and ſhews that he was Lord, and that the Tenant alien'd the Land in Mortmain to the Tenant in the Aſſize, and that he entered, and ſo was ſeized until by the Tenant diſſeized, this Title is not good, becauſe it might be that he entered after the Year after the Alienation, in which Caſe his Entry was not lawful, or it might be that he entered within the Year, in which Caſe his Entry was lawful; and therefore it ſhall be taken moſt ſtrongly againſt him, viz. that he entered after the Year, and ſo the Plaint ſhall be adjudged inſufficient. [f] So (it was ſaid) the Caſe is in 3. *Ed.* 4. where a Man brought

[a] S. P. Kitch. 437.

[b] See Ante 84 (e) and the Books there cited.

[c] Hardr. 135. Heath's Max. 67.

[d] Vet. Lib. Intrat. 168. a. Hardr. 135.

[e] See Ante 27 (g). 33 (f). and the Books there cited.

[f] See Ante 84 (f) and the Books there cited.

brought an Action of Debt for 15 l. againſt a Prioreſs, and counted that he was retained with one *Cicily* Predeceſſoreſs of the Defendant, in the Office of Bailiff of Huſbandry, taking 40 s. by the Year, and that he did the Services which came to the Uſe of the Houſe, and that he was not paid for ſo many Years as amount to the Sum before mentioned, and by the better Opinion this Declaration was held inſufficient, becauſe he had ſhewn that he was retained with the Predeceſſoreſs, and did not ſhew who retained him, for there it is ſaid it might be that he was retained by one who had no Warrant to retain him, and then the Retainer is void, and it might be that he was retained by the Predeceſſoreſs herſelf, or by ſome other by her Command, and then the Retainer is good; and as this may be taken two Ways it is incertain, and therefore ſhall be taken moſt ſtrongly againſt the Plaintiff, and that is, in the Senſe that makes againſt him, and ſo it ſhall be adjudged inſufficient. So in the principal Caſe the Plaintiff goes about to charge the Defendant for an Offence done the laſt Day of *October Anno* 3 & 4. *P & M.* and ſhews that he was then Receiver of the ſaid Manors, and has not ſhewn that the ſaid Manors then belonged to the ſaid King and Queen. So that it ſtands indifferent whether they belonged to them or not, and if they did belong to them, then the Defendant was Receiver to them, and ſo clearly within the Danger of the Statute; and if they then belonged to another, then the Defendant was Receiver to another. And if the Receiver to a common Perſon is out of the Danger of the Statute, then it ſhall be taken here that the Manors belonged to another than to the King, and ſo that the Defendant was Receiver to another than to the King, and conſequently out of the Danger of the Statute; for that is the Senſe that makes ſtrongeſt againſt the Plaintiff, and ſo it ſhall be taken, and therefore the Declaration is inſufficient [a] becauſe of the Incertainty in not ſhewing whoſe Receiver the Defendant was.

[a] S. P. Hardr. 135. Kitch. 437.

As to the next Point, viz. whether the Statute extends to Treaſurers, Receivers, or Miniſters Accountant of any other Perſon than the King; this was argued by the Counſel for the Defendant, and alſo it was argued and held by all the Barons, [b] that Treaſurers, Receivers, or Miniſters Accountant of common Perſons, and their Deputies, who receive Money or other Profit for Payment of Fees, &c. are out of the Purview and Penalty of the ſaid Statute. And yet they all agreed that ſuch are within the Words of the Statute, for the Words are, *if any Treaſurer, Receiver, or Miniſter Accountant, or their Deputies, take or receive, &c.* which Word (*any*) is a general Word, and contains *every* Treaſurer, Receiver, or Miniſter Accountant. For he that is a Treaſurer to a common Perſon is a Treaſurer, and this Word (*any*) includes *every one*, for in containing each ſingular Number it has the Senſe of the Plural, ſo that the Words which enact that if any Receiver do ſuch an Act he ſhall forfeit ſo much, include in them that if the Receiver of a common Perſon does the Act, he ſhall forfeit the Thing. Wherefore the Words of the Branch being general comprehend the Defendant here. [c] But if a Man conſiders where the Miſchief lay before the Statute, and what it was that the Parliament intended to redreſs, he will thereby perceive that the Intent of the Makers of the Act was only to puniſh the Treaſurers, Receivers, and Miniſters of the King, and not of common Perſons, for from the former only the Miſchief grew. [d] For when Monaſteries, Houſes of Religion, Colleges, and Chantries were diſſolved, and came to the Hands of King *Henry* 8. and King *Edward* 6. Penſions were aſſigned to the Abbots, Monks, Nuns, Incumbents and others who before lived upon the Poſſeſſions of the ſaid Monaſteries and Houſes which ſo came to the Hands of the ſaid Kings, and of theſe Penſioners there was a great Number. And alſo upon other Actions the ſaid Kings were charged with the Payment of many Annuities. And the Treaſurers and Receivers and other Miniſters Accountant appointed by the ſaid Kings to pay them, perceiving that ſo many were payable thro' their Hands, made a Gain of it, and would give for Anſwer to the Penſioners, Annuitants, &c. that they had no Money of the King's in their Hands, or would delay and put them off by other Means, until they were forced to give them ſome Reward to get what was due to them. And by ſuch extortious Delays and Means they compelled the poor Penſioners and others to part with a good deal of what was due to them to the Treaſurers, Receivers, and others appointed to pay them, who inriched themſelves thereby, and impoveriſhed the Penſioners, which was a great Enormity, and neceſſary to be reſtrained. And to this End a Branch was put in the Act made in 33. *H.* 8. concerning the Erection of the Court of Surveyors, by which it is enacted, *that the general or particular Receivers, or their Deputies, who hereafter ſhall happen to pay any Annuity, Penſion, or Rent, ſhall not retain or take of the Party to whom they ſhall happen to pay the ſame by way of Reward or otherwiſe, above the Sum of* 4 *d. for every twenty Shillings which the ſame general or particular Receiver ſhall happen to pay, on Pain of forfeiting* 6 *s.* 8 *d. for every Penny which he or they ſhall happen to receive above the Sum of* 4 *d. for every twenty Shillings which he or they ſhall happen to pay, the one Moiety of this Forfeiture to be to the King, and the other to the Party that will ſue for the ſame*; which Act extends only to the Receivers of the King, as one may ſee by comparing and conſidering the Clauſes therein together. And agreeable to the Intent of this Branch, and as a Confirmation of it was the ſaid Clauſe made in the ſaid Act of 7. *Edw.* 6. which was alſo made by Reaſon of the ſaid Miſchief which attended ſuch Payments made by the King's Receivers, and other Miniſters of the King, [e] and againſt them only was the Act intended to be made, which may be collected from the Words of the Act in other Branches; for the Stile of the Act is, *An Act for the true anſwering of the King's Revenues*, ſo that the Stile ſignifies the Scope of the Act to be touching the Matters of the King and his Miniſters. And alſo all the Branches before the ſaid Branch above recited treat of the King's Miniſters, viz. of his Receivers, Auditors, Bailiffs, and other Miniſters of Receipt or Payment, and then comes the ſaid Clauſe which hath general Words, viz. *if any Treaſurer, Receiver, or Miniſter Accountant*, &c. which are referred to ſuch Treaſurer, Receiver, or Miniſter before ſpoken of, that is, the King's. And the Clauſes before, ſpeaking of the King's Miniſters, are an Inducement to us to take the Intent of the Legiſlature in the ſaid Clauſe above recited to extend to the King's Miniſters. And that the ſaid Clauſe reaches only to the King's Miniſters, is more fully

2 Point.

[b] S. P. Litt. R. 247. 1 Keb. 507. 4 Inſt. 330.

[c] 4 Inſt. 330.

[d] Litt. R. 247.

[e] 11 Co. 33. a.

proved by the Words which come afterwards, viz. *more or otherwiſe than he or they might lawfully do by foreign Laws and Statutes therein provided*, (which Word *(foreign)* it was ſaid, ſhould be former, and was miſprinted, but by *Saunders* Chief Baron, *foreign* is well enough, and ſhall be taken in the Senſe of former) which Words *(he or they)* go to every Treaſurer, Receiver, or Miniſter reſtrained by the Statute: And the Words *(foreign* or former *Laws and Statues)* imply that the Officers intended in the Branch for the Payment of the ſaid Fees, Annuities, Penſions, Duties, or Warrants, might take ſome Sum. And what Treaſurers, Receivers, or Miniſters could by any former Law receive any Sum for the Payment of any Fees, Annuities, Penſions, Duties, or Warrants? [a] certainly the King's Miniſters might, and no other. And this they might do by Implication of the ſaid Act of 33. *H.* 8. which inflicts a Penalty on the King's Officers who receive for ſuch Payments above the Sum of 4 d. for every twenty Shillings, whereby it is implied that he might receive 4 d. for every twenty Shillings, and that which is implied by any Act is equal to expreſs Words in the Act. So that by the Senſe and Intent of the ſaid Act of 33. *H.* 8. they might receive 4 d. for the Payment of every twenty Shillings; and accordingly it has been uſed ſince. But there is not any former Law or Statute which permits the Receiver of a common Perſon to take any Thing for any Payment made by him to another. Wherefore foraſmuch as all the former Words of the Sentence, as to the Miniſters named and their taking any Thing, are referred to the latter Words, viz. *more or otherwiſe than they might by foreign Laws or Statutes*, which latter Words are intended only of the King's Miniſters, and no other, from thence it follows that the latter Words clear up the Intent of the firſt, and that the Treaſurers, Receivers, and Miniſters named in the former Part are intended the Treaſurers, Receivers, and Miniſters of the King only, and of no other. So that the Senſe of the ſubſequent Words diminiſh the Generality of the Words precedent, and alſo manifeſt the Intent of the Makers of the Act. And the Judges of the Law in all Times paſt have ſo far purſued the Intent of the Makers of Statutes, that they have expounded [b] Acts which were general in Words to be but particular where the Intent was particular. As the Statute *de Prærogativa Regis cap.* 1. provides, *that the Lord the King ſhall have the Wardſhip of all the Lands of ſuch as hold of him in chief by Knights-Service, whereof the Tenants were ſeized in their Demeſn as of Fee the Day of their Death (of whomſoever they hold elſe by like Service, ſo that they held of ancient Time any Land of the Crown) until the Heir come to his lawful Age, &c.* [c] yet if the King's Tenant, who has Land holden of the King *in capite* by Knights-Service by Deſcent on the Part of his Father, and other Lands holden of another by Knights-Service, which deſcended to him on the Part of his Mother, dies without Iſſue, his Heir on the Part of the Father, and alſo his Heir on the Part of the Mother being within Age, the Judges have ſo expounded the Law that the King ſhall not have the Wardſhip of the Lands deſcended to the Heir on the Part of the Mother, becauſe the Lands which came on the Part of the Mother did not deſcend to the Heir to whom the Lands holden *in capite* deſcended. So that altho' the Words of the Act or Treatiſe ſay that *the King ſhall have the Wardſhip of all the Lands of ſuch as hold of him in chief, whereof the Tenants were ſeized in their Demeſn as of Fee the Day of their Death*, yet he ſhall not have the Wardſhip of all the Lands whereof he dies ſeized in Fee in this Caſe, becauſe the Intent of the Makers of the Act was not ſuch, for it was not their Intent to give the King more than deſcended to the Heir to whom the Land holden of him deſcended. So that tho' the Words are general, they are not to be taken generally, but are to be reduced to a Particularity, viz. where the Lands holden of the King and the Lands holden of another deſcend to one ſame Heir. So is the ſame Statute taken afterwards in *cap.* 3. which provides, that *the King ſhall have primer Seizin after the Death of thoſe who hold of him in chief of all the Lands whereof they were ſeized in their Demeſn as of Fee*; [d] yet if the Tenant holds of the King *in capite* by Socage, it has been always taken that he ſhall not have primer Seizin of the Lands held of others, tho' by the Generality of the Words he ſhall have it there, but that was not the Intent of the Makers of the Act. So the Statute of *Marlbridge cap.* 4. enacts, that *none from henceforth ſhall cauſe any Diſtreſs that he has taken to be driven out of the County where it was taken*, and ſays further, *if the Lord preſume to do ſo againſt his Tenant, he ſhall be grievouſly puniſhed by Amercement*; [e] yet if one has a Manor in one County, and a Perſon holds Lands which he has in another County, of this Manor, it is held in 1. *H.* 6. that it is lawful for the Lord to diſtrain for the Services, and to carry the Diſtreſs to the Manor into the other County where the Manor is, notwithſtanding the ſaid Statute, and yet it ſeems contrary to the Letter of the Act, as it is in Truth contrary to the Generality of the Letter of the Act. But the Judges have expounded the Intent of the Makers of the Act not to extend to the Lord, but where the Seigniory and Tenancy are in one ſame County. So that by ſuch Expoſition made according to the Intent of the Act the Generality of the Words is abridged. And ſo it was ſaid, the Statute of *Glouceſter cap.* 1. provides, that *the Diſſeizee ſhall recover Damages in a Writ of Entry upon Novel-Diſſeizin againſt him that is found Tenant after the Diſſeizor*, [f] yet if a Diſſeizor by Deed makes a Feoffment to three, and makes Livery to two of them, but the third is not at the Livery of Seizin, nor ever agrees to the Feoffment, nor will ever take the Profits, and afterwards the two die, and the third ſurvives them, and the Diſſeizee brings his Writ of Entry *ſur diſſeizin* in the *Per* againſt him, he ſhall ſhew the whole Matter how that he never agreed to the Feoffment, and ſo ſhall diſcharge himſelf of the Damages: So that the Demandant ſhall not recover Damages againſt him, altho' he be Tenant of the Freehold of the Land, as *Littleton* ſays in his Chapter of *Remitter*, which Expoſition of the ſaid Statute by *Littleton* (it was ſaid) is founded upon the Intent of the Makers of the Act, and upon good Reaſon. And yet it ſeems contrary to the Text, which ſays generally that *the Diſſeizee ſhall recover Damages againſt him that is found Tenant after the Diſſeizor*. And *Littleton* ſays that in the ſaid Caſe he is found Tenant after the Diſſeizor, and yet the Diſſeizee ſhall not recover Damages againſt him, but it was the Intent of the Legiſlature that made him ſay ſo.

[a] S. P. Litt. R. 247.

[b] 4 Inſt. 330. 3 Keb. 721. Vin. Abr. tit. Statutes E. 6. pl. 66. Ante 109.

[c] M. 12. Ed. 4. 18. b. Fitz. Traverſe 8. Bro. Traverſe de office 37. Gard. 95. Livery 48. Parliament 79. Prerogative 75. Reſeizer 40. Stamf. Prerog. 8. b.

[d] See Ante 109 (d). and the Books there cited. SeeDy. 213. pl. 39.

[e] M. 1. H. 6. 3. b. *per Cur.* Fitz. Diſtreſs 1. Bro. 33. Action ſur l'Eſtatute 41. Palm. 544. 2 Brownl. 260. Crompt. J. C. 18. a. Vin. Abr. tit. Diſtreſs E. 4. pl. 3, 9, 10. Gilb. Law of Replev. 50, 51. Ante 9(g). 18(d) and See the other Books there cited.

[f] Litt. § 685. 4 Bac. Abr. 618.

And that their Intent was ſo, he gathered from Reaſon, for Reaſon would never ſuffer him to pay Damages to the Diſſeizee, where he never aſſented to the Wrong done to the Diſſeizee, and never received nor intended to receive any Profits of his Land. So that by the Expoſition of the Statute there is a Diverſity where he is Tenant by his Agreement, and where without his Agreement. And from hence we may ſee that Statutes are often taken contrary to the Generality of the Words. And the Statute of *Weſtminſter* 2. *cap.* 48. concerning View provides *that from henceforth View ſhall not be granted but in caſe when View is neceſſary*, and then ſays further, *in caſe when one by an Exception dilatory abates a Writ after the View of the Land, as by non-Tenure, or miſnaming of the Town, or ſuch like, if he purchaſe another Writ, in this Caſe View ſhall not be granted, if he had View in the firſt Writs*; [a] yet (it was ſaid) if one has View in a *Præcipe quod reddat*, and afterwards abates the Writ by falſe-*Latin*, or other apparent Fault, it is held in *Longo* 5. *Ed.* 4. that in another Writ he ſhall have the View, becauſe there the Party abated the Writ by Exception *ut Amicus Curiæ*, for the Exception was apparent, but if the Tenant had abated it for other Cauſe not apparent, it had been otherwiſe, for there he ſhould not have the View. From which Caſe it appears that notwithſtanding the Generality of the Words of the Statute, which provides that the View ſhall not be granted in the ſecond Writ, where the Party after the View abated the firſt Writ *by Exception dilatory*, yet where he abates the Writ by ſome Kind of Exception dilatory the Judges have granted the View, becauſe they took the Intent of the Makers of the Act to be ſo, for it was not their Intent that the View ſhould be denied where the Party abated the Writ by ſuch an Exception for which the Court might have abated it without Motion of the Party. So that the Generality of the Purview is by ſuch Expoſition become ſpecial. And ſo the Statute of 25. *Ed.* 3. *cap.* 16. enacts, *that no Writ ſhall abate by Exception of Non-tenure of Parcel, but for the Quantity of the Non-tenure which is alledged*; [b] yet in a *Præcipe quod reddat* of a Manor if the Tenant pleads Non-tenure of Parcel, it has been adjudged ſince the Statute that the whole Writ ſhall abate, becauſe the Demandant had not an Exception in the Writ, for it has been taken that the Intent of the Makers of the Act was, that no Writ ſhould abate for Non-tenure of Parcel, but for the Quantity, where the Things demanded were ſeveral; but if the Thing demanded be entire, then it was not their Intent that the Writ ſhould not abate, nor did they deſign to alter the Form of the *Regiſter* in the Exception. So that where the Statute ſays generally, *for Non-tenure of Parcel no Writ ſhall abate*, the Judges have expounded it that in ſome Caſe for Non-tenure of Parcel the whole Writ ſhall abate, which Expoſition ſeems to be contrary to the Text, but when it is declared that ſuch is the true Intent of the Makers of the Act, then it is not contrary to the Text, but a Right Interpretation of the Letter thereof. And ſo the Statute of *Weſtminſter* 2. *cap.* 25. enacts, that in Aſſize *if any being named Diſſeizor do perſonally alledge the Exception*, viz. if he ſhall vouch a Record and fail at the Day, *he ſhall be adjudged for a Diſſeizor without taking of the Aſſize, &c.* [c] yet if a Feme-Covert with her Huſband vouch a Record in an Aſſize and fail, ſhe ſhall not be attainted a Diſſeizoreſs, but afterwards being received ſhe ſhall plead to the Aſſize, as it is taken in 11. *H.* 4. for it was not the Intent of the Makers of the Act to convict a Feme-Covert for a Diſſeizoreſs by ſuch Plea. So that when the Statute ſays *if any alledge the Exception*, it has been expounded not to include a Feme-Covert by the Intent of the Legiſlature. And ſo there are many other Inſtances where Statutes, which have inflicted a Penalty upon every one that ſhall do ſuch an Act, have been expounded not to extend to Femes-Covert, or Infants, ſo that though the Words have comprehended all, yet in Effect they have not reached to all. [d] And if the Conuſee in a Statute Merchant has the Land of the Conuſor extended, if it be extended too high, then at the Prayer of the Conuſee by Equity of the Statute of *Acton Burnel* (which extends to Goods only, and was made before the *Statute Merchant*) the Land ſhall be delivered to the Extenders, who ſhall preſently anſwer to the Creditor for his Debt, as the Words of the Act ſpeak; [e] and yet if it is delivered to the Extenders, they ſhall not pay the Money until the Days appointed and limited in the Extent, as *Saunders* Chief Baron put it, notwithſtanding the Words of the Act are *(ſhall preſently anſwer, &c.)* but the Intent of the Makers of the Act (as every reaſonable Man may obſerve) was not to compel them to pay it immediately, and to let them wait to receive it again when the Days ſhall come, for if ſo, every one would charge the Extenders with the Land, and then none would be willing to be an Extender; for which Reaſon the Judges have expounded the Words *(preſently anſwer)* to mean that they ſhall preſently become Debtors for the Duty, and chargeable with the Payment of it at the Days for paying the Rents or receiving the Revenues: And ſo they have qualified the Rigour of the Word *(preſently)* according to Reaſon, in ſuch Manner as the Intent of the Makers of the Act might be preſumed to be. From which Caſes it appears that the Sages of the Law heretofore have conſtrued Statutes quite contrary to the Letter in ſome Appearance, and thoſe Statutes which comprehend all things in the Letter they have expounded to extend but to ſome Things, and thoſe which generally prohibit all People from doing ſuch an Act they have interpreted to permit ſome People to do it, and thoſe which include every Perſon in the Letter they have adjudged to reach to ſome Perſons only, which Expoſitions have always been founded upon the Intent of the Legiſlature, which they have collected [f] ſometimes by conſidering the Cauſe and Neceſſity of making the Act, ſometimes by comparing one Part of the Act with another, and ſometimes by foreign Circumſtances. So that they have ever been guided by the [g] Intent of the Legiſlature, which they have always taken according to the Neceſſity of the Matter, and according to that which is conſonant to Reaſon and good Diſcretion. In our Caſe then the Occaſion and Neceſſity of the Act was to reform the Abuſe practiſed by the King's Receivers and Miniſters towards the Penſioners and others, as is ſhewn before, but not by the Miniſters of other People, for if the Miniſters of others had abuſed the Parties in the Payments, or had delayed to pay them, they that ought to be paid might eaſily have had Acceſs to the Maſter of ſuch Miniſter, and have ſhewed

[a] M. Long. 5. Ed. 4. 14. a. b. Bro. View 75. 2 Inſt. 481. 1 Keb. 205.

[b] See Ante 109 (c) and the Books there cited.

[c] H. 11. H. 4. 50, 51. Bro. Attaint 28. Diſſeizin 71. Parliament 103. 2 Inſt. 414. Kelw. 131. b. 132. a. 1 Kol. R. 91.

[d] See Ante 82 (c) and the Books there cited.

[e] P. 2. H. 4. 17. pl. 3. Fitz. Extent 20. Bro. 1. Vin. Abr. tit. Statutes Merchant E. 11. fo. 537.

[f] Hardr. 208. 4 Bac. Abr. 648.

[g] That Acts of Parliament ought to be expounded according to the Intent and Meaning of the Legiſlature, Hardr. 185, 208. 1 Sid. 137. 5 Co. 5. a. b. 2 Rol. R. 318. 2 Keb. 330. 1 Show. 491 *Per Eyre* J. 8 Mod. 65 *Per Cur.* 11 Mod. 161 *Per Trevor* C. J. 4 Bac. Abr. 647, 648. Vin. Abr. tit. Statutes E. 6. pl. 81. Ante 53 (a) *Per Hales* J. 57 (m) *Per Mountague* C. J. Poſt 231 *Per Brown* J. 464 *Per Cur.* 465 by the Reporter.

* Litt. R. 247. their Grievance, or they might have * distrained for their Duties, if Distress was given to the Party, or they might have sued the Principals themselves that owed them the Duties; but such easy Access, Distress, or Suit they could not have with regard to the King, for which Reason the Mischief lay only in the King's Ministers, and it was the Intent of the Parliament to redress their Abuses only; and that their Intent was such, it may be collected from other Parts of the Act, as it is shewn before. Wherefore the whole Court held that Receivers and Ministers of others than of the King or Queen were out of the Provision and Penalty of the Act, and that the Declaration here shall be taken most strongly against the Plaintiff, *viz.* that the Defendant shall be taken for a Receiver to another than to the King and Queen *Philip* and *Mary*, and that for these Causes the Declaration is insufficient to charge the Defendant. And *Saunders* chief Baron said that the Declaration was also insufficient because he had not recited the said Act of 23. *H.* 8. for the Act of 7. *Edw.* 6. was grounded upon it, and both the Acts are but as one. [a] As if an Act is made which prohibits the doing of such a Thing, and afterwards another Act is made which ordains that if any does the Thing he shall forfeit so much, there if any one will sue for the Forfeiture he ought to recite both the Acts, for the first Prohibition and the Penalty given after are but as one Act. So is it here, as he said. And also he said that the Plaintiff has not shewn fully that he was Bedel, and that he had the Fee of 20 Marks, for he has said in the Declaration that *by virtue of the Letters-patent of King Henry* 8. *&c. to the same* (Plaintiff) *made he was and yet is Bedel, &c.* which is not a sufficient shewing that he was Bedel, for he ought to have declared in Fact that the King was seized of the Manors at the Time of the Date of the Letters-patent, which as it is here, is alledged only by Implication, and that is not sufficient. So that for this Cause also he took the Declaration to be insufficient.

[a] Owen 135. 4 Bac. Abr. 646, 656. Vin. Abr. tit. Statutes E. 3. pl. 15.

3 Point. Further it was moved and debated whether or no if the Declaration had been good, and the Matter sufficient to charge the Defendant, the Plaintiff might sue for the Penalty elsewhere than in *Wales*, forasmuch as it appears by the Declaration that the Receipt was at *Cardiff* in the County of *Glamorgan*, which is a *Welsh* County. And it was argued for the Defendant, that altho' upon the Matter the Defendant had been chargeable, and although *Wales* is by the Statute of 27. *H.* 8. incorporated, united, and annexed to *England*, by which Means it might be that any personal Action for a Cause arising in *Wales* might be sued in the Common Bench in *England*, yet the Defendant here shall not be sued for the Duty now demanded elsewhere than in *Wales*; because *Wales* was by the aforesaid Statute of 27. *H.* 8. divided into twelve Counties, and by the Statute of 34 & 35. *H.* 8. concerning the Ordinance of *Wales* four Justices were appointed for *Wales*, that is, one for every three Counties, and they had Power given them by the same Statute to hold Plea of all Things within their Precincts at their Sessions limited by the said Statute, and also one original Seal was appointed to each of the four Circuits to seal all original Letters within the three Counties of each of the Circuits; and there is a Branch in the said Statute of 34 & 35. *H.* 8. containing the Words following, *viz. Also that all Actions real and mixed, Attaints, Conspiracies, Assizes, and Quare Impedit, Appeals of Murder and Felony, and all Actions founded upon any Statutes, shall be sued by original Writ, to be obtained and sealed with the said original Seal returnable before the Justices at their Sessions within the limits of their Authorities, in Manner and Form before declared*; by which Words of the Act all Actions founded upon Statutes, as our's here is, are appointed to be sued there by original Writ, to be sealed with the said original Seal, returnable before the said Justices. So that the Statute appoints the Place, Order, and Form of such Suits, and then they cannot sue in any other Place, or in any other Form, for if they should, it would be contrary to the Purview of the Statute. And upon this it was said, that the Statute of *Westminster* 2. *cap.* 11. provides, that upon Account finished before Auditors assigned, and Arrears found upon the Accountants, *their Bodies shall be arrested, and by the Testimony of the Auditors of the same Account shall be sent and delivered to the next Goal of the King's in those Parts, &c.* [b] upon which Words it is taken in 27. *H.* 6. that the Auditors ought to commit them to the next Goal, although the next Goal be in another County, for they cannot vary from the Place limited by the Statute. [c] And so the Statute of *Westminster* 2. *cap.* 3. gives a Writ of second Deliverance out of the Court where the first Replevin was granted, and a Man cannot have it elsewhere, for if so, then he would vary from the Place limited by the Statute. [d] So in the Principal Case this Action founded upon a Statute, which is appointed by the said Act of 34 & 35. *H.* 8. to be returned before the Justice of *Glamorgan* at his Sessions, cannot be sued nor returned elsewhere, nor before any other. [e] As the Statute of 31. *Ed.* 3. *cap.* 12. provides, that *Error in the Exchequer shall be corrected and amended before the Chancellor and Treasurer*, and therefore it cannot be corrected before any other. [f] For when a Statute appoints a Thing to be done before a certain Man, it cannot be done before any other, for it must be done as the Statute limits it. So here an Action founded on a Statute for an Offence in *Wales* appointed to be sued before the Justice there cannot be sued before any other. And although the Words in the Act of 34 & 35. *H.* 8. are in the affirmative, *viz. that all Actions founded, &c. shall be sued there by original Writ, to be sealed with the said Seal, returnable, &c.* and has not an express negative, as *(and not elsewhere)*, yet this Affirmative implies in itself a Negative, *viz.* and not elsewhere; for the Clause saith, *all Actions founded upon Statutes shall be sued there*, and if any should be sued in the Exchequer, then *all* would not be sued *there*: So that this universal Word *(all)* admits of no Exception, but excludes every particular one from being sued elsewhere. And if any Writ should be sealed with any other Seal, then *all* would not be sealed with *the said Seal*, and if any should be returned before another Justice, then *all* would not be returned before *the said Justice*. [g] Wherefore every Statute that limits a Thing to be done in a particular Form, although it be spoken in the affirmative, includes in itself a Negative, *viz.* that it shall not be done otherwise. [h] As the Statute of *Quod ei deforceat* ordains that the Demandant shall vouch *as if he were Tenant in the former Writ,*

For the Defendant.

[b] H. 27. H. 6. 8. pl. 7. Bro. Faux Imprisonment 32.

[c] 4 Bac. Abr. 380. Vin. Abr. tit. Replevin O. 3. pl. 6.

[d] 4 Bac. Abr. 642.

[e] 11 Co. 59. a. Bridgm. 119. 4 Bac. Abr. 642.

[f] 11 Co. 59. a. 3 Show 421 4 Bac. Abr. 642.

[g] Vin. Abr. tit. Negative A. pl. 2. tit. Statutes E. 6. pl. 7. See Ante 113 (b) and the Books there cited

[h] See Ante 113 (c) and the Books there cited. Crompt. J. C. 15. a.

Writ, this includes a Negative, *viz.* and not otherwiſe: For it has been taken ſince the Statute that if the firſt Writ was a *Scire Facias*, and the Tenant in the *Quod ei deforceat* maintains the Title of it, the Demandant ſhall not vouch, for he ſhall only vouch *as if he were Tenant in the former Writ*, which is as much as to ſay, "he ſhall vouch as if he were Tenant in the former Writ, and in no other Manner," and then in the former Writ (being a *Scire Facias*) he might not vouch, and therefore he may not now. [a] And if Tenant in Tail makes a Feoffment to the Uſe of himſelf for Life, and afterwards to the Uſe of his Iſſue in Tail, and dies, afterwards the Statute of 27. *H.* 8. is made, it has been adjudged that the Iſſue in Tail ſhall not be remitted, for the Statute executes the Poſſeſſion in the ſame Manner and Form as he had the Uſe, which is much as to ſay, "and in no other Manner and Form." And he had the Uſe as a Purchaſer, and ſo he ſhall have the Land now by the Statute, *ergo* he is not remitted. And ſo the Statute of 31. *H.* 8. enacts that *the King ſhall have all the Poſſeſſions of Abbies and Colleges, &c. which then were come, and afterwards ſhould come to his Hands, in the ſame Eſtate as they then were*; [b] and it has been adjudged that if any College, after that Statute, makes a Leaſe for Years, and three or four Years afterwards the College and the Poſſeſſions come to the Hands of the ſaid King, the Leaſe is void, for the King ſhall have the Poſſeſſions as they were then, *viz.* at the Time of the making the ſaid Statute, and then they were void of the Leaſe, and were in Poſſeſſion, and if the King ſhould now have them in Reverſion, he could not have them in the ſame Eſtate as they then were. So that this Statute ſpoken in the affirmative contains a Negative. And ſo in the principal Caſe the ſaid Statute of 34 & 35. *H.* 8. which limits the Order of ſuing Actions founded upon Statutes for Offences done in *Wales*, *viz.* that they ſhall all be ſued there by original Writ to be ſealed with the ſaid Seal, and to be returned before the ſaid Juſtices, implies a Negative, *viz.* that they ſhall not be ſued elſewhere, and eſpecially if the ſaid Word *(all)* be conſidered, which ſtrongly excludes the Suit of any particular one any where elſe. And of this Opinion was *Frevil* the third Baron.

[a] See Ante 114 (b) and the Books there cited.. Bridgm. 98. Crompt. J. C. 14. a. 3 P. Wms. 461.

[b] S. P. 2 Co. 49. a. 10 Co. 55. a. b. Winch 97. L. P. adjudged in the Abbot of *Ramſey*'s Caſe Dy. 231. pl. 1. N. Bendl 132. pl. 195. Kelw. 211. pl. 19. 1 Co. 47. a. 10 Co. 55. b. See Vin. Abr. tit. Statutes E. 6. pl. 123.

On the contrary it was argued, that foraſmuch as by the Statute of 27. *H.* 8. *Wales* was [c] incorporated and united to *England*, and all was made but one Realm, for this Reaſon Actions upon Statutes ariſing upon a Cauſe there might before the ſaid Statute of 34 & 35. *H.* 8. be ſued in the King's Courts at *Weſtminſter*. And the ſaid Clauſe in the ſaid Ordinance made in the 34 & 35. *H.* 8. being ſpoken in the affirmative ſhall not take away the Juriſdiction of other Courts. Nevertheleſs in the ſaid Caſes of *Quod ei deforceat*, and upon the Execution of a Uſe, and in the other Caſes put on this Head, it was ſaid, the Law is accordingly as it is there alledged, becauſe by the common Law there was not any Voucher by the Demandant, nor any coming to the Land by the Uſe, nor any Power given to Auditors to commit an Accountant to Priſon. And therefore where an Act of Parliament gives them an Authority to do that which they could not do before, they ought to do it in the Order limited by the Statute, and not otherwiſe. But where an Action of Debt or other Action which was at the common Law is given by any Statute in a Caſe wherein it did not lie before, the Law ſays that it is ſuable in the common Courts uſed for it by the Common Law, [d] and that the Courts entitled to it ſhall not be deprived of their Juriſdiction in the Caſe but by expreſs Words of Reſtraint. And in our Caſe the affirmative Words in the Statute of 34 & 35. *H.* 8. which ordain that Actions founded upon Statutes ſhall be ſued before the Juſtices of *Wales*, are uſed rather to declare that the ſaid Juſtices might hold Plea of them, and to give them a Juriſdiction, than to take away the Juriſdiction of other Courts, and they are put to make the Offenders ſuable as well there as elſewhere, and not to reſtrain other Courts of their Juriſdiction in the Caſe. So that the affirmative Words there do not take away the Juriſdiction of other Courts. And of this Opinion was *Saunders* Chief Baron, who ſaid, that where it is enacted [e] that *all Murders, Robberies, Felonies, and the Acceſſaries of the ſame, which ſhall happen hereafter to be perpetrated and committed within the County of* Merioneth *in* Wales, *ſhall and may be from henceforth enquired, heard, and determined in the Counties of* Cannarvon *and* Angleſea, *before the King's Juſtice of* North-Wales, *or his Deputy*, [f] it has been taken by good Advice ſince that Statute, that the ſaid Murders and Felonies might be enquired, heard, and determined before the Juſtice of *Merioneth*, as well as before the Juſtice of the Counties of *Caernarvon* and *Angleſea*, for the Words being in the affirmative do not take away the Enquiry in the proper County where the Murder or Felony was committed, nor the Juriſdiction of the Juſtice thereof, but only tend to give the Juſtice of the ſaid other Counties a concurrent Juriſdiction to enquire thereof. And of the like Effect are the ſaid affirmative Words of the ſaid Statute of 34 & 35. *H.* 8. as it ſeemed to him.

E contra for the Plaintiff.

[c] See 2 Bulſt. 156.

[d] L. P. adjudged Cro. E. 326 *Agard v. Candiſh*. See Moor 658.

[e] Stat. 26. H. 8. cap. 6.

[f] 1 Rol. R. 91. *arguendo*.

But note that the ſaid Words of the ſaid Statute touching the Enquiry of the ſaid Offences done in the County of Merioneth *are as before recited, viz.* "*that they ſhall and may be thenceforth enquired,* "*heard, and determined in the Counties of* Caernarvon *and* Angleſea, *before the Juſtice of* North-"Wales *or his Deputy for the Time being,*" *but the Words are further,* "*by the Verdict or Enqueſt* "*to be taken by the Inhabitants of the ſame Counties of* Carnarvon *and* Angleſea, *or otherwiſe, if* "*by the Diſcretion of the Juſtice there or of his Deputy it ſhall be thought convenient,*" *which Words (if by the Diſcretion of the Juſtice there, &c. it ſhall be thought convenient) are referred, as it ſeems, to the Enquiry, hearing, and determining in the other Counties, ſo that the Act refers the Thing to the Will of the Juſtice of* North-Wales, *and therefore the Words are not as preciſe to take away the Enquiry in the County of* Merioneth, *and to give it to the Juſtice of the other Counties, as the Words are in the ſaid Statute of* 34 & 35. H. 8.

Nota bene by the Reporter.

As to the laſt Point, it was argued on behalf of the Defendant that where the Words of the ſaid Act of 7. *Edw.* 6. give the Penalty to be recovered *in any of the King's Courts of Record by Bill, Plaint, or Action of Debt*, notwithſtanding the Law ſhould be that the Words of the ſaid Statute of 34 & 35. *H.* 8. being put in the affirmative don't take away the Juriſdiction of other Courts which might hold Plea thereof before that Statute, yet the Suit here ſhall not be maintenable by the

4 Point.

For the Defendant.

* 1 Vern. 221. *Per North* Ld. K.

the Plaintiff by original Writ of Debt in the Exchequer, as it is here brought. * For the Exchequer is not a Court for Common Pleas, but it is a Court for the King's Buſineſs only, that is, touching the Revenues, Debts,, and Duties of the King. But no Plea between common Perſons ſhall be held there, [a] unleſs for a Perſon privileged there, as Officers that attend upon the Court, the Abſence of whom (as they would be abſent if they were impleaded elſewhere) would be prejudicial to the Buſineſs of the King in the ſaid Court, and therefore for the King's [b] Benefit and to diſpatch his Buſineſs in the ſame Court the Officers and Miniſters of the Court ſhall ſue there. [c] And ſo ſhall one that is indebted to the King by Surmiſe of *Quo minus*, *&c.* (as here lately in an [d] *Ejectione firmæ* brought by *Garraway* againſt *Richard ap Thomas* upon an Ejectment of Lands in the County of *Angleſea* in *North Wales*, after Arguments made on both Sides, you adjudged the ſame maintenable, as well as a Suit ſhould be here maintenable by the King himſelf for an Intruſion into Lands in *Wales*,) and the Reaſon is, becauſe the King ſhall have [e] Execution of the Thing and Damages recovered in the *Quo minus*, towards Satisfaction of the Debt which the Plaintiff owes the King: So that the Plaintiff in the *Quo minus* partakes of the King's Prerogative, and the King ſhall have † benefit by the Suit. And ſo a Man may ſue here one that is in Ward in this Court, or one that is Accountant or Attendant here, becauſe he cannot have his Body out of this Court to be arreſted or impriſoned, and therefore the Plaintiff muſt of Neceſſity ſue him by Bill here. And upon theſe Cauſes only is the Office of common Pleas founded in this Court. And in all theſe three Caſes the Plaintiff, in order to give Juriſdiction to the Court, ought to make his Surmiſe, and ſhew the Cauſe, *viz.* that he is privileged, or indebted to the King, or that the Defendant is in Ward here, or attendant upon this Court. But in the principal Caſe the Plaintiff has brought his Action, and has not made any Surmiſe to entitle the Court to Juriſdiction. And without Surmiſe the Juriſdiction ſhall not be taken away from other Courts, and given to this Court. [f] As the Defendant ſhall not remove a Plea of Replevin out of the County Court into the Common-Bench without Surmiſe in the *Pone* or *Recordare*, for which reaſon it is uſual to make a Surmiſe in the Writ, and the Writ ſays, *fiat Executio iſtius brevis, ſi cauſa ſit vera, aliter non.* [g] And a Writ of Right for Lands holden of a Manor ſhall not be ſued in the Common Bench without Cauſe ſhewn, *viz.* that *the chief Lord has remitted his Court* to the King. [h] And a *Venire Facias* ſhall never be awarded to the Coroners without Cauſe ſhewn to take away the Direction to the common Officer, *viz.* the Sheriff, and to direct it to the Coroners. So here, without Surmiſe the Juriſdiction of the Court appointed for common Pleas ſhall not be taken away, and given to this Court, for the Penalty here and the Action for it is only given by the Act to the Party, and nothing is given to the Queen, for which reaſon the Court without Surmiſe or Cauſe ſhewn has no more Cauſe to hold Plea upon it than it has upon an Action of Debt brought upon an Obligation. And as to what has been objected to the contrary, *viz.* that the Penalty is given to be recovered in any of the King's Courts of Record by Bill, Plaint, or Action of Debt, and here the Exchequer is one of the King's Courts of Record, *ergo* the Action of Debt ſhall be maintenable here, Sir, although the Words of the Act are ſo, yet we ought to conſtrue ſuch general Words to ſtand with Reaſon, and not in ſuch Manner as to confound all Order and Uſage. [i] And therefore they ought to be taken to mean in ſome of the King's Courts of Record uſual and proper for that Purpoſe, and in no others. [k] For if the Offence was done in *London* or in *Northumberland*, a Man might not ſue for it in the Court of *Oxford*, and yet the Court held at *Oxford* before the Mayor there is the King's Court; but the Intent of the Makers of the Act was not to give the Suit but in Courts convenient for it, and within their Juriſdiction. And where the Act gives the Suit in any of the King's Courts of Record by Bill, Plaint, or Action of Debt, if it ſhould be expounded according to the Words, a Man might ſue for the Penalty in the Chancery by original Writ of Debt, for that is within the Words, and it never was ſeen that any Writ of Debt was returned into the Chancery, but the Intent of the Words is to give the Party an Action of Debt in ſuch Courts wherein Actions of Debt are ſuable, and a Bill or Plaint in ſuch Courts wherein original Writs are not ſued nor returnable, but where Bills or Plaints are uſed. So that the Intent of the Makers of the Act was to purſue Order and Juriſdiction, and not to alter Order, or to give a new Juriſdiction to Courts which never had Juriſdiction in ſuch like Caſes before; and therefore ſuch general Words in Acts ought to be interpreted with Reaſon, and not always according to the Rigour of the Text. And hereupon ſeveral of the Caſes before recited for the Underſtanding of Statutes were again repeated, and therefore it was ſaid, that notwithſtanding the ſaid Objection if the Offence had been done even in a County of *England*, the Action here would not be maintenable in this Court of Exchequer without Surmiſe or Cauſe ſhewn. And of this Opinion was *Frevil* the third Baron, and *Luke* the ſecond Baron. And *Luke* alſo ſaid, that by the Statute of *Articuli ſuper Chartas cap.* 4. it is ordained, that *no common Pleas ſhall be from henceforth holden in the Exchequer contrary to the Form of the Great-Charter.* And he alſo cited the Statute of *Rutland* made in 10. *Ed.* 1. which ſays, *but foraſmuch as certain Pleas have been heretofore holden in our Exchequer, which did not concern us nor our Miniſters of our Exchequer, whereby as well our Pleas as the Cauſes of our People are unduly prorogued and letted, we will and ordain that no Plea ſhall be holden or pleaded in the Exchequer aforeſaid, unleſs it do ſpecially concern us or our Miniſters aforeſaid, &c.* by which Statutes, he ſaid, the Exchequer is reſtrained from holding common Pleas, except in the Cauſes aboveſaid; which Statutes it was not the Intent of the Makers of the ſaid Act of 7. *Edw.* 6. to repeal, and therefore this Suit in the Exchequer is not maintenable.

E contra for the Plaintiff, *Saunders* Ch. B.

But *Saunders* Chief Baron was of opinion to the contrary. For he ſaid, the Exchequer has of very ancient Time been a Court to hold all common Pleas whatever between any of the King's Subjects. [l] And this (he ſaid) appears by *Glanvil*, who in the Title of his Book ſays, *ex illas ſolum leges continet*

[a] 2 Inſt. 551.

[b] 38 Aſſ. pl 20. *Per Skipw.* This Court may take Conuſance of all Things that concern the King, and may turn to his Benefit, for the greater Diſpatch of his Buſineſs. Godb. 297.

[c] T. 11. H. 7. 26. pl. 9. Bro. Quo minus 10. H. 8. H. 5. Fitz. Ley 66. 2 Inſt. 551. 4 Inſt. 112. 2 Rol. R. 301. Crompt. J. C. 105 b. 139. a. And herewith agrees *Britton* ſpeaking of the Court of Exchequer in theſe Words, *Et que il eyent poer a conuſtre de dettes que lon doit a nous Dettours, par ou nous pouiſſons plus toſt approcher a noſtre.*

[d] S. P. Crompt. J. C. 107. a. 139. a Godb. 296.

[e] S. P. 2 Rol. R. 301. Crompt. J. C. 107. a. 139. a. Godb. 296.

† Dy. 174. pl. 19.

[f] Ante 74 (c).

[g] Ante 74 (b). Gilb. Law of Replev. 132, 143.

[h] See Ante 74.

[i] See 6 Co. 19. b *Gregory*'s Caſe. 11 Co. 38. b. 39. a. Cro. E. 530. pl. 59.

[k] Heath's Max. 179.

[l] Glanvil, in titulo lib i. See 4 Inſt. 113.

continet et conſuetudines, ſecundum quas placitatur in Curia regis ad Scaccarium, &c. From whence it appears that the Exchequer was then a Court for all common Pleas, and there has not been any Reſtraint by Statute ſince, but by Reaſon of the Multitude of the King's Buſineſs rather than for Want of Power this Court has of late Time ceaſed to hold Pleas between common Perſons in other Caſes than thoſe before mentioned, but not *de rigore juris*, and he denied that to be a Statute which was called the Statute of [a] *Rutland*, for he ſaid it was only an Ordinance made by the King without the Authority of Parliament, touching the Order of the Court of Exchequer. And as to the other Statute which refers to *Magna Charta*, he ſaid that there is no ſuch Reſtraint in *Magna Charta*. So that they did not agree upon the Authority and Juriſdiction of the Court, and in what Place the Action ought to be brought.

But they all unanimouſly agreed that the Receiver of a common Perſon is out of the Penalty of the Statute, and that by the Declaration the Defendant ſhall be intended a Receiver of a common Perſon, becauſe the Declaration ſhall be taken moſt ſtrongly againſt the Plaintiff. And alſo they all agreed, that altho' the Verdict be paſſed, yet for the Fault in the Declaration the Plaintiff ſhall not have Judgment; [b] and it is not remedied by the Statute of *Jeofails*, for Faults in the Matter of the Count cannot be compriſed within miſpleading or inſufficient pleading, for that which comes [c] after the Count ſhall be called the Pleading, as that which is contained in the Bar, Replication, and Rejoinder. And *Saunders* Chief Baron ſaid, that when *Bromley* was Chief Juſtice it was accordingly ſo adjudged in the King's Bench in a Writ of Error upon an *Ejectione firmæ*, viz. the Judgment given upon the Verdict in the *Ejectione firmæ* was reverſed for Default in the Count. And *Note*, that Caſe was between *Moon* and *Clifford*. For which Cauſes the Court agreed that Sir *Thomas Stradling* the Plaintiff ſhould not have Judgment upon the ſaid Verdict, but that they would and ought to award that he ſhould take nothing by his Writ, for the Cauſe aforeſaid. And afterwards it was ſo awarded, as appears by the Judgment which here follows.

Whereupon all and ſingular the Premiſſes being ſeen and read by the Barons aforeſaid, and more full Deliberation being thereupon had amongſt them, becauſe it ſeems to the ſame Barons here that the aforeſaid Writ and Declaration of the aforeſaid *Thomas Stradling* in manner and Form above declared, and the Matter ſpecified in the ſame is inſufficient in Law, &c. Therefore it is conſidered by the ſame Barons that the aforeſaid *Thomas Stradling* take nothing by his Writ and Declaration aforeſaid, and that the ſaid *Thomas Stradling* be in Mercy of the Lady the Queen now. And alſo that the ſaid *Rowland Morgan* as to the Premiſſes be diſmiſſed from this Court, and go thereof without Day &c.

The reſt of the Record.

Judgment.

[a] This Point has been much controverted. See 4 Inſt. 113. But 2 Inſt. 551 ſays it is a Statute, and that this Opinion of *Saunders* is to be rejected as contrary to great Authority, and being never read nor heard of before. Yet Pryn's Animadv. 55, 56, 57, gives many Reaſons to prove that it is no Statute.

[b] S. P. Dy. 97. pl. 45. Crompt. J. C. 95. a.

[c] Dy. 97. pl 45. but the Reporter puts a *Quære*, And in Brown's Anal. 2. 'tis ſaid this is contrary to the ancient Opinion, whereby the Count or Declaration, and all Acts entered on Record relating to Plaints, Suits, or Actions, before the ſame, as well as thoſe after, were reputed to be Pleadings.

A Report of a Judgment given in the Common Bench *upon Argument in* Michaelmas *Term in the* third *and* fourth *Years of the Reign of Queen* Elizabeth, *upon a Verdict found in a* Quid juris clamat *brought by* William Saunders *againſt* George Freeman *and* Joan *his Wife. And the Record appears amongſt the Records of* Michaelmas *Term* 2 & 3 Elizabeth. *Rot.* 1321. *and it was as follows.*

Mich. Term 2 & 3 *Eliz. Rot.* 1321. *North.* Same Precedent Raſt. Entr. 536. b. pl. 24.

THE Sheriff was commanded that he diſtrain *George Freeman* and *Joan* his Wife by all their Lands and Chattles, ſo that he might have their Bodies here at this Day, viz. on the Octave of *St. Michael*, to acknowledge what Right they claim in two Meſſuages, two Cottages, two Gardens, 100 Acres of Land, 40 Acres of Meadow, 20 Acres of Paſture, one Acre of Wood, 8 Acres of Furze and Heath, and one Penny Rent with the Appurtenances in *Arthingworth* in the County aforeſaid, which *Henry Edling* in the Court here granted to *William Saunders* Eſquire by Fine thereof between them made, &c. And now here at this Day came as well the aforeſaid *William* by *Richard Perwich* his Attorney, as the aforeſaid *George* and *Joan* in their proper Perſons. And thereupon the ſame *William* prays that the aforeſaid *George* and *Joan* may attorn to him thereof, &c. And the aforeſaid *George* and *Joan* pray *Oyer* of the Writ aforeſaid. And it is read to them &c. They alſo pray *Oyer* of the Note from whence the ſame Writ iſſued; and it is read to them in theſe Words, " Between *William Saunders* Eſquire Complainant and *Henry Edling* Deforceant of " two Meſſuages, two Cottages, 100 Acres of Land, 40 Acres of Meadow, 20 Acres of Pa- " ſture, one Acre of Wood, 8 Acres of Furze and Heath, and one Penny Rent with the Ap- " purtenances in *Arthingworth*, whereof a Plea of Covenant was ſummoned between them, viz. " that the aforeſaid *Henry* has acknowledged the Tenements and Rent aforeſaid with the Appur- " tenances to be the Right of the ſaid *William*, and has granted for himſelf and his Heirs that " the aforeſaid Tenements and Rent with the Appurtenances, (which the aforeſaid *George* and " *Joan* hold for Term of Life of the ſaid *Joan*, of the Inheritance of the aforeſaid *Henry*, the Day " when this Agreement was made, and which after the Death of the ſaid *Joan* ought to re- " vert to the aforeſaid *Henry* and his Heirs,) after the Death of the ſaid *Joan* ſhall wholly remain " to the aforeſaid *William* and his Heirs for ever; to hold of the chief Lords of the Fee by the " Services which to the aforeſaid Tenements and Rent belong. And for this Acknowledgment, " Grant, Fine, and Agreement, the ſame *William* hath given to the aforeſaid *Henry* 100 Marks " Sterling." Which being read and heard, the ſame *George* and *Joan* ſay, that they by virtue of the Note aforeſaid ought not to attorn themſelves to the aforeſaid *William Saunders* for the Tenements and Rent aforeſaid, becauſe they ſay that before the aforeſaid *Henry Edling* had any Thing in the Tenements and Rent aforeſaid with the Appurtenances, one *John Edling* was ſeized of the Tenements and Rent aforeſaid with the Appurtenances in his Demeſn as of Fee; and

Defendants pray *Oyer*.

Plead in Bar of the Attornment a Deviſe of the Tenements in tail.

that the ſame Tenements and Rent are, and at the Time of the Death of the aforeſaid *John Edling* were held of the aforeſaid *William* in Socage by Fealty and Rent of two Pence to be paid yearly at the Feaſt of *St. Michael* the Archangel. And the ſame *John* being ſo ſeized thereof, the *ninth* Day of *March* in the Year of our Lord 1556, at *Arthingworth* aforeſaid made his laſt Will and Teſtament in Writing, and thereby deviſed to the aforeſaid *Joan* the Tenements and Rent aforeſaid with the Appurtenances, by the Name of his Houſe with the Appurtenances to the ſame belonging for ever in the Town and Fields of *Arthingworth*, to have to her and to the Heirs of her Body lawfully begotten; and afterwards he there died, after whoſe Death the ſame *Joan* entered into the Tenements and Rent aforeſaid with the Appurtenances, and was thereof ſeized in her Demeſn as of Fee Tail, by Form of the laſt Will and Teſtament aforeſaid. And afterwards, viz. the *ſecond* Day of *May* in the Years of the Reign of the Lord and Lady *Philip* and *Mary* late King and Queen of *England*, at *Arthingworth* aforeſaid in the County aforeſaid, the ſame *Joan* took to Huſband the aforeſaid *George*, whereby the ſame *George* and *Joan*, in right of the ſaid *Joan*, were thereof ſeized in their Demeſn as of Fee Tail, viz. to the ſame *Joan* and to the Heirs of her Body lawfully begotten. And this they are ready to verify, wherefore they pray Judgment if they by virtue of the ſaid Note ought to attorn themſelves to the aforeſaid *William* thereof, &c.

Replication.

And the aforeſaid *William Saunders* ſays, that by any Thing before alledged he ought not to be precluded from having the Attornment of the aforeſaid *George* and *Joan* of the Tenements and Rent aforeſaid by virtue of the Note aforeſaid, becauſe by proteſting that the ſame Tenements and Rent with the Appurtenances are, and at the Time of the Death of the aforeſaid *John Edling* were held of the ſame *William* by Knights-Service, and not in Socage as the aforeſaid *George* and *Joan* in their Bar aforeſaid have above alledged, nevertheleſs for Plea ſays, that well and true it is that the aforeſaid *John Edling* was ſeized of the Tenements and Rent aforeſaid with the Appurtenances in his Demeſn as of Fee: And the ſame *John* being ſo ſeized thereof, the aforeſaid *ninth* Day of *March* in the aboveſaid Year of our Lord 1556, at *Arthingworth* aforeſaid made his laſt Will and Teſtament in Writing, as in the Bar aforeſaid is above alledged. But the ſame *William Saunders* ſays that the aforeſaid *John Edling* by his ſame laſt Will and Teſtament amongſt other Things willed and deviſed the aforeſaid Tenements with the Appurtenances, by the Name aforeſaid, to the aforeſaid *Joan*, to have to her for Term of her Life, and afterwards the ſame *John* there died, after whoſe Death the ſame *Joan* entered into the ſaid Tenements with the Appurtenances, and was thereof ſeized in her Demeſn as of Freehold by Form of the laſt Will and Teſtament aforeſaid. And being ſo ſeized thereof, the aforeſaid *ſecond* Day of *May* in the aboveſaid Years of the Reign of the aforeſaid late King and Queen at *Arthingworth* aforeſaid, ſhe took to Huſband the aforeſaid *George*, whereby the ſame *George* and *Joan* were ſeized of the ſame Tenements and Rent with the Appurtenances in their Demeſn as of Freehold in right of the ſaid *Joan*; without that that the aforeſaid *John Edling* by his laſt Will and Teſtament aforeſaid deviſed to the aforeſaid *Joan* the aforeſaid Tenements and Rent with the Appurtenances, to have to her and to the Heirs of her Body lawfully begotten, as the aforeſaid *George* and *Joan* have above alledged. And this he is ready to verify, wherefore he prays Judgment, and that the aforeſaid *George* and *Joan* may attorn to him thereof, &c.

That the Deviſe was for Life.

Traverſes the Deviſe in Tail.

Rejoinder. Maintains the Deviſe in Tail.

And the aforeſaid *George* and *Joan* as before ſay that the aforeſaid *John Edling* by his laſt Will and Teſtament aforeſaid did deviſe to the ſame *Joan* the Tenements and Rent aforeſaid with the Appurtenances by the Name aforeſaid, to have to her and to the Heirs of her Body lawfully begotten, as they have above alledged. And of this they put themſelves upon the Country: And the aforeſaid *William Saunders* likewiſe. Therefore the Sheriff is commanded that he cauſe to come here on the Octave of *St. Martin* twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c. *Alias Venire Facias* returnable the Octave of *St. Hillary*.

Iſſue. *Venire Facias.*

THE CASE.

Mich. Term 3 & 4 Eliz. Where a Jury gives a privy Verdict, and on the Morrow gives an open Verdict in Court contrary to their privy Verdict, the open Verdict ſhall be good, and the firſt void. S. C. Dyer 209. pl. 21. Moor 33. S. P. Co. Litt. 227. b. 2 Rol. Abr. 712. pl. 1. Heath's Max. 228. Tri. per Pais 218, 273.

It appears by the Record that the Fine upon which the ſaid Writ of *Quid juris clamat* was founded, was levied between the ſaid *William Saunders* Complainant, and one *Henry Edling* Deforceant of the Tenements in *Arthingworth* in the County of *Northampton*, and was as follows, viz. "That the aforeſaid *Henry* hath acknowledged the Tenements and Rent aforeſaid with the Appurtenances to be the Right of the ſaid *William*, and hath granted for himſelf and his Heirs that the aforeſaid Tenements and Rent with the Appurtenances, which the aforeſaid *George* and *Joan*, the Day when this Agreement was made, held for Term of Life of the ſaid *Joan*, of the Inheritance of the aforeſaid *Henry*, and which after the Death of the ſaid *Joan* ought to revert to the aforeſaid *Henry* and his Heirs) ſhall after the Death of the ſaid *Joan* wholly remain to the aforeſaid *William* and his Heirs for ever, to hold, &c." And the ſaid *George Freeman* and his Wife plead in Bar of Attornment, that before the ſaid *Henry Edling* (the Conuſor) had any Thing in the ſaid Tenements, one *John Edling* was ſeized thereof in Fee, and held them in Socage of the Plaintiff, and by his Teſtament in Writing made in the Year of our Lord 1556 at *Arthingworth* aforeſaid he deviſed to the ſaid *Joan* the ſame Tenements by the Name, &c. to have to her and to her Heirs of her Body begotten, and afterwards died, after whoſe Death ſhe entered and took to Huſband the ſaid *George*, whereby they in right of the ſaid *Joan* were ſeized in Tail, and therefore they demand Judgment if they ought to attorn. And the ſaid *William Saunders* ſays, that well and true it is the ſaid *John Edling* was ſeized of the ſaid Tenements in Fee, but he ſays that he by his ſaid Teſtament deviſed them to the ſaid *Joan* for Term of her Life, and afterwards died, after whoſe Death *Joan* entered, and was ſeized thereof in her Demeſn as of Freehold, and ſhe being ſo ſeized took to Huſband the ſaid *George Freeman*, without

that that the aforeſaid *John Edling* by his laſt Will and Teſtament aforeſaid deviſed to the aforeſaid *Joan* the aforeſaid Tenements and Rent with the Appurtenances, to have to her and the Heirs of her Body lawfully begotten, as the aforeſaid *George* and *Joan* have above alledged. And the ſaid *George Freeman* and *Joan* by their Rejoinder maintain the Deviſe in Tail, and thereupon they were at Iſſue, which was tried by *Niſi Prius* at *Northampton*, and the *Poſtea* came in as follows, "viz. Afterwards at the Day and Place within contained before *James Dyer* Knight Chief *Poſtea.*
" Juſtice of the Lady the Queen of the Common Bench, and *William Bendloe* Serjeant at Law Juſ-
" tice of the ſaid Lady the Queen aſſigned to take Aſſizes in the County of *Northampton*, by Form
" of the Statute, &c. came as well the within named *William Saunders* by his Attorney within
" contained, as the within written *George Freeman* and *Joan* his Wife by *John Farwel* their Attor-
" ney. And the Jurors of the Jury whereof mention is made being called likewiſe came, who
" to ſay the Truth of the within contained being choſen, tried, ſworn, and charged, retired from
" the Bar there to communicate with one another under the Cuſtody of one of the Bailiffs of *Tho-*
" *mas Lovet* Eſquire then Sheriff of the County aforeſaid. And after the riſing of the Court a-
" foreſaid and Adjournment of the ſame Court until eight of the Clock on the Morrow of the
" ſame Day, viz. *Wedneſday* the *ninth* Day of *July* within written, the ſame Jurors under the Cuſ-
" tody of the aforeſaid Bailiff in the Abſence of the Parties aforeſaid, on the within written *Tueſ-*
" *day* in the Evening about eight of the Clock in the Afternoon of the ſame Day, came before
" the aforeſaid Juſtices at the Inn of the ſaid Juſtices in the Town of *Northampton* in the County
" aforeſaid. And the ſame Jurors being then and there aſked by the ſame Juſtices whether or no
" they were agreed of giving their Verdict touching the Matters within contained, ſaid that they
" were fully agreed thereof between them. And thereupon the ſame Jurors ſecretly ſaid upon
" their Oath, that the within named *John Edling* by his laſt Will and Teſtament in writing
" within written deviſed to the aforeſaid *Joan* the Tenements and Rent within ſpecified with the
" Appurtenances, by the Name of his Houſe with the Appurtenances to the ſame belonging for
" ever in the Town and Fields of *Arthingworth*, to have to her and to the Heirs of her Body
" lawfully begotten, as the aforeſaid *George* and *Joan* within have alledged. And then the ſame
" Jurors, for their Eaſe (as is the Cuſtom) to † eat and drink together, if they pleaſed, and to † That after a privy Verdict, and at their own Expences, the Jury may eat and drink, until, &c. See T. 2. H. 4. 22. a. M. Long. 5. Ed. 4. 61. b. Co. Litt. 227. b. Heath's Max. 230. Tri. per Pais 218.
" lie together until the Morrow aforeſaid, and then to give their Verdict aforeſaid openly before
" the aforeſaid Juſtices at *Northampton* aforeſaid, by the Command of the Juſtices aforeſaid de-
" parted together under the Cuſtody of the aforeſaid Bailiff unto the Place from whence they
" came. On which ſaid *ninth* Day of *July* before the aforeſaid Juſtices in the open Court afore-
" ſaid at the Caſtle aforeſaid came the aforeſaid *William Saunders* by his Attorney aforeſaid, and
" the Jurors of the Jury aforeſaid under the Cuſtody of the Bailiff aforeſaid being called to give
" their Verdict aforeſaid openly of and upon the Premiſſes came, whereupon the Verdict afore-
" ſaid in manner and Form aforeſaid given by the Jury aforeſaid before the aforeſaid Juſtices at
" the Inn aforeſaid, on the aforeſaid *eighth* Day of *July* in the Evening of the ſame Day, being by
" the Court then read and repeated, and the ſaid Jurors being thereupon aſked whether or no
" they would affirm the ſaid Verdict, the ſame Jurors, not denying that they had given the Ver-
" dict aforeſaid of and upon the Premiſſes on the Day then laſt paſt, but for certain Cauſes ſpe-
" cially moving them and their Conſciences holding the ſaid Verdict for nought, anſwered that
" they were now otherwiſe agreed together upon the Matter; and they ſay upon their Oath that
" the aforeſaid *John Edling* by his laſt Will and Teſtament aforeſaid in Writing did not deviſe to
" the aforeſaid *Joan* the Tenements and Rent within ſpecified with the Appurtenances, by the
" Name of his Houſe with the Appurtenances to the ſame belonging for ever in the Town and
" Fields of *Arthingworth*, to have to her and to the Heirs of her Body lawfully begotten, as the
" aforeſaid *William Saunders* within has alledged. And they pray that this their Verdict in Form
" aforeſaid given may be recorded by the Juſtices aforeſaid, &c." And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until, &c.

And upon this Matter, whether the firſt Verdict was good and the ſecond void, or the ſecond good and the firſt void, was argued this Term in the Common Bench by Serjeant *Harper* for the Defendants, and by Serjeant *Carus* for the Plaintiff. And the laſt Day of the Term the Juſtices ſhewed their Opinions ſeverally, but I was not preſent at either the one Argument or the other. And all the Juſtices (as I was credibly informed) unanimouſly agreed that the laſt Verdict ſhould ſtand, and that the firſt ſhould not be taken as a Verdict, for the Jury was charged openly in Court, and in Court their Verdict ought to be received, and that which they pronounce openly in Court ſhall be taken to be their Verdict. And altho' it is uſual to take the Verdict privily when the Jurors are agreed, yet the Law does not neceſſarily require this, but it is only out of Curteſy for the [a] Eaſe of the Jurors, and in ſuch Caſe what they then ſay ſhall not be looked upon as their Verdict, until it be openly pronounced in Court. And when they come into Court the Plaintiff ſhall be called, and may then be nonſuited: [b] But when they give a privy Verdict the Plaintiff is not demandable, nor can he be then nonſuited, and he may be nonſuited when the Verdict ought of Right to be given, *ergo* it is of Force when given in Court, and not elſewhere. [c] And even in Court if they pronounce a Verdict they may change it if they have miſtaken it, or if it was not full in Law, or for any other reaſonable Cauſe immediately perceived; for, it was ſaid, in the Lord Chief Juſtice *Mountague*'s Time one [d] *Archer* was arraigned in the King's Bench for Felony of the Death of a Man, and the Jury gave their Verdict, *not guilty*, and preſently after they ſaid they had miſtaken themſelves, and they ſaid he was guilty, and this laſt was received and entered as their Verdict. [e] And in 11. *H.* 4. in Conſpiracy againſt two the Inqueſt found one guilty

[a] Moor 33. Tri. per Pais 273.
[b] Ibid.
[c] Dy. 204. pl 3. Co. Litt. 227. b. 2 H. H. P. C. 299, 300. 5 Mod. 350. Tri. per Pais 274.
[d] 5 Mod. 350.
[e] M. 11. H. 4. 2. pl. 3. Fitz. Verdict 18. Bro. 12. Conſpiracy 13. Judges 3. Jurors 7. Vin. Abr. tit. Trial E. g. pl. 4.

† So in Dy. 204. pl. 3. to part the Jury gave a Verdict at the Bar for the Defendant, and being remanded to enquire of the reſt, they came again and changed that Verdict, (of their own accord without being put to it by the Judge) and with the reſt gave for the Plaintiff, which was received.

ty, and it was there ſaid that their Verdict was contrary in itſelf, for a Conſpiracy cannot be but between two at leaſt, and if the one is not guilty the other is not guilty; for which Reaſon they were ſent back, and afterwards they came again and ſaid that both were guilty, and this was received as their Verdict. So that upon Occaſion they may contradict † their firſt ſaying, and if they may vary from or contradict their firſt ſaying in open Court, *a fortiore* they may do it upon better Advice when their firſt Verdict was given out of Court, and they not diſcharged, for they were not out of the Cuſtody of the Bailiff, but always under his Cuſtody, as the Record ſhews. And altho' the *Poſtea* contains that they were ſent back to the Place from whence they came, to eat and drink together if they would, yet it was not found by the *Poſtea* that they did eat and drink indeed, and it ſhall not be taken that they did ſo, inaſmuch as it is not ſhewn by the Record, nor aver'd by the Party. Wherefore their open Verdict in Court was taken to be their Verdict by the Opinion of the whole Court. And ſo it was afterwards adjudged, as appears by the Record here.

The reſt of the Record. Judgment.

1 Judgments 239. there miſprinted (235). Hern's Plead. 638.

At which Day here came as well the aforeſaid *William Saunders* as the aforeſaid *George* and *Joan* by their Attornies aforeſaid. And thereupon the Premiſſes being ſeen, and by the Juſtices fully underſtood, it is conſidered that the aforeſaid *William Saunders* (if he will) may proſecute for having his Seizin of the Tenements and Rent aforeſaid with the Appurtenances, againſt the aforeſaid *George* and *Joan*, by Occaſion of the Claim and Plea aforeſaid forfeited: And alſo that the Fine aforeſaid (if he will) ſhall be engroſſed. And the aforeſaid *George* and *Joan* in Mercy, &c.

A Report of the Opinions of divers of the Judges and others learned in the Law hereunder named in a Caſe depending in the Court of the Dutchy of Lancaſter, *wherein many Things appear concerning the Eſtate and Degree of the ſaid Court, and of the Lands of the ſame* Dutchy, *as well as of the Perſon of the preſent Queen in Relation to the* Dutchy, *and of the Kings that have heretofore inherited the* Dutchy,

Mich. Term 4. Eliz. A Leaſe under the Dutchy Seal of Land parcel of the Dutchy made by King *Edward* 6. within Age, to commence after the End of a former Leaſe in *Eſſe*, is good, and not avoidable by reaſon of his Nonage. S. C. Dy. 209. pl. 22. 4 Inſt. 209, 210. Crompt. J. C. 134. b. Vin. Abr. tit. Prerogative M. b. 4. pl. 2.

ON the Morrow of the Term of *St. Michael*, viz. on the Eve of *St. Andrew* the Apoſtle, in the 4th Year of the Reign of Queen *Elizabeth*, *Dyer* Chief Juſtice of the Common Bench, *Saunders* Chief Baron of the Exchequer, *Raſtal* one of the Juſtices of the King's Bench, and alſo one of the Juſtices of Aſſize in the County Palatine of *Lancaſter*, *Anthony Brown* one of the Juſtices of the Common Bench, *Corbet* one of the Juſtices of the King's Bench, *Weſton* one of the Juſtices of the Common Bench, *Frevil* one of the Barons of the Exchequer, *Carus* Queen' Serjeant, *Puttrel* Serjeant who was the other Juſtice of Aſſize in the ſaid County Palatine of *Lancaſter*, *Gerard* the Queen's Attorney, *Ruſwel* the Queen's Sollicitor, *Carell* Apprentice Attorney of the *Dutchy*, and *Plowden* Apprentice who was one of the Counſel of the ſaid Court, by the Queen's Command aſſembled at *Serjeant's-Inn* in *Fleetſtreet*, to confer together in order to underſtand the Law in a certain Caſe which was depending in the ſaid Court between the Queen on the one Part, and divers of her Subjects ſeverally on the other Part, wherein the Queen required their Reſolution upon the Matter in Law. And the Caſe was delivered to them in Writing in this Manner. King *Henry* 8. being ſeized of certain Lands in right of his Dutchy of *Lancaſter*, made a Leaſe to W. C. by the Advice of the Counſel of the ſaid Dutchy, and under the Dutchy Seal, for the Term of 21 Years, and died, after whoſe Death King *Edward* 6. by like Advice made a Leaſe to R. W. of the ſame Lands for the Term of 21 Years, to commence immediately after the Expiration, Forfeiture, Surrender, or other Determination of the firſt Term, the ſame King *Edward* 6. then being within the Age of 21 Years. The Queſtion was, if the preſent Queen ſhall be bound by this Leaſe made by King *Edward* 6. or if ſhe ſhall avoid it by Reaſon of the Nonage of the ſaid King *Edward* 6. And this Caſe was argued in the Dutchy Chamber in the Time of Queen *Mary*, when Sir *Edward Walgrave* Knight was Chancellor of the Dutchy, on a Demurrer upon the Point between *John Scudamore* Plaintiff and Lady *Mary Morgan*, late Wife of Sir *Richard Morgan* Knight deceaſed, late Chief Juſtice of the Common Bench, Defendant, upon a Leaſe of Lands in the County of *Monmouth* parcel of the Dutchy: But it was not adjudged in the Time of Queen *Mary*. And the Judges and others abovenamed now conſidered firſt what the Common Law was in this Caſe, and then what was the Purport of the Statutes made concerning the Dutchy, all which they purſued.

And

And this the greateſt Part of them (as well as Sir *Robert Catline* Chief Juſtice of *England*, who was now ſick) had done twice before in *Michaelmas* Term in the *ſecond* and *third* Years of the preſent Queen, *viz.* once at the ſame *Serjeant's-Inn*, and the other Time at *Spooner's-Hall* in *Fleet-ſtreet*, being there aſſembled for the ſame Cauſe, at which Places they had debated the Matter at large, and by their ſeveral Arguments at *Spooner's-Hall* they had ſhewn their Opinions. And the greateſt Part of them then, and all of them now aſſembled, except *Ruſwel* (who had but little Time to conſider the Matter) unanimouſly agreed that the Queen ſhould not avoid the Leaſe made by King *Edward* her Brother, by reaſon of his nonage. For firſt of all they agreed, [a] that by the common Law no Act which the King does as King ſhall be defeated by his nonage. [b] For the King has in him two Bodies, *viz.* a Body natural, and a Body politic. His Body natural (if it be conſidered in itſelf) is a Body mortal, ſubject to all Infirmities that come by Nature or Accident, to the Imbecillity of Infancy or old Age, and to the like Defects that happen to the natural Bodies of other People. But his Body politic is a Body that cannot be ſeen or handled, conſiſting of Policy and Government, and conſtituted for the Direction of the People, and the Management of the public-weal, and this Body is utterly void of [c] Infancy, and old Age, and other natural Defects and Imbecillities which the Body natural is ſubject to, and for this Cauſe what the King does in his Body politic cannot be invalidated or fruſtrated by any Diſability in his natural Body. And therefore his Letters-patent which give Authority or Juriſdiction, or which give Lands or Tenements that he has as King, ſhall not be avoided by reaſon of his nonage. [d] And hereupon was alledged what *Thorp* ſaith in 26 *Aſſ.* that "the King's Gift ſhall not "be defeated by his nonage, and ſo have many Peers and Sages of the Realm ſaid." [e] And alſo it was ſaid, it appears in 6. *Ed.* 3. that the ſame King *Edward* 3. brought a Writ of Right of a Manor, as Heir to King *Richard*, and there it was pleaded that the King was within Age, Judgment if during his nonage he ſhould be received to this Writ, and the Exception was not allowed, for which reaſon the Tenant demanded the View and had it. By which Caſes it appears that the nonage which the King has in his natural Body ſhall not blemiſh or defeat the Acts or Suits which he does or purſues in his Body politic.

Further as to the Things which he has in his Body natural, they took the Law to be [f] that if the King has Land by Deſcent on the Part of his Mother or other Anceſtor, or which he (when King) purchaſed in Fee in the Capacity of his Body natural, or which he purchaſed before he was King, if he (being King) gives them to another during his nonage, ſuch Gift by the Courſe of the common Law ſhall never be defeated by reaſon of his nonage. For although he has or takes the Land in his natural Body, yet to this natural Body is conjoined his Body politic, which contains his royal Eſtate and Dignity, and the Body politic includes the Body natural, but the Body natural is the leſſer, and with this the Body politic is conſolidated. So that he has a Body natural adorned and inveſted with the Eſtate and Dignity royal, and he has not a Body natural diſtinct and divided by itſelf from the Office and Dignity royal, but a Body natural and a Body politic together indiviſible, and theſe two Bodies are incorporated in one Perſon, and make one Body and not divers, that is * the Body corporate in the Body natural, *et e contra* the Body natural in the Body corporate. So that the Body natural by the Conjunction of the Body politic to it (which Body politic contains the Office, Government, and Majeſty royal) is magnified, and by the ſaid Conſolidation hath in it the Body politic, for which reaſon the Acts which the King does touching the Things that he poſſeſſes or inherits in the Body natural require the ſame Circumſtance and Order as the Things which he poſſeſſes or inherits in the Body politic do; for the Thing poſſeſſed is not of ſuch Conſideration as to change the Nature of the King's Perſon, but the Perſon who poſſeſſes it changes the Courſe of the Thing poſſeſſed. [g] And therefore it was held, that if the King will part with Land in Fee which he has by Deſcent on the Part of his Mother, or by ſome other Anceſtor who was not King, this ſhall paſs by his Letters-patent only without other Matter, and without Livery of Seizin, for he cannot make Livery of Seizin in his Body natural diſtinct from the Body politic, becauſe they are one ſame Body and not divers. So that he cannot do it without doing it as King, and it would be inconvenient and beneath the Dignity royal for the Law to make the King give Livery in proper Perſon to a Subject. [h] And beſides Livery of Seizin is Matter of Fact, which the King cannot do, [i] for his Acts ought to paſs by Matter of Record, which is ſuitable to his Majeſty, and therefore the Land ſhall paſs by the King's Letters-patent only by the Courſe of the common Law. And ſo it has been the Practice with regard to the Lands which deſcended to the King from the Duke of *York*, the Earl of *March*, and others of the King's Anceſtors who never were Kings. [k] And alſo if a Man would give Land to the King and to his Heirs, which he would veſt in his Body natural, and not in his Body politic, the King cannot take this by Livery, but it ought to paſs to him by Deed enrolled or Matter of Record, *cauſâ qua ſupra*. [l] And if the Mother or other Anceſtor of the King makes a Leaſe for Life, rendering Rent, with Re-entry for Default of Payment, and dies, ſo that the Reverſion deſcends to the King, if the Rent be in Arrear, he ſhall re-enter without Demand, for he is not bound by Law to make Demand in his proper Perſon, *cauſâ qua ſupra*: [m] But the Breach of a Condition ought to be found by Office before the Entry of the King. [n] And ſo if the King aliens Land which he had by Deſcent from his Mother, he ſhall not defeat it by Reaſon that he was within Age at the Time of the Alienation; [o] for his Body politic which is annexed to his Body natural takes away the

[a] 8 H. 1. Ed. 6. Bro. Age 52, 78. Prerogative 132.. B. N. C. § 373. Kelw. 138. pl. 2. 5 Co. 27. a. 7 Co. 12. a *Calvin's* Caſe. Co. Litt. 43. a. Pref. to 2 Inſt. 1 Rol. Abr. 728. A. 1 Finch 57. 2 Finch 82. 3 Bac. Abr. 123, 305. Vin. Abr. tit. Enfant A. pl. 2. Poſt 364 (m).

[b] 7 Co. 10. a *Calvin's* Caſe. Poſt 234 (a).

[c] The King is always adjudged in Law of full Age, and Infancy ſhall not be preſumed in him, Crompt. J. C. 134. b. 1 Finch 57. Poſt 216 (c).

[d] 26 Aſſ. pl. 54. Fitz. Enfant 15. Bro. Age 34.

[e] M. 6. Ed. 3. 50. pl. 49. Fitz. Droit 24. Age 89. Bro. 34.

[f] S. P. Crompt. J. C. 134. b. 1 Finch 57. 2 Finch 82. Infra (n).

[g] Moor 149. S. P. 1 Keb. 643. 2 Finch 239.

[h] M. 38. H. 8. Bro. Patents 101.

[i] The King cannot take nor part with any Thing but by Matter of Record. M. 37. H. 6. 10. b. *Per Choke*. Dy. 74. pl. 17. 139. pl. 33. Puph. 26. 2 Co. 53. a. Dr. & Stud. lib. 1. cap. 8. fo. 31. 1 Finch 56, 161. 2 Finch 82, 83. Poſt 484, 553, 562. Cowel's Inſt. 116.

[k] Vide M. 37. H. 6. 10. b. *Per Choke*. T. 7. Ed. 4. 17. Fitz. Feoffments 21. H. 29. H. 8. Bro. Faits enrolle 16. Feoffments 69. B. N. C. § 110. 2 Rol. Abr. 204. Z. pl. 1. 2 Finch 232. Vin. Abr. tit. Prerogative Z. c. pl. 1. in margine. Poſt 242 (e).

[l] S. P. Poſt 243 (s). and ſee the Books there cited.

[m] 5 Co. 52. b. 9 Co. 95. b. Moor 293. 2 Leon. 124, 135. 1 Finch 162. 2 Finch 232. Poſt 229 (k).

[n] See ſupra (f).

[o] Co. Litt. 43. b. Moor 149, 150. T. Raym. 99. Poſt 238 (b).

the Imbecillity of his Body natural, and draws the Body natural, which is the leſſer, and all the Effects thereof to itſelf which is the greater, *quià magis dignum trahit ad ſe minus dignum.* And yet if Land deſcends to the King from his common Anceſtor, he ſhall have it by reaſon of his Body natural, for this Body is privy to the Deſcent, but the Body politic is not privy to this Deſcent. And if the ſecond Son of the King purchaſes Land, and aliens it within Age, and afterwards the King and his eldeſt Son die, ſo that the ſecond Son becomes King, he may enter for the Nonage which was in him before, *viz.* at the Time of the Alienation when he was not King, but yet he ought to have an Office before his Entry to find his Title, becauſe his Perſon which had a Right of Entry before has now the Eſtate royal united to it, which can do nothing without Record. But if he had been King at the Time of the Alienation, he ſhould never have avoided it by reaſon of his nonage, [a] for it would be repugnant to ſay that he is diſabled to make a Feoffment or Leaſe, who is admitted and received to govern the Realm and the People, and all the Buſineſs of the Realm. Then in the principal Caſe here King *Henry* 4. was Son and Heir to *John a Gaunt*, who was one of the Sons of King *Edward* 3. and alſo Son and Heir to *Blanch* Wife of the ſaid *John a Gaunt*, who was Daughter and Heir to *Henry* Duke of *Lancaſter*. So that the Dutchy of *Lancaſter* came to the ſaid King *Henry* 4. by Deſcent on the Part of his Mother, [b] and in this Caſe if he had not afterwards been King, his Poſſeſſions ſhould have paſſed by Livery and Seizin, and Attornment, *&c.* in the ſame Manner as the Poſſeſſions of other Subjects ought to paſs. [c] But after he had depoſed King *Richard* 2. and had aſſumed upon him the royal Eſtate, and ſo had conjoined to his natural Body the Body politic of King of this Realm, and was become King, then the Poſſeſſions of the Dutchy of *Lancaſter* were in him as King, and not as Duke, [d] for the Name of Duke being lower than the name of King was drowned by the Name of King, and by the Acceſſion of the Eſtate royal to him who was Duke, for the King could not be Duke in his own Realm, though he might out of it. And in like Manner the Name of the Dutchy, and all the Franchiſes, Liberties, and Juriſdictions thereof, whilſt they were in the Hands of him that had the Crown and Juriſdiction royal, were extinguiſhed by the common Law. [e] And after that the Poſſeſſion of the Dutchy of *Lancaſter* could not paſs from King *Henry* 4. by Livery of Seizin, but by his Letters-patent under the Great Seal of *England*, without any Livery of Seizin or Attornment, as the Poſſeſſions of the Dukedom of *York*, or the Earldom of *March*, or ſuch other Poſſeſſions, which have deſcended to the Kings of this Realm from other Anceſtors than Kings, have uſed to paſs heretofore from the Kings of this Realm, [f] and ſo they ſhould have paſſed until this Day by the common Law, if no Statute had been made to the contrary. And therefore his Grant or Alienation of the Lands Parcel of the Dutchy made during his nonage ſhould not be avoided by the common Law. And ſo they took the common Law to be in this Caſe. But in order to take away the common Law, and to have the Dutchy to be a Dutchy with Liberties to it, as it was before, and to alter the Order and Degree of the Lands of the Dutchy, the ſaid King *Henry* 4. made a Charter by Authority of Parliament, which is intitled *Carta Regis Henrici quarti de ſeparatione Ducatus Lancaſtriæ a Corona Auctoritate Parliamenti, anno Regni ſui primo*, Part whereof here follows.

[a] 3 Bac. Abr. 123, 305.

[b] Crompt. J. C. 134. b. 135. a.

[c] Crompt. J. C. 135. a. b.

[d] Litt. R. 201. Crompt. J. C. 35. a. Poſt. 217.

[e] Crompt. J. C. 135. b.

[f] Moor 149, *arguendo.*

Charter of *H.* 4. of Separation of the Lands and Poſſeſſions of the Dutchy of *Lancaſter* from the Crown. Vide 1 Keb. 643. T. Raym. 90. Lutw. 1235, 1236.

Henricus Dei gratia rex Angliæ et Franciæ, dominus Hiberniæ, omnibus ad quos præſentes literæ pervenerint ſalutem. Sciatis quod cum ducatus Lancaſtriæ, ac quam plura alia comitatus, honores, caſtra, maneria, feoda, poſſeſſiones, et dominia, infra regnum noſtrum Angliæ et Walliæ, et alibi, nobis tam per mortem celebris memoriæ Henrici nuper ducis Lancaſtriæ, avi noſtri, ac chariſſimi domini et Patris noſtri Johannis nuper ducis Lancaſtriæ, necnon chariſſimæ dominæ et matris noſtræ Blanciæ uxoris ejus, filiæ et hæredis prædicti Henrici, nobis jure hæreditario, antequam ad ſtatum et dignitatem regalem rerum dominus omnium ſua ineffabili clementia nos nuperrimè evocavit, deſcenderunt et acciderunt, in quibus quidem ducatu, comitatibus, honoribus, caſtris, maneriis, poſſeſſionibus, et dominiis diverſa libertates, jura regalia, conſuetudines et franchefiæ dictis progenitoribus et anteceſſoribus noſtris, quædam videlicet eis et hæredibus de corpore ſuo exeuntibus, et quædam ſibi et hæredibus maſculis de corporibus ſuis exeuntibus, ac quædam præfato domino et patri noſtro ad terminum vitæ ſuæ per diverſas chartas tàm domini Edwardi nuper regis Angliæ avi noſtri, quàm domini Richardi nuper regis Angliæ ſecundi poſt conqueſtum, ſunt et fuerunt conceſſa, prout in chartis prædictis apparet, quarum tenores ſequuntur in hæc verba. Edwardus Dei gratia, &c. Sciatis quod ſi nos debita conſideratione penſantes geſtus magnificos cunctorum qui nobis in guerris noſtris laudabiliter et ſtrenue ſervierunt, ipſos deſideremus honoribus attollere, et pro viribus juxta merita premiare, quanto magis filios noſtros, quos tàm ſapientia quàm in geſtu nobili alios præcellere conſpicimus, et qui nobis locum tenuerunt et tenere poterunt poſterum, nos convenit majoribus honoribus et gratiis prærogare? Conſiderantes itaque probitatem ſtrenuam et ſapientiam præcellentem chariſſimi filii noſtri Johannis regis Caſtellæ et Legionis, ducis Lancaſtriæ, qui laboribus et expenſis ſemper ſe nobis obſequioſum exhibuit, pro nobis pluries in neceſſitatibus intrepide ſe guerrarum diſcriminibus exponendo, et nullatenus eo præterito, ac conſiderantes eundem filium noſtrum aliquali commodo et honore ad præſens (licet non ad plenum prout digna merita expoſcunt) remunerare, ex certa ſcientia noſtra et læta corde, de aſſenſu Prælatorum et Procerum in inſtanti Parliamento noſtro apud Weſtmonaſterium convocatorum exiſtentium, conceſſimus pro nobis et hæredibus noſtris præfato filio noſtro, quòd ipſe ad totam vitam ſuam habeat infra comitatum Lancaſtriæ Cancellariam ſuam, ac brevia ſua ſub ſigillo ſuo pro officio Cancellarii deputando conſignanda, juſticiarios ſuos tàm ad

*ad placita coronæ, quàm ad quæcunque alia placita communem legem tangentia, tenenda, ac cognitiones eorundem, et quaſcunque executiones per brevia ſua et miniſtros ſuos ibidem faciendas. Et quæcunque alia libertates et jura regalia ad comitatum Palantium pertinentia adeo libere et integre ſicut comes Ceſtriæ infra eundem comitatum Ceſtriæ dignoſcitur obtinere, &c. Nos nolentes dictam hereditatem noſtram, aut libertates ejuſdem, occaſione inſtantis aſſumptionis regalis ſtatus, et dignitatis noſtræ, in aliquo mutari, transferri, diminui, ſeu derogari, ſed eandem hæreditatem noſtram cum juribus et libertatibus ſuis prædictis eiſdem modo et forma, conditione, et ſtatu, quibus nobis deſcenderunt et revenerunt, ac etiàm cum omnibus et ſingulis talibus libertatibus et franchesiis, ac aliis privilegiis, commoditatibus, et proficuis quibuſcunque, quibus prædictus dominus et pater noſter, dum vixit, eam ad terminum vitæ ſuæ ex conceſſione prædicti Richardi nuper regis habuit et tenuit, nobis et dictis hæredibus noſtris in dictis chartis ſpecificatis plenariè et integrè conſervari, continuari, et haberi volumus, ac tenore præſentium ex certa ſcientia noſtra, de aſſenſu præſentis parliamenti noſtri concedimus, declaramus, diſcernimus, et ordinamus pro nobis et hæredibus noſtris, quod tàm ducatus noſter Lancaſtriæ, quam univerſa et ſingula alia comitatus, honores, caſtra, maneria, feoda, advocationes, poſſeſſiones, annuitates, et dominia quæcunque, nobis ante adeptionem dignitatis noſtræ regia qualitercunque et ubicunque jure hæreditario, in dominico, ſervicio, vel in reverſione, ſeu alias qualitercunque diſcenſa, nobis et dictis hæredibus noſtris in chartis prædictis ſpecificatis in forma prædicta remaneant in perpetuum. * Et quod taliter, et tali modo, et per tales officiarios et miniſtros in omnibus remaneant, deducantur, gubernentur, et pertractentur, ſicut remanere, deduci, gubernari, et pertractari deberent, ſi ad culmen dignitatis regiæ aſſumpti minime fuiſſemus. Ac inſuper quod talia et hujuſmodi libertates, jura regalia, conſuetudines et franchesiæ in ducatu, comitatu, honoribus, caſtris, maneriis, feodis, et cæteris poſſeſſionibus, et in dominiis prædictis, in omnibus et per omnia in perpetuum habeantur, exerceantur, continuentur, fiant, et utentur, et per tales officiarios et miniſtros gubernentur et exequentur, quæ et qualia et per quales officiarios et miniſtros tàm tempore dicti domini et patris noſtri, quam temporibus aliorum progenitorum et anteceſſorum noſtrorum in dictis ducatu, comitatibus, honoribus, caſtris, maneriis, feodis, et aliis poſſeſſionibus, et dominiis prædictis, uti & haberi ac regi et gubernari conſueverunt virtute chartarum prædictarum. Volentes ulterius et concedentes, ac pro nobis et hæredibus noſtris prædictis ex certa ſcientia noſtra, et aſſenſu prædictis, plenariè declarantes, quòd univerſi et ſinguli tenentes de ducatu, comitatu, honoribus, maneriis feodis, et aliis poſſeſſionibas et dominiis prædictis, et hæredes ſui adeo liberi ſint, et in omnibus tales adeo liberæ et illeſæ conditiones, tàm ingreſſibus ſuis in hæreditates ſuas poſt mortem anteceſſorum ſuorum, quàm in tenuris ſuis, et aliis quibuſcunque, ſicut eſſe poſſent et deberent de conſuetudine vel de jure, ſi dicta dignitas noſtra regia nobis nuſquam accidiſſet, dicta aſſumptione noſtra dignitatis regiæ, aut quòd ducatus, comitatus, honores, caſtra, maneria, feoda, advocationes, poſſeſſiones, dominia, et libertates prædicta in manu noſtra jam exiſtunt, ſeu aliqua interruptione, ceſſatione, vel diſcontinuatione libertatum prædictarum, ſeu aliquibus aliis occaſionibus, cauſis, coloribus, vel impedimentis quibuſcunque (quæ in contrarium præſentis voluntatis, conceſſionis, et declarationis noſtræ rigorem ſeu effectum aliquem habere nolumus) in aliquo non obſtantibus.*

* See Moor 150. 1 Keb. 643.

By which Charter it is ordained that the Dutchy of *Lancaſter* and all the Poſſeſſions thereof ſhall not be altered or changed by Reaſon that King *Henry* 4. aſſumed the royal Eſtate upon him, but that they ſhall be preſerved and continued in the ſame Form, Condition, and Eſtate in which they deſcended and came to him, and ſhall remain to the ſame Heirs contained in the Charters beforementioned, and that they ſhall ſo, in ſuch Manner, and by ſuch Officers and Miniſters in all Points remain, be ordered, governed, and demeaned, as they ſhould have been if he had never been King. So that by theſe Words the Dutchy is a Dutchy with the like Franchiſes and Liberties as it was before, meerly disjoined from the Crown, and from the Miniſters and Officers of the Crown, and from the Receipt of the Revenues of the Crown, and from ſuch Order of Conveyance as the Law requires in the paſſing of the Poſſeſſions of Crown; for if the King would give any Lands Parcel of the Dutchy to another in Fee, or for Life, he ought to make Livery of Seizin, and alſo upon his Grants of the Reverſion there ought to be Attornment, in the ſame Manner as there ſhould have been before he was King. And this is by reaſon of theſe Words of the Charter, † *quod taliter et tali modo remaneant, deducantur, gubernantur, et pertractentur, ſicut remanere, deduci, gubernari, et pertractari deberent, ſi ad culmen dignitatis regiæ aſſumpti minimè fuiſſemus*, and alſo by reaſon of the other Words in the ſaid Charter. Which Separation, Diviſion, and Severance of the Dutchy from the Crown, and from the Receipt and Order of the Poſſeſſions of the Crown, ſeemed to the Judges and other the Counſellors abovementioned to be a politic Scheme of King *Henry* 4. who well knew that he had the Dutchy of *Lancaſter* upon a good and indefeaſible Title, and that his Title to the Crown was not ſo good, and therefore having ſome Diſtruſt that in Time to come the Crown might be taken from him or his Heirs, and being deſirous nevertheleſs that the Dutchy ſhould continue to him and his Heirs, and knowing at the ſame Time that if the Poſſeſſions of the Dutchy ſhould be mixed with the Poſſeſſions of the Crown, and not be notoriouſly cut and diſſevered from the Poſſeſſions of the Crown, it might be a Means of cauſing the Dutchy the ſooner to be taken away from him or his Heirs, or at leaſt he or his Heirs would receive no good by their being mixed with the Poſſeſſions of the Crown, if the Crown ſhould be taken from him or his Heirs, for theſe Reaſons he made the ſaid Charter by the Authority of Parliament, whereby the ſaid Separation is made as is ſhewn before. But notwithſtand-

† See Moor 150.

ing that the Poſſeſſions of the Dutchy ought to be demeaned and ordered and paſs as they ſhould before *Henry* 4. was King, by force of the Words of the ſaid Charter, yet there is no Clauſe in the Charter which makes the Perſon of the King that has the Dutchy to be in any other Degree than it was before; but for Things which concern his Perſon he ſhall be in the ſame Eſtate as he was before. So that if the Law before the Charter adjudged the Perſon of the King to be of full Age, having Regard to his Gifts as well of the Land which he inherits in his Body natural as of that which he inherits in Right of his Crown, ſo he ſhall be adjudged with regard to the Lands of the Dutchy ever ſince the Charter, for the Charter extends only to the Eſtate, Condition, and Order of the Lands of the Dutchy, but does not reach to the Perſon of the King who has the Lands, in Points touching his Perſon, nor does it diminiſh or alter the Preheminences which the Law gives or attributes to the Perſon of the King, but the ſame continue as well with regard to the Poſſeſſions of the Dutchy of *Lancaſter*, as the Lands which come to him from other Anceſtors. [a] And in Proof hereof was cited the Caſe in *Hill.* 10. *H.* 4. 7. which is as follows, *viz.* "King "*Henry* 4. brought a *Scire facias* againſt the Lord *Strange*, reciting that a Judgment given a- "gainſt *Thomas of Lancaſter* his Anceſtor, by which he was to forfeit his Land, was reverſed "for certain Errors at the Suit of *Henry of Lancaſter*, Brother and Heir of the ſaid *Thomas*, in a "Parliament holden in the firſt Year of the King his Grandfather, and the ſaid *Henry* was ad- "mitted to inherit to the ſaid *Thomas*; and he demanded to know if he could ſay any thing why "the Manor of *M.* (whereof the ſaid *Thomas* was ſeized at the Time of the Judgment given, and "whereof the Lord *Strange* is now ſeized) ſhould not be delivered to the King, as Couſin and Heir "of the ſaid *Thomas*, and the Record of the Reverſal was reſident of ancient Time in the King's "Bench. ¶ *Horton*, Judgment of the Writ, for the Writ ſaith, *quòd non omittas propter ali- "quam libertatem in Balliva tua*, which Words are uſed in Writs where the King demands as "King a Thing belonging to his Crown: But here he demands Execution by his Writ, as "Duke of *Lancaſter*, and not as King, ſo that theſe Words *(non omittas)* ſhall not be put in "the Writ, wherefore, *&c.* ¶ *Tirwith*, Although he demands the Manor as Parcel of the Dutchy "of *Lancaſter*, he is the ſame Perſon that is King, and he cannot ſue otherwiſe than as King. "¶ *Huls*, The King has ſuch a Prerogative, that no Officer ſhall [b] execute his Writ but his own, "and although there is a Franchiſe in the County, yet the Sheriff is the King's Officer, and ſhall "make Execution for the King within the Franchiſe and without, wherefore for the King the "Writ ought not to be otherwiſe. ¶ *Gaſcoign*, By Advice we award the Writ good." And this Caſe was cited by *Catline* Chief Juſtice of the King's Bench at the firſt Aſſembly abovementioned at the ſaid *Serjeant's-Inn* in the ſaid Term of *St. Michael* in the 2d & 3d Years of the Reign of the preſent Queen, and he had a Copy of the ſaid Writ of *Scire facias* written out of the ſaid Record remaining in the King's Bench, which he then ſhewed to the other Juſtices and Counſellors, and it was according as it is recited in the Caſe. Which Caſe being adjudged in Manner and Form aforeſaid, then and alſo now ſtrongly moved them to be and continue of Opinion according as it is ſaid above, *viz.* that the Prerogatives which the Law attributes to the Perſon of the King hold Place as well in relation to the Land of the Dutchy, as other Land which he has or holds in the Capacity of his Body natural; and by the ſame Reaſon the Prerogative which the Law attributes to the Perſon of the King touching his Age, *viz.* [c] that he ſhall always be judged of full Age, and never under Age, ſhall continue with relation to the Lands of the Dutchy ſince the ſaid Charter, as well as with relation to other Lands which he holds in his Body natural. [d] And to this Purpoſe the Lord *Dyer* now vouched a Record in *Eaſter* Term 3. *H.* 6. *Rot.* 112. which, he ſaid, he and the ſaid *Anthony Brown* read in the Treaſury the ſame Day, and the Record is to this Effect, *viz.* one *Henry Kniveton* brought a Writ of Treſpaſs againſt *Ralf Shirley* and four others for breaking his Cloſe at *Bradley* in the County of *Derby*, and ſpoiling and conſuming his Graſs and the Germins of his Wood with their Cattle, *&c.* and declared of a Treſpaſs on *Sunday* next after the Feaſt of *St. John Baptiſt*, in the *tenth* Year of the Reign of King *Henry* 5. and alledged Continuance until the *ſecond* Year of the Reign of King *Henry* 6. *Ralf Shirley* pleaded that the Place where, *&c.* was a great Waſt called *Bradley-Hey*, and that one *Joan*, who was Wife of Sir *John Baſſet*, Knight, was late ſeized of the Manor of *Brailsford* in her Demeſn as of Fee, and that ſhe and all her Anceſtors Lords of the ſame Manor, and all thoſe whoſe Eſtate ſhe had in the ſaid Manor, had Common of Paſture in the ſaid Waſt for all Cattle at all Times of the Year, as appendant to the ſaid Manor from Time beyond the Memory of Man, and for ſo long Time uſed to crop and lay Waſt with the ſaid Cattle the Germins of the Underwood growing in the ſaid Waſt. And he ſhewed that the ſaid *Joan* died, and that the Manor deſcended to one *Ralf* being within Age, and becauſe the Manor was held of the ſaid King as of his Dutchy of *Lancaſter* by Knight's-Service, the ſame King ſeized the ſaid Manor during the Nonage of the ſaid Heir, and committed it by his Letters-patent to a Huſband and Wife during the Nonage of the Heir, rendering 40 Marks Rent yearly, the Eſtate of which Huſband and Wife in one Meſſuage and one Yard-Land of the ſaid Manor the ſaid *Ralf Shirley* (the Defendant) at the Time of the Treſpaſs had, and now hath, and he prayed in Aid of the King, and had it by Award before Iſſue joined or Plea over. And afterwards the Plaintiff obtained a *Procedendo*

[a] H. 10. H. 4. 7. pl. 5. Moor 150, S. C. cited but there miſprinted (10 H. 7). Crompt. J. C. 135. a. Poſt 239.

[b] Poſt 243 (9).

[c] Ante 213 (c).

[d] See the Effect of this Caſe, viz. that Aid ſhall be had of the King before Iſſue joined, touching the Lands which he holds in right of his Dutchy of *Lancaſter*, Moor 150. T. Raym. 90. 1 Finch 309. 2 Finch 399.

a *Procedendo* with the following Words in it, viz. *dum tamen ad judicium inde reddendum nobis inconſultis nullatenus procedatis*; and there was the like Plea, Aid Prayer, and *Procedendo* by each of the other four Defendants. Which Caſe (it was ſaid) ſhews us what were the Opinions of the Judges in the time of King *Henry* 6. touching the Eſtate of the King's Perſon in relation to the Lands of the Dutchy, for if they had looked upon him, with regard to thoſe Lands, as Duke, and ſo as a common Perſon, and no higher, then ſhould not the Defendant have had Aid of him before Iſſue joined, any more than he ſhould have of another common Perſon, nor ſhould the Plaintiff have had a *Procedendo* with the ſaid Clauſe, viz. *dum tamen ad judicium inde reddendum nobis inconſultis nullatenus procedatis.* Wherefore notwithſtanding the Order limited by the Charter for the Lands of the Dutchy, viz. *quòd taliter et tali modo remaneant, deducantur, gubernentur, et pertractentur, ſicut remanere, deduci, gubernari, et pertractari deberent, ſi ad culmen dignitatis regiæ aſſumpti minime fuiſſemus*, and notwithſtanding that theſe Words have been ſo taken as to make the Dutchy Lands of the King paſs by other Order and Circumſtance than other Lands which he inherits in his Body natural, yet theſe Caſes argue and prove that the Perſon of the King, with regard to the Dutchy Lands, ſhall be uſed, demeaned, have his Prerogatives, and be in like Eſtate, as he ſhould have had or been if the Charter aforeſaid had not been made, altho the Eſtate and Nature of the Land is in another Degree. And the Prerogative which the Common Law gives to the Perſon of the King to be always of full Age, and never within Age, is as firmly annexed to him with Regard to the Dutchy Lands, as the Prerogative of *Non omittas*, or of not proceeding to Iſſue without Aid of him in the Caſe before recited, and Nonage is a Thing which touches the Perſon more than the Land, but the Land of the Dutchy, and the Things which concern it more than the Perſon, ſhall be demeaned and uſed as if a common Perſon had held them. And ſo is the Diverſity between the Eſtate and Degree of the Land of the Dutchy, and the Eſtate and Degree of the Perſon who inherits the Land of the Dutchy. And altho' the Charter and the Act make the King to have the Dutchy and all the Liberties, Privileges, and Juriſdictions thereof, as they were before in the Hands of the Duke, yet they don't make the King to be Duke of *Lancaſter*, for there is not a Word in them to any ſuch Purpoſe, nor can it be reaſonably ſuppoſed to be the Intent of the Charter or of the Makers of the Act to make him ſo, for the King cannot be Duke in his own Realm, tho' he may out of it, as it is ſaid before, * for his Name and Dignity of King merges and drowns the inferior Name and Dignity of Duke within his own Realm. And after the Charter if a Leaſe had been made of parcel of the Dutchy by the Name of *Henry* Duke of *Lancaſter*, without other Name, it had been void, for it ſhould have been in the Name of *Henry* 4. King of *England*. And for this Reaſon it is that in Leaſes which the Kings have made of the Poſſeſſions of the Dutchy they have uſed to call themſelves Kings, and not Dukes. And in Offices it is uſual to find that the Tenant held of the King *as of the Dutchy of Lancaſter*, and it is not well found that he held of the King *as Duke of Lancaſter*, for he is not Duke, but King. So that the Condition of his Perſon and his Prerogatives are not to be comprehended or meaſured by the Eſtate or Name of Duke, but according to the Eſtate and Name of King. And Infancy which is a great Diſability is repugnant to the Eſtate of a King, and altho' the natural Body of the King is ſubject to Infancy, † yet when the Body politic is conjoined with it, and one Body is made of them both, the whole Body ſhall have all the Properties, Qualities, and Degrees of the Body politic which is the greater and more worthy, and in which there is not nor can be any Infancy. So that neither the Common Law, nor the Charter (altho' it be by Authority of Parliament) gives Authority to the King or his Heirs to avoid by Reaſon of Nonage ſuch Leaſes as he makes during his Nonage. Wherefore it ſeemed to them that the whole Intent of King *Henry* 4. and of the Charter and Act was only to ſever the Lands, Poſſeſſions, Privileges, Juriſdictions, and Hereditaments of the Dutchy from the Hereditaments of the Crown, viz. in Survey, Order, Government, and Proceſs, but not in Perſon, ſo long as by the Grace of God the Crown and the Dutchy ſhould continue and abide together in the Blood of the Duke of *Lancaſter*, and of the ſaid *Blanch* Mother of the ſaid *Henry* 4. and that if the Crown ſhould afterwards by any Means be taken out of the Blood of the Duke of *Lancaſter*, that yet the ſaid Dutchy ſhould continue in the Blood of the ſaid Duke. So that the Intent of the Charter may be ſatisfied without derogating from the Perſon of the King, or deſtroying the Dignity or Preheminence which the Law attributes to it.

* Litt. R. 201. Crompt. J. C. 135. a. Ante 214 (d).

† Ante 213 (o).

Further they conſidered the following Part of the Statute entitled, *A Statute touching the Seal of the Dutchy of Lancaſter*, made in the Parliament holden the *ſixteenth* Day of *March* in the *third* Year of the Reign of King *Henry* 5. viz. the Commons of *England* aſſembled in that Parliament delivered a Petition in the ſame Parliament in the Form following, " May it pleaſe our Sovereign " Lord the King by the Aſſent of the Lords ſpiritual and temporal and of the Commons in this " preſent Parliament aſſembled, by Authority of the ſame Parliament, to accept, approve, ratify " and grant your Letters Patent, by you made and granted in your Parliament holden at *Weſt-* " *minſter* in the *ſecond* Year of your Reign, touching the Liberties, Cuſtoms, and Franchiſes to " be uſed and to continue within your Inheritances of your Dutchy of *Lancaſter*, and of the " Counties of *Hereford*, *Eſſex*, and *Northampton*, and other Things compriſed in the ſaid Letters,

Statute of 3. *H.* 5. concerning the Dutchy Seal.

" according to the Effect, Tenor, and Purport of the ſame Letters, in due Form adding and in-
" ſerting, by your Letters, amongſt other Affairs granted by you and your Heirs, with the Aſ-
" ſent of the ſaid Lords and Commons of this ſame Parliament, and by Authority of this Par-
" liament, for your great Profit touching your Inheritances aforeſaid, and for the better Govern-
" ment thereof, and in Preſervation and Suſtentation of the aforeſaid Liberties, Cuſtoms, and
" Franchiſes, the Clauſes and Words here following, &c." *Moreover we are willing by the Aſſent of the Lords Spiritual and Temporal, and of the Commons of this Realm of* England *in our preſent Parliament aſſembled, and by Authority of the ſame Parliament do grant and declare for us and our Heirs, that no Gifts, Grants, Pardons, Remiſſions, or Releaſes which concern or in any Caſe ariſe, or by any Sort of Colour may concern or for the future happen or ariſe touching our ſaid Inheritances, or any parcel thereof, or the Honours, Caſtles, Manors, Lands, Tenements, Rents, Fees, Advowſons, Liberties, and Franchiſes to our ſame Inheritances or any parcel thereof in anywiſe belonging, or touching the Wards, Wardſhips, Marriages, Reliefs, Iſſues, Fines, Amercements, Profits, and Commodities, or the Officers and Miniſters of us our Heirs and Aſſigns, of the Inheritances aforeſaid, whether the ſaid Honours, Caſtles, Manors, Lands, Tenements, Rents, Fees, Advowſons, Liberties and Franchiſes be in the Hands of us, or our ſaid Heirs or Aſſigns, or in the Hands of others whomſoever by Grant or Feoffment of us, or of our ſame Heirs or Aſſigns thereof made or to be made for Term of Life, or Years, or in Fee, or any otherwiſe whatſoever, to the Uſe of us or our Heirs or Aſſigns, ſhall for the future be made under any other Seal of us our Heirs or Aſſigns aforeſaid great or ſmall, ordained or to be ordained, but only under our Seal for the Dutchy aforeſaid, as is aforeſaid, and if any ſhall happen in any wiſe to come under any other Seal for the future, they ſhall not be valid or effectual by any Means, but ſhall be judged and deemed vain, nul, and void for ever.* Which Petition being read openly in the ſaid Parliament, and well underſtood, was anſwered in the Manner following, " The King, by " the Aſſent of the Lords Spiritual and Temporal being in this Parliament, and at the Requeſt " of the Commons aforeſaid, wills that the ſame be done in all Points." Which Act making all Charters of any of the Poſſeſſions of the Dutchy ſealed with any other than the Dutchy Seal to be void, declares the Intent of the ſaid King *Henry* 5. to be, that the ſaid Dutchy and all the Poſſeſſions thereof ſhould be diſtinct, ſeparate, and ſo openly known and uſed, from the Poſſeſſions of the Crown. Which ſeemed to be done by the ſaid King *Henry* 5. being lineal Heir to the Dutchy of *Lancaſter*, with the ſame politic Deſign before mentioned. But yet there is nothing in it that touches the Perſon of the King, ſo that the Prerogatives concerning his Nonage and other Points of his Perſon remain as they were before the making of that Statute; and the ſaid Caſe in 3. *H.* 6. being adjudged as it is before recited, and being after this Statute, declares that the Prerogatives of his Perſon continue in him with regard to the Dutchy Lands after this Statute.

Statute of 1 *Ed.* 4. of Confiſcation for ever of the Dutchy of *Lancaſter* to the Crown. Vide B. N. C. § 373. Lutw. 1236.

Further they conſidered the following Part of the Statute made the *fourth* Day of *November* in the *firſt* Year of the Reign of King *Edward* 4. entitled *An Act of incorporating and alſo of confiſcating, amongſt other Things, the Dutchy of* Lancaſter *to the Crown of* England *for ever*, that is to ſay, *It is declared and adjudged by the Aſſent and Advice of the Lords Spiritual and Temporal, and of the Commons being in this preſent Parliament, and by the Authority of the ſame, that the ſame* Henry *late called King* Henry *the ſixth, for the Conſiderations of the great, heinous, and deteſtable Matters and Offences before ſpecified by him committed againſt his Faith and Ligeance to our ſaid Liege Lord King* Edward *the fourth, his true, righteous, and natural Liege Lord, offended and hurt unjuſtly and unlawfully the Royal Majeſty of our ſaid Sovereign Lord, ſtand by the ſaid Advice and Aſſent convicted and attainted of High Treaſon. And that it be ordained and eſtabliſhed by the ſame Advice, Aſſent, and Authority, that he the ſame* Henry *forfeit unto the ſame our Liege Lord* Edward *the fourth, and to his Heirs, and to the ſaid Crown of* England, *all Caſtles, Manors, Lordſhips, Towns, Townſhips, Honours, Lands, Tenements, Rents, Services, Fee-Farms, Knight's-Fees, Advowſons, Hereditaments, and Poſſeſſions with their Appurtenances, which he or any other to his Uſe had the third Day of* March *laſt paſt, being of the Dutchy of* Lancaſter, *or that were any parcel or Member of the ſame Dutchy, or thereunto annexed or united in the firſt Year of the Reign of* Henry *late called King* Henry *the fifth, or at any Time ſince. And that it be ordained and eſtabliſhed by the ſame Advice, Aſſent, and Authority, that the ſame Manors, Caſtles, Lordſhips, Honours, Towns, Townſhips, Lands, Tenements, Rents, Services, Fee-Farms, Knight's-Fees, Advowſons, Hereditaments, and Poſſeſſions with their Appurtenances in* England, Wales *and* Calais, *and the Marches thereof, make, and from the ſaid third Day of* March *be to the ſaid Dutchy of* Lancaſter *corporate, and be called the Dutchy of* Lancaſter. *And that our ſaid Sovereign Lord King* Edward *the fourth have, ſeize, take, hold, enjoy, and inherit all the ſaid Manors and Caſtles, and other the Premiſſes with their Appurtenances, by the ſame Name of Dutchy from all other his Inheritances ſeparate, from the ſaid fourth Day of* March, *to him and to his Heirs Kings of* England *perpetually, and that the County of* Lancaſter *be a County Palatine: And that our Liege and Sovereign Lord King* Edward *the fourth and his Heirs have, as parcel of the ſaid Dutchy, the ſame County of* Lancaſter *and County Palatine, and a Seal, Chancellor, Judges, and Officers for the ſame; and all Manner of Liberties, Cuſtoms, Laws Royal, and Franchiſes in the ſame County Palatine lawfully and rightfully uſed, and over that, another Seal called the Seal of the Dutchy of* Lancaſter, *and a Chancellor for the keeping thereof, Officers and Counſellors for the guiding and Go-*

vernance of the ſame Dutchy, and of the particular Officers, Miniſters, Tenants and Inhabitants thereof, in as great, ample, and large Form as Henry, *calling himſelf* Henry *the fifth, at any Time therein had, uſed, and enjoyed lawfully. And by the ſame Authority the ſaid Officers and Miniſters, and alſo the ſaid Tenants and Inhabitants of and in the ſame Dutchy have, uſe, exerciſe and enjoy ſuch and all Liberties, Privileges and Cuſtoms, as the Officers, Miniſters, Tenants and Inhabitants of the ſame Dutchy had, uſed, exerciſed or enjoyed lawfully in the Time of the ſame* Henry, *calling himſelf King* Henry *the fifth; and that alſo in the ſame Dutchy be uſed, had, and occupied all ſuch Freedoms, Liberties, Franchiſes, Privileges, Cuſtoms and Juriſdictions, as were uſed therein lawfully before the ſaid fourth Day of* March. *And the Officers, Miniſters, Tenants, and Inhabitants of or in the ſaid Dutchy be entreated and demeaned according to the ſame Freedoms, Liberties, Franchiſes, Cuſtoms, Privileges and Juriſdictions, and not diſtrained, arcted, nor compelled to the contrary in anywiſe.*

From which Acts the ſaid Juſtices and Counſellors inferred, that if before the making of this Act the Nonage of the King had been any Cauſe to avoid Gifts or Leaſes made by him within Age of the Lands of the Dutchy, that yet by this Statute it is made clear that his Nonage is no Cauſe after the Act to avoid them, for by this Act the Dutchy is annexed to the Crown. And it is to be obſerved that King *Edward* took himſelf to be lawful Inheritor of the Crown of *England*, and that the Houſe of *Lancaſter* had unlawfully uſurped upon him and his Anceſtors. And as the Houſe of *Lancaſter*, doubting their Title to the Crown, intended to preſerve their Inheritance of the Dutchy of *Lancaſter*, in which they had no Manner of Doubt whilſt it was disjoined from the Crown, ſo on the contrary King *Edward* 4. knowing his Title to the Crown to be undoubted, intended to extirpate the Houſe of *Lancaſter*, and to unite to the Crown their Inheritance, in which he had no Title but in right of the Crown, viz. for Treaſon committed againſt it, and to veſt the Dutchy and all the Poſſeſſions thereof in the Body politic of the King. And to this Purpoſe are the Words of the ſaid laſt Act, viz. *that King* Edward 4. *ſhall have, ſeize, take, hold, enjoy, and inherit all the ſaid Manors, &c. from the fourth Day of* March, *to him and to his Heirs Kings of* England *perpetually.* So that the ſaid Inheritance of the Dutchy is placed and ſettled only in the Body politic of the King, in which Perſon there is no Nonage or other Imbecillity to which the Body natural is ſubject. And by theſe Words as well as by the other Words in the Act, by which it is ordained *that the ſaid King* Henry 6. *ſhall forfeit to King* Edward 4. *and to his Heirs, and to the Crown of* England, *the Hereditaments of the Dutchy*, the County Palatine of *Lancaſter*, and the Court of the Dutchy, and the Liberties and Franchiſes thereof ſhould have been utterly diſſolved and extinguiſhed in the Crown, if there had been no other Proviſion made in the Act; [a] for the Crown which receives any Hereditaments by Eſcheat (as it did theſe here) merges all Juriſdictions, Franchiſes, and Liberties had and uſed in them, which were before derived from the Crown, for the greater extinguiſhes the leſſer. So that the Act having Relation to the *fourth* Day of *March* laſt paſt, (on which Day King *Edward* 4. begun his Reign) would have extinguiſhed the ſaid County Palatine, and the ſaid Court, and the Liberties thereof from the ſaid *fourth* Day of *March* thenceforwards for ever, if it had ſtopped there without making any other Proviſion; but to raiſe it up again it was neceſſary to have a new Erection or a Saving by Words proper for it. And therefore King *Edward* 4. being deſirous that the Dutchy and all that belonged to it ſhould be as it was before, as to the Order and Direction of it, he made a new Eſtabliſhment thereupon by the Act, whereby it is ordained and eſtabliſhed, *that the ſame Manors, Caſtles, &c. ſhould make, and from the third Day of* March *be the ſaid Dutchy of* Lancaſter *incorporate, and be called the Dutchy of* Lancaſter, *and that the County of* Lancaſter *ſhould be a County Palatine, and that the King ſhould have, as parcel of the Dutchy, the ſame County Palatine, and a Seal, Chancellor, Judges, and Officers there*, and the Liberties and other Things as in the ſaid Act is before recited. So that this laſt Act has eſtabliſhed or confirmed the County Palatine from the *third* Day of *March* laſt before the Act, and that the ſame King *Edward* ſhould have the Hereditaments thereof, by the Name of the Dutchy, from the *fourth* Day of *March* to him and to his Heirs Kings of *England* for ever. Yet it ſhews how he ſhall have them, viz. *from all other his Inheritances ſeparate*; and how ſeparate? not from the Perſon of the King, as King, but from the Order of the other Poſſeſſions of the King, as to paſs by another Seal than a Leaſe of the Poſſeſſions of the Crown is uſed to do, and by other Means than Poſſeſſions of the Crown ſhall paſs by, viz. by Livery of Seizin and by Attornment, and by other Officers than the Officers of the Poſſeſſions of the Crown, and by ſuch other Rules and Methods uſed before. And to prove that the Dutchy is ſeparated from the other Poſſeſſions of the Crown in the Method of Conveyance, ſince this Act, as it was before the Act, the Caſe in *M.* 21. *Ed.* 4. was alledged at *Spooners*, which is, that in the Exchequer Chamber it was held by all the Juſtices, [b] that if the King makes a Feoffment of the Lands which he has in right of his Dutchy of *Lancaſter* in Fee, or for Term of Life, it is neceſſary to have Livery of Seizin as well as if the Feoffment be made by a common Perſon, unleſs it be of Lands within the County Palatine, which ſhall paſs by the Letters-Patent of the Dutchy without Livery; and the ſaid Queſtion was there demanded by the Attorney of the Dutchy. So that the Word *(ſeparate)* may and ought to be taken ſeparate in reſpect of Order, but not ſeparate from the Perſon of the King, as King. Wherefore the ſaid Statute of

[a] Dy. 41. pl. 32. Kelw. 147. b *per Aldenh.* 9 Co. 25. b. Cro. E. 592. 1 Finch. 126. 2 Finch 164.

[b] M. 21 Ed. 4. 60. pl. 17. Bro. Feoffments 51. Prerogative 72. Moor 153. 1 Keb. 643. 4 Inſt. 2-6. Lutw. 1236. Crompt. J. C. 135. a. See 1 Lev. 28, 29 *Carpenter v Marſhall.*

of King *Edward* 4. ordains three Things, firſt, it eſtabliſhes the County Palatine of *Lancaſter*; ſecondly, it veſts it in the Body politic of the King of this Realm and his Heirs; thirdly, it divides it from the Order of the other Poſſeſſions of the Crown. And in this Form the ſaid Dutchy continued until the Time of King *Henry* 7.

Statute of 1. *H.* 7.

Vide B.N. C. § 373.

And further they conſidered the following Part of the Statute made in the *firſt* Year of King *Henry* 7. entitled, *A Repeal of a Feoffment made by King* Edward 4. *of certain Lands and Tenements of the Dutchy of* Lancaſter *by Authority of Parliament, for the Performance of his laſt Will in the* 12*th Year of his Reign*, which was as follows, *Where in the Parliament begun and holden at* Weſtminſter *the ſixth Day of* October *in the* 12*th Year of the Reign of* Edward *late King of* England *the fourth, and by divers Prorogations unto the* 23*d Day of* February *the* 14*th Year of his Reign continued, and then there holden, for certain Conſiderations by the Advice of the Lords Spiritual and Temporal, and the Commons in that preſent Parliament aſſembled, and by the Authority of the ſame would, ordained, and enacted, that* Thomas Cardinal *Archbiſhop of* Canterbury, *and divers others there named, from the ſaid* 23*d Day ſhould, have, hold, enjoy, and poſſeſs the Honour, Caſtle, Lordſhip, and Manor of* Tutbury *with the Members and Appurtenances, and all Manors, Lordſhips, &c. Be it enacted, ordained and eſtabliſhed by the Advice and Aſſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, that the ſaid Act and every Thing therein contained be from the* 21*ſt Day of* Auguſt *laſt paſt void, repealed, annulled, and of none Effect. And over that, by the ſame Authority, the King our Sovereign Lord ſhall have, hold, enjoy and poſſeſs, from the ſaid* 21*ſt Day of* Auguſt *to him and to his Heirs for ever, all the Honours, Caſtles, Lordſhips, Manors, Lands, Tenements, Rents, Reverſions, Services, Poſſeſſions, and other Hereditaments with their Appurtenances in the ſaid Act contained, and the County Palatine of* Lancaſter, *and all Honours, Caſtles, Lordſhips, Manors, Lands, Tenements, Rents, Reverſions, Services, Poſſeſſions, and other Hereditaments with their Appurtenances, that were parcel of the ſaid Dutchy of* Lancaſter, *in the Hands or Poſſeſſion of the ſaid* Edward *late King of* England *the fourth Day of* March *the firſt Year of his Reign, or any Time after, or in the Hands or Poſſeſſion of* Richard *the third, late in deed and not in right King of* England, *any Time during his Reign, with all Liberties, Freedoms, Franchiſes, and other Things as well to the ſaid County Palatine, as to any other the Premiſſes appertaining or belonging; and to be governed by like Officers, and uſe like Seals, as for Time paſt have been uſed and accuſtomed, in as ample and large Manner, and in like Manner, Form and Condition ſeparate from the Crown of* England, *and the Poſſeſſions of the ſame, as* Henry 4. Henry 5. Henry 6. *the King's noble Progenitors, late Kings of this Realm, or the ſaid* Edward *late King had and held, or any of the ſaid Kings had and held, any Act or Statute before this made in anywiſe notwithſtanding, &c.*

And it was argued at *Spooners* by ſome, that by this Act the Dutchy is deveſted out of the Body politic of the King, in which Capacity it was veſted by the Act of *Edward* 4. and that it is become veſted in the natural Body of King *Henry* 7. For the Words are, *that the King our Sovereign Lord ſhall have, hold, enjoy, and poſſeſs from the ſaid* 21*ſt Day of* Auguſt *to him and to his Heirs for ever, all the Honours, Caſtles, &c. in the County Palatine of* Lancaſter, *&c.* and alſo they referred to this Clauſe the Words after, viz. *in as ample and large Manner, and in like Manner, Form, and Condition ſeparate from the Crown of* England, *and from the Poſſeſſions of the ſame, as H.* 4. *H.* 5. *H.* 6. *or King* Edward *had and held, or any of them had and held,* for the ſaid Words, *in as ample and large Manner, and in like Manner, Form, &c.* cannot be referred to the Clauſe before, viz. *to be governed, &c.* for that Clauſe ends at the Word *accuſtomed*, viz. *to be governed by like Officers, and uſe like Seals, as in Time paſt have been uſed and accuſtomed*; ſo that this Clauſe ends here. And alſo they took it that the Word *ſeparate* would not ſuffer this Clauſe to be referred to the Clauſe, *to be governed*; for then it ſhall be put adverbially, that is, ſeparately. And if the Words, *in as ample and large Manner, and in like Manner, Form and Condition*, be referred to the Words, *the King ſhall have, hold, enjoy and poſſeſs, &c.* as they ſaid they ought to be, then King *H.* 7. ſhall receive the Poſſeſſions in his Body natural, and not in his Body politic, as King. But if the Words had been to him and to his Heirs Kings of *England*, as the Words of the Act of King *Edward* 4. were, then *H.* 7. ſhould have taken them in his Body politic, as King *Edward* 4. took them. And the Words *in like Manner, Form, and Condition ſeparate from the Crown, as any of the Kings H.* 4. *H.* 5. *H.* 6. *or Edw.* 4. *held*, being referred thereto, do enforce the Conſtruction that he received them in his Body natural, for if King *H.* 7. ſhall have them in like Manner, Form, and Condition as *any* of the ſaid Kings held them, then ſhall he have them in his Body natural, for each of the three firſt Kings ſo held them, tho' King *Edward* 4. held them in his Body politic, but inaſmuch as the County Palatine is given to *H.* 7. in as large and ample Manner, and in like Manner, Form and Condition ſeparate from the Crown, as *any* of the four Kings held it, and three of them held it more largely ſeparated from the Crown than the fourth did, (for they three held it in their Body natural ſeparate from the Crown, and the fourth in his Body politic in right of the Crown, and ſeparated in the Order and Government of the Crown, and not otherwiſe) then King *H.* 7. ſhall take it according to the moſt ample and large Separation from the Crown that might be, and that is, in his Body natural. And this alſo ſeemed to them to be the Intent of the Act, for King *H.* 7. was deſcended from the Houſe of

Lancaſter, and favoured that Party, and therefore it is moſt probable that he intended to have the Dutchy in the like Form as the Houſe of *Lancaſter* held it, which was in the Body natural, and this the rather, becauſe his Wife pretended an Intereſt in the Body politic along with him; and this Act repealed the other Act of *Edward* 4. in this Point, for it has in it theſe Words, *viz. any Act before made notwithſtanding*. And for theſe Cauſes it ſeemed to ſome that the Dutchy was veſted in the natural Body of King *Henry* 7. and in like Manner in the Body of King *Edward* 6. and then with regard to the Nonage, that it reſts only upon the common Law, without any Enforcement by the Statute of *Edw.* 4. or any other Statute.

On the contrary it was argued at *Spooner*'s by others, that it is enforced by the ſaid Statute of *Edw.* 4. and that the Dutchy was not veſted in the natural Body of King *Henry* 7. but in his Body politic, for the Dutchy was veſted in King *Edward* 4. in his Body politic, and when King *Henry* 7. took upon him the Government of the Realm, whereby he had in him the Body politic of King of this Realm, in that Body he received and held the Dutchy before the ſaid Act in the firſt Year of his Reign was made; and although the ſaid Act ſays that King *Henry* 7. ſhall have it to him and to his Heirs from the 21ſt Day of *Auguſt*, this may be intended his Heirs that ſhould have inherited it if the Act had not been made, and that is, the Heirs to the Body politic; ſo that the Act is as a Confirmation of it to that Body which then held it. And if the Words *(in as ample and large Manner, Form, and Condition, &c.)* be referred to the Clauſe *(the King ſhall have, hold, enjoy, and poſſeſs, &c.)* they will enforce this Opinion; for if King *Henry* 7. ſhould have it in as large and ample Manner, and in like Manner as the four Kings or any of them held it, and three of them held it in their Body natural, which is not ſo ample and large as the other, and the fourth held it in his Body politic, which is more ample and large than the Body natural, then King *Henry* 7. ſhould have it in his Body politic, becauſe that is the more ample and large Manner; for both the Sentences are joined together by a Copulative, ſo that it ought to be *in as ample and large Manner*, and alſo *in like Manner, Form, and Condition, &c.* and ſo the firſt Part, *viz.* concerning the Ampleneſs and Largeneſs, ought to be ſatisfied as well as the ſecond Part, *viz.* the Likeneſs of the Manner, Form, and Condition. And the Word *(ſeparate)* may be fulfilled by ſuch a Separation from the Poſſeſſions of the Crown as relates only to the Order, Direction, and Method of Conveyance, as it is ſhewn before in the Expoſition of the Act of *Edw.* 4. And the Clauſe of *(in as ample and large Manner, and in like Manner, &c. ſeparate from the Crown, &c.)* may belong to the Clauſe *(to be governed, &c.)* and ſo it agrees with the Letter. And therefore the Leaſes are good, the rather by reaſon of the ſaid Statute of *Ed.* 4. and *H.* 7. and are not avoidable for the Nonage of the ſaid King *Edward* 6. And ſome held that the Opinion of the Serjeants in * 15. *H.* 7. is not Law, where it is reported to be held by them, that if a Man juſtifies in Treſpaſs as Bailiff of the King by Reaſon of his Manor which he has as of his Dutchy of *Lancaſter*, the Defendant ſhall not have Aid before Iſſue joined. And they alſo held, that if it was the Intent of the ſaid Act of *Henry* 7. to have the Poſſeſſions of the Dutchy ſeparated from the Poſſeſſions of the Crown as well in the Inheritance as in the Order and Government of the ſame Inheritance, (as it ſeemed to them it was not, and the more ſo from the Title of the ſame Act, which is, *a Repeal of a Feoffment, &c. ut ſupra)* yet there is not any Word in the ſame Act that requires the Dutchy to be ſeparated from the Perſon of the King, or the Perſon of the King to be ſeparated from the Poſſeſſions of the Dutchy, nor is there any Word that tends to make the King Duke of *Lancaſter*, or to make him Duke of *Lancaſter* with regard to the Poſſeſſions of the Dutchy, or to alter the Quality of the Perſon of King *Henry* 7. but only that the King ſhall have to him and to his Heirs the ſaid Dutchy ſeparate from the other Poſſeſſions, in which Caſe the Dutchy is at leaſt joined to the Perſon of King *Henry* 7. and to his Heirs, and the Perſon of the King remains as it was before, for nothing is ſaid as to the Quality of the Perſon of the King in this Act, or in the other Acts before made in the Time of *H.* 4. or *H.* 5. nor as to the Alteration of his Name, but he continues as before. And the Perſon of the King ſhall not be invalidated by the Dutchy's being given to him and to his Heirs by the ſaid Act, and his Perſon remains always of full Age as well with regard to Gifts and Grants of Lands made by him, as in the Adminiſtration of Juſtice. And to theſe laſt Reaſons the others agreed, although they did not agree to this Expoſition of the Act of *Henry* 7. *viz.* that the Dutchy remains not ſeparated in Inheritance and in Right from the Crown, and that it is not deveſted out of the Body politic of the King, in which Capacity only it was, and veſted in the Body natural of King *Henry* 7. But that wherein they all agreed proves that the Leaſes are not voidable by reaſon of the Nonage of King *Edward* 6. And therefore all the Juſtices, Serjeants, and Counſellors aſſembled on the Eve of *St. Andrew* (as it is ſhewn before) except *Ruſwel*, agreed unanimouſly, † that the ſaid Leaſes made of the Lands Parcel of the Dutchy (whether the Lands lie out of the County Palatine of *Lancaſter*, or within it) were not voidable for the Nonage of the ſaid King; and that the Law is all one where the Leaſe is made of Lands of the Dutchy which are not in Leaſe, to commence preſently, and where to commence after the End of another Leaſe before made, and that neither the one nor the other is voidable for the Nonage of the ſaid King. And the *Proviſo* contained in the Statute of 7. *Edw.* 6. *cap.* 3. hath not changed the Law, wherein it is provided, that the Act then made for Confirmation of the Letters-patent of the ſaid King *Edward* 6. ſhall not extend to make good any Leaſe made in Reverſion of any Lands or Tenements Parcel of the Dutchy of *Lancaſter*; for (it was ſaid at *Spooner*'s) this *Proviſo* does nothing but only puts the Matter at large as it was before.

* T. 15. H. 7. 17. a. Bro. Aid de Roy 51.

† See the Books cited Ante 212 at the Head of the Caſe.

And the next Day, being the Feaſt of *St. Andrew* the Apoſtle, the Juſtices went to *Catline* Chief Juſtice of *England*, who was ſick at his Houſe, to have his Opinion in the Caſe, (for ſo they had agreed to do at their ſaid Aſſembly), and he agreed in Opinion with them, that the Leaſes of King *Edward* 6. were not voidable by reaſon of his Nonage. And afterwards on *Monday*, being the Morrow of *St. Andrew* the Apoſtle, all the ſaid Juſtices, Serjeants, and Counſellors, *viz. Dyer*, *Saunders*, *Raſtal*, *Anthony Brown*, *Corbet*, *Weſton*, *Frevil*, *Carus*, *Puttrel*, *Gerard*, *Ruſwel*, *Carell*, and *Plowden*, at a Time appointed for the ſame, went to *York-place*, to report their Reſolution to Sir *Nicholas Bacon* Knight, Keeper of the Great Seal, (to whom they were referred to report it) and to Sir *Ambroſe Cave* Knight, Chancellor of the ſaid Dutchy, to the Intent that the ſaid Sir *Nicholas Bacon* might report it over to the Queen, according as her Majeſty had given Orders. And there the Lord *Dyer*, in the Preſence of all the reſt, ſhewed their ſaid Reſolution, and briefly declared the Cauſe thereof, and ſaid that all the reſt there preſent, except *Ruſwel*, were unanimouſly of the ſame Opinion, which they all affirmed, and upon this Anſwer given they departed.

Nota bene by the Reporter.

And note, in the ſaid Caſe in the Dutchy upon Demurrer between Scudamore *and Lady* Morgan, *it was argued that the Act of* 1. Edw. 6. cap. 8. *for Confirmation of Letters-patent does not enforce the ſaid Leaſes, for that Act makes all Leaſes and Grants good, notwithſtanding the Cauſes and Matters mentioned in the Act, or to which the Act has relation, and the Nonage of the King is not any of them. And alſo it was then argued, that the ſaid Act of* 7. Edw. 6. cap. 3. *whereby it is enacted,* that all Letters-patent ſealed with the Great Seal of the Dutchy of *Lancaſter* ſhall be good, perfect, and available in Law to all Intents and Purpoſes, the Nonage of the ſame King *Edward* 6. as Duke of *Lancaſter* (although as King he is always of full Age) to the contrary notwithſtanding, *does not enforce the Leaſe of King* Edward 6. *for, it was ſaid, the Preamble of the Branch and the Circumſtance of the Act ſhew that it extends to Letters-patent of Inheritances only; and, it was ſaid, that for Patents of Inheritance it was put in for the Suerty of the Patentees, becauſe of the Doubtfulneſs of the Law, and the Words don't preciſely affirm that he ſhall be accounted within Age with regard to the Dutchy Land. And then the Caſe in* M. 2. H. 3. Fitz. Age 149. *was cited, where a Man vouched the King within Age, and prayed that the Parol might demur, and ſhewed that the King's Progenitor had given him the Land, and becauſe he did not ſhew the Charter, he was ouſted of the Warranty. So that there it did not go ſo far as to be adjudged whether the Parol ſhould demur, or not. And the ſaid Demurrer in the Dutchy was argued by ſome of them beforementioned, viz. by* Plowden, Gerard, *and* Carus, *in the hearing of ſome of the reſt abovenamed thereunto required by the Chancellor of the ſaid Dutchy in the Name of the Queen. And note, there is a Statute made in* 1. H. 4. *as follows, viz.* Alſo our ſaid Lord the King, conſidering how that Almighty God of his Grace hath placed him in the honourable Eſtate of King, and foraſmuch as he himſelf may not for a certain Cauſe bear the Name of Duke of *Lancaſter* in his Stile, and alſo the ſame our Lord the King conſidering how that this honourable Name and Eſtate of Duke hath been very honourably born and demeaned in the honourable Perſon of his Father (whom God aſſoil) and of many of his honourable Anceſtors, and being willing thereupon that the ſaid Name of Duke of *Lancaſter* be continued in Honour as it behoveth, by the Advice and Aſſent of all the Lords ſpiritual and temporal, and of the Commons aforeſaid, hath ordained that *Henry* his eldeſt Son have and bear the Name of Duke of *Lancaſter*, and that he be named Prince of *Wales*, Duke of *Aquitain*, of *Lancaſter*, and *Cornwal*, and Earl of *Cheſter*. And over that the ſame Lord the King conſidering how that divers Liberties and Franchiſes have been granted before this Time as well to his ſaid Father, as to other his Anceſtors Dukes and Earls of *Lancaſter*, willeth and granteth, by the Advice and Aſſent aforeſaid, that the ſame Liberties and Franchiſes be and continue to his ſaid eldeſt Son and his Heirs Dukes of *Lancaſter*, diſſevered from the Crown of *England* quitly and entirely according to the Effect and Purport of the Grants aforeſaid, *&c. So that the ſaid Statute in the Preamble recites, that the King for a certain Cauſe might not bear the Name of Duke of* Lancaſter *in his Stile; which Cauſe (though it is not there expreſſed) is, for that he was King, and the Name of King and the Dignity royal merges the Name of Duke, as it is ſaid before. Wherefore the Preamble of this Act confirms the above Opinion of the ſaid Judges, Serjeants, and Counſellors in the Point before recited.*

Faſter & Trin. Terms 4 Eliz.

And afterwards in *Eaſter* and *Trinity* Terms in the *fourth* Year of the Reign of the ſame Queen *Elizabeth*, and alſo in the Term of *St. Michael* then next following, by virtue of a Privy-Seal directed to the ſaid Chancellor by the ſaid Queen *Elizabeth*, the ſaid Matter was argued again on ſeveral Days in the Dutchy Court by many Counſellors before the ſaid Chancellor, and before *Saunders* Chief Baron, and *Anthony Brown* one of the Juſtices of the Common-Bench, and *Puttrel* and *Walſh* Juſtices of Aſſize in the County of *Lancaſter*, *Carus* Serjeant at Law to the Queen, and *Sackford* one of the Maſters of Requeſts, and *Carell* Attorney of the ſaid Court of the Dutchy, and *Plowden* aforeſaid, who was one of the Counſel of the ſaid Court of the Dutchy. And after all the Arguments the ſaid Judges and Counſellors of the Court aſſembled themſelves at divers Times to make their Reſolution, ane at laſt they all agreed as before was agreed. And alſo they all agreed, that King *Henry* 7. had the Dutchy in his Body natural, as King *Henry* 5. had it, diſjoined from the Crown, and not as King *Edw.* 4. had it. And this was by Force of the Act made in the Time of the ſaid King *Henry* 7. and for the Reaſon before given to this Purpoſe at *Spooner's*.

Note

Note, at the ſaid Aſſemblies it was ſaid by the ſaid Judges and Counſellors of the Dutchy Court, * that if the Queen makes a Feoffment of Land of the Dutchy out of the County Palatine, to hold of her *in capite*, the Feoffee ſhall hold of the Queen *in capite* as of her Crown of *England*. And many good Caſes were put by them. And upon their Reſolution agreeing with the former Reſolution, as is ſhewn before, a Report was afterwards made thereof to the Queen.

* S. P. 2 Leon. 151. Crompt. J. C. 134. b. Vin. Abr. tit. Tenure L. 2. pl. 28.

A brief Report of a Caſe argued by the Serjeants in the Common-Bench *before the Juſtices there in* Hillary *and* Eaſter *Terms in the* third *Year of the Reign of Queen* Elizabeth, *and by the ſaid Juſtices in* Trinity *Term in the* fourth *Year of the Reign of the ſaid Queen, upon an Ejectione Firmæ brought by* Henry Willion *againſt* Henry Berkley *Knight Lord* Berkley, *and* Richard Knight. *And the Record was as follows.*

HEretofore as appears in the Term of *St. Michael* in the *fifth* and *ſixth* Years of the Reign of the Lord *Philip* and Lady *Mary* late King and Queen of *England*, *Rot.* 314. it is contained thus. *Hertford*, to wit, *Henry Berkley* Knight * Lord *Berkley*, and *Richard Knight* of *Weſton* in the County aforeſaid Yeoman, were attached to anſwer *Henry Willion* of a Plea, wherefore with Force and Arms into ſeven Acres of Wood with the Appurtenances in *Weſton*, which *Henry Cock* Eſquire demiſed to him for a Term not yet paſſed, they entered, and the ſaid *Henry Willion* from his Farm aforeſaid ejected, and other Wrongs to him did, to the great Damage of the ſaid *Henry Willion*, and againſt the Peace of the Lord the King and Lady the Queen now, *&c.* And whereupon the ſame *Henry Willion* by *Thomas Hanchet* his Attorney complains, that whereas the aforeſaid *Henry Cock* was of the aforeſaid ſeven Acres of Wood with the Appurtenances ſeized in his Demeſn as of Fee, and being ſo ſeized thereof, the ſame *Henry* the *fifth* Day of *May* in the *fourth* and *fifth* Years of the Reign of the Lord the King and Lady the Queen now, at *Hoddeſdon* in the ſaid County of *Hertford*, had delivered, granted, and to Farm let to the ſame *Henry Willion* the aforeſaid ſeven Acres of Wood with the Appurtenances, to have to the ſame *Henry Willion* unto the End and Term of ſeven Years from thence next following, and fully to be compleat. And the ſame *Henry Willion* of the aforeſaid ſeven Acres of Wood with the Appurtenances by virtue of the Grant and Demiſe aforeſaid was poſſeſſed, and the ſame ſeven Acres occupied, until the aforeſaid *Henry Berkley* and *Richard Knight* the *ſixth* Day of *May* in the Years aboveſaid, with Force and Arms, *viz.* Swords, Staves, and Knives, into the aforeſaid ſeven Acres of Wood with the Appurtenances entered, and the ſaid *Henry Willion* from his Farm aforeſaid ejected, and other Wrongs, *&c.* to the great Damage, *&c.* and againſt the Peace, *&c.* wherefore he ſays that he is damnified, and has Damage to the Value of 10*l.* and therefore he produces the Suit, *&c.*

Eaſter Term 1 *Eliz. Rot.* 307. *Hertford.* Declaration. Same Precedent Raſt. Entr. 254. a. pl. 12.

* Vide 6 Co. 53. a.

And the aforeſaid *Henry Berkley* and *Richard* by *John Bill* their Attorney come and defend the Force and Injury when, *&c.* and pray Leave to imparl thereon here until the Octave of *St. Hillary*, and they have, *&c.* The ſame Day is given to the aforeſaid *Henry Willion* here, *&c.* At which Day here came as well the aforeſaid *Henry Willion* as the aforeſaid *Henry Berkley* and *Richard* by their Attornies aforeſaid. And thereupon the ſame *Henry Berkley* and *Richard* further pray Leave to imparl thereon here until from the Day of *Eaſter* in fifteen Days; and they have, *&c.* The ſame Day is given to the aforeſaid *Henry Willion* here, *&c.* And now here at this Day came as well the aforeſaid *Henry Willion* by his Attorney aforeſaid, as the aforeſaid *Henry Berkley* and *Richard* by *John Comber* their Attorney. And the ſame *Henry* and *Richard* as to the coming with Force and Arms ſay that they are not guilty thereof, and of this they put themſelves upon

Bar.

Imparlance.

the Country; and the aforeſaid *Henry Willion* likewiſe. And as to the reſt of the Treſpaſs and Ejectment aforeſaid above ſuppoſed to be done, the ſame *Henry Berkley* and *Richard* ſay that the aforeſaid *Henry Willion* his Action aforeſaid againſt them ought not to have, becauſe they ſay that long before the aforeſaid Time when the Treſpaſs and Ejectment aforeſaid is ſuppoſed to be done, one *William* Marqueſs *Berkley* was ſeized of the Manor of *Weſton* near *Baldock* in the aforeſaid County of *Hertford*, whereof the aforeſaid ſeven Acres of Wood with the Appurtenances are, and at the aforeſaid Time when, *&c.* and alſo from Time whereof the Memory of Man is not to the contrary, were Parcel, in his Demeſn as of Fee, and being ſo ſeized thereof, a certain Fine levied in the Court of Lord *Henry* the *Seventh* late King of *England* here, *viz.* at *Weſtminſter* on the Octave of the Purification of the bleſſed *Mary*, in the *fifth* Year of his Reign, before *Thomas Brian*, *Roger Townſend*, *William Davers*, and *John Vaviſor* Juſtices, and other faithful Subjects of the ſaid late King *Henry* the *Seventh* then there preſent, between one *William Willoughby* Eſquire and *John Skill* Complainants, and the aforeſaid Marqueſs Deforceant, of the Manor aforeſaid with the Appurtenances whereof, *&c.* by the Name of the Manor of *Weſton* near *Baldock* with the Appurtenances in the County of *Hertford*, amongſt other Things, *&c.* whereof a Plea of Covenant was ſummoned between them in the ſame Court of the ſame late King *Henry* the *Seventh*, *viz.* that the aforeſaid Marqueſs acknowledged the Manor aforeſaid with the Appurtenances amongſt other Things to be the Right of the ſaid *Edward*, as that which the ſaid *Edward* and *John* had of the Gift of the aforeſaid Marqueſs, and the ſame releaſed and quit-claimed from himſelf and his Heirs to the aforeſaid *Edward* and *John Skill*, and to the Heirs of the ſame *Edward* for ever. And further, the ſame Marqueſs by the ſame Fine granted for himſelf and his Heirs, that they would warrant to the aforeſaid *Edward* and *John*, and to the Heirs of the ſame *Edward*, the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things, againſt all Men for ever. And for the ſaid Acknowledgment, Remiſe, Quit-Claim, Warranty, Fine and Agreement, the ſame *Edward* and *John* by the ſame Fine granted to the aforeſaid Marqueſs the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things, and the ſame to him rendered in the ſame Court, to have and to hold to the ſame Marqueſs, and to the Heirs of his Body begotten, to hold of the chief Lords of the Fee by the Services which to the aforeſaid Manor ſhould belong for ever. And if it ſhould happen that the ſame Marqueſs ſhould die without Heir of his Body begotten, then after the Death of the ſaid late Marqueſs, the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things ſhould wholly remain to the aforeſaid late King *Henry* the *Seventh*, and to the Heirs Males of his Body lawfully begotten. And if it ſhould happen that the ſame late King ſhould die without Heirs Males of his Body begotten, then after the Death of the ſaid late King *Henry* the *Seventh*, the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things ſhould wholly remain to the right Heirs of the ſaid late Marqueſs, to hold of the chief Lords of the Fee by the Services which to the aforeſaid Manor belong for ever *. By reaſon of which ſaid Fine the aforeſaid Marqueſs was of and in the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things, ſeized in his Demeſn as of Fee-Tail, *viz.* to him and to the Heirs of his Body begotten, Remainder thereof to the aforeſaid late King *Henry* the *Seventh*, and to the Heirs Males of his Body begotten, and for Default of ſuch Iſſue, Remainder thereof to the Right Heirs of the aforeſaid late Marqueſs for ever. And the aforeſaid Marqueſs of the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things being ſeized in his Demeſn as of Fee-Tail in Form aforeſaid, the ſame late Marqueſs of ſuch his Eſtate therein, before the aforeſaid Time when, *&c.* died by Proteſtation ſeized without Heir of his Body begotten, after whoſe Death the ſame late King *Henry* the *Seventh* into the Manor aforeſaid with the Appurtenances whereof, *&c.* as in his Remainder thereof, before the ſame Time when, *&c.* entered, and was thereof ſeized in his Demeſn as of Fee-Tail, *viz.* to him and to the Heirs Males of his Body iſſuing, Remainder thereof, for Default of ſuch Iſſue, to the right Heirs of the aforeſaid late Marqueſs, by virtue of the Fine aforeſaid. And being ſo ſeized thereof, of ſuch his Eſtate therein he afterwards died ſeized, after whoſe Death, and before the aforeſaid Time when, *&c.* the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things deſcended to the late King *Henry* the *Eighth*, as Son and Heir Male of the Body of the ſaid late King *Henry* the *Seventh* lawfully begotten, whereby the ſame late King *Henry* the *Eighth* into the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things, before the ſame Time when, *&c.* entered, and was thereof ſeized in his Demeſn as of Fee-Tail, *viz.* to him and to the Heirs Males of his Body iſſuing, and for Default of ſuch Iſſue, and for Default of Heirs Males of the Body of the aforeſaid late King *Henry* the *Seventh* lawfully begotten, Remainder thereof to the right Heirs of the aforeſaid late Marqueſs, by virtue of the Fine aforeſaid. And being ſo ſeized thereof, the ſame late King *Henry* the *Eighth* died by Proteſtation thereof ſeized, after whoſe Death, and before the aforeſaid Time when, *&c.* the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things deſcended to *Edward* the *Sixth* late King of *England*, as Son and Heir Male of the Body of the ſame late King *Henry* the *Eighth* lawfully begotten, whereby the ſame late King *Edward* the *Sixth* into the Manor aforeſaid with the Appurtenances whereof, *&c.* amongſt other Things, before the aforeſaid Time when, *&c.* entered, and was thereof ſeized in his Demeſn as of Fee-Tail, *viz.* to him and to the Heirs Males of his Body iſſuing, and for Default of ſuch Iſſue, and for Default of Heirs Males of the Body of the aforeſaid late King *Henry* the *Seventh* lawfully begotten, Remainder thereof to the right Heirs of the aforeſaid late Marqueſs, according to the Form of the Fine aforeſaid. And afterwards before the aforeſaid Time when, *&c.* the ſame late King *Edward*

* Note here the Fine pleaded without any Concluſion of *prout patet*, *&c.* See 1 Leon. 77.

ward of ſuch his Eſtate in the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, died ſeized without Heir Male of his Body iſſuing. And the aforeſaid late King *Henry* the *ſeventh* before the ſame Time when, &c. died without Heir Male of his Body lawfully begotten. By Reaſon whereof the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, remained and came, and of Right ought to remain and come, by Form of the Fine aforeſaid, to the aforeſaid *Henry Berkley* and to his Heirs, as Couſin and next Heir of the aforeſaid *William* late Marqueſs *Berkley*, viz. as Son and Heir of *Thomas* late Lord *Berkley*, Son and Heir of *Thomas Berkley* Knight late Lord *Berkley*, Brother and Heir of *Morice Berkley* Knight, Son and Heir of *Morice Berkley* Knight, Brother and Heir of the aforeſaid *William* late Marqueſs *Berkley*. By reaſon of which ſaid Premiſſes the ſame *Henry* Lord *Berkley*, the *eleventh* Day of *Auguſt* in the *firſt* Year of the Reign of the aforeſaid Lady the Queen, into the aforeſaid Manor with the Appurtenances whereof, &c. entered as in his Remainder, as it was lawful for him to do, and was thereof ſeized in his Demeſn as of Fee, until the aforeſaid *Henry Cock* into the aforeſaid ſeven Acres of Wood with the Appurtenances before the aforeſaid Time when, &c. entered, and the ſame to the ſaid *Henry Willion* delivered and demiſed for the Term aforeſaid, as the aforeſaid *Henry Willion* by his Writ and Declaration aforeſaid above ſuppoſes, upon the Poſſeſſion of which ſaid *Henry Willion* thereof the aforeſaid *Henry Berkley* in his own proper Right, and the aforeſaid *Richard* as Servant of the ſaid *Henry Berkley*, and by his Command, the aforeſaid Time when, &c. entered, and the aforeſaid *Henry Willion* from his Farm aforeſaid ejected, as it was lawful for them to do, and this they are ready to verify; wherefore they pray Judgment if the aforeſaid *Henry Willion* his Action aforeſaid againſt them ought to have, &c.

And the aforeſaid *Henry Willion* ſays, that by any Thing before alledged he ought not to be precluded from having his Action aforeſaid, becauſe he ſays that well and true it is that the aforeſaid *William* Marqueſs *Berkley* was ſeized of the aforeſaid Manor of *Weſton* near *Baldock* with the Appurtenances whereof, &c. amongſt other Things, in his Demeſn as of Fee, and he being ſo ſeized thereof, the aforeſaid Fine levied in the aforeſaid Court of the late King *Henry* the *ſeventh* here, viz. at *Weſtminſter* on the Octave of the Purification of the bleſſed *Mary* in the *fifth* Year of his Reign, before the aforeſaid *Thomas Brian*, *Roger Townſend*, *William Davers*, and *John Viſor* then Juſtices, and other faithful Subjects of the ſaid late King *Henry* the *ſeventh* then there preſent, between the aforeſaid *Edward Willoughby* Eſquire and *John Skill* Complainants, and the aforeſaid Marqueſs Deforceant, of the aforeſaid Manor with the Appurtenances whereof, &c. by the Name of the Manor of *Weſton* near *Baldock* with the Appurtenances in the County of *Hertford*, amongſt other Things, &c. whereof a Plea of Covenant was ſummoned between them in the ſame Court of the ſaid late King *Henry* the *ſeventh*, viz. that the aforeſaid Marqueſs acknowledged the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, to be the Right of the ſaid *Edward*, as that which the ſaid *Edward* and *John* had of the Gift of the aforeſaid Marqueſs, and the ſame releaſed and quit-claimed from himſelf and his Heirs to the aforeſaid *Edward* and *John Skill*, and to the Heirs of the ſaid *Edward* for ever. And further, that the ſame Marqueſs by the ſame Fine granted for himſelf and his Heirs that they would warrant to the aforeſaid *Edward* and *John*, and to the Heirs of the ſame *Edward*, the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, againſt all Men for ever. And for the ſame Acknowledgment, Remiſe, Quit-claim, Warranty, Fine, and Agreement, the ſame *Edward* and *John* by the ſame Fine granted to the aforeſaid Marqueſs the aforeſaid Manor with the Appurtenances whereof, &c. amongſt other Things, and the ſame rendered to him in the ſame Court of the aforeſaid late King *Henry* the *ſeventh*, to have and to hold to the ſame Marqueſs, and to the Heirs of his Body lawfully begotten, to hold of the chief Lords of the Fee by the Services which to the ſaid Manor belong for ever: And if it ſhould happen that the ſame Marqueſs ſhould die without Heir of his Body begotten, then after the Death of the ſaid late Marqueſs the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, ſhould wholly remain to the aforeſaid late King *Henry* the *ſeventh*, and to the Heirs Males of his Body lawfully begotten; and if it ſhould happen that the ſame late King *Henry* the *ſeventh* ſhould die without Heir Male of his Body begotten, then after the Death of the ſame late King *Henry* the *ſeventh*, the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, ſhould wholly remain to the right Heirs of the ſaid late Marqueſs, to hold of the chief Lords of the Fee by the Services which to the aforeſaid Manor belong for ever, as by the ſame Fine appears. And that by Reaſon of the Fine aforeſaid the aforeſaid Marqueſs was of the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, ſeized in his Demeſn as of Fee-tail, the Remainder thereof to the aforeſaid late King *Henry* the *ſeventh*, and to the Heirs Males of his Body lawfully begotten in Form aforeſaid belonging, as the aforeſaid *Henry Berkley* and *Richard* have above alledged. And the ſame Marqueſs being ſo ſeized thereof before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, of ſuch his Eſtate therein afterwards died ſeized, without Heir of his Body begotten, after whoſe Death, and before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, the aforeſaid late King *Henry* the *ſeventh*, then having Iſſue of his Body lawfully begotten, viz. one *Arthur* late Prince of *Wales*, into the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, as in his Remainder aforeſaid entered, and was thereof ſeized in his Demeſn as of Fee, by reaſon of the Fine aforeſaid, by Form, &c. And afterwards the aforeſaid Prince *Arthur* died without Heir Male of his Body lawfully begotten. And the ſame late King *Henry* the *ſeventh* being ſo ſeized in Manner and Form aforeſaid of the Manor aforeſaid with the Appurtenances whereof, &c. the ſame late King of ſuch Eſtate in the ſame Manor with the Appurtenances whereof, &c. amongſt other Things, afterwards died ſeized,

Replication.

after whoſe Death the Manor aforeſaid with the Appurtenances whereof, &c. deſcended to the aforeſaid Lord *Henry* the *eighth* late King of *England*, as Son and Heir of the aforeſaid late King *Henry* the *ſeventh*, whereby the ſame late King *Henry* the *eighth* before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, into the aforeſaid Manor with the Appurtenances whereof, &c. entered, and was thereof ſeized in his Demeſn as of Fee, by Reaſon of the Fine aforeſaid. And the ſame late King *Henry* the *eighth* being ſo ſeized thereof took to Wife one Lady *Catharine Latimer*. And afterwards and before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, by a certain Act made in a Parliament of the aforeſaid late King *Henry* the *eighth* begun at *Weſtminſter* the *fourteenth* Day of *January* in the *thirty-fifth* Year of the Reign of the ſame late King *Henry* the *eighth*, and there held and continued until the *twenty ninth* Day of *March* in the ſaid *thirty-fifth* Year, amongſt other Things it was ordained and enacted, that all Demiſes, Releaſes, Gifts, Grants, Obligations, Recognizances, Patents, Fees, Acquittances, and other Things from thenceforth to be made by the ſaid Lady *Catherine*, or to the ſame Lady *Catherine*, by or to the ſaid late King *Henry* the *eighth*, or by or to any other Perſon or Perſons, ſhould ſtand and be of the ſame Force and Effect in Law, as they ſhould if they were made by, to, or between any other Subjects of the ſaid late King *Henry* the *eighth*, without any Intereſt, Profit, or Benefit to come or accrue by any Means to the ſaid late King *Henry* the *eighth*, his Heirs, Executors, or Succeſſors, of, for, or in any of the Premiſſes, or by reaſon or Occaſion of the ſame, or of any Part thereof, or otherwiſe, as in the ſame Act amongſt other Things is more fully contained. And that afterwards and before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, the aforeſaid late King *Henry* the *eighth* by his Letters Patent ſealed under his Great Seal of *England*, bearing Date the 25th Day of *February* in the 35th Year of his Reign, gave and granted the aforeſaid Manor of *Weſton* with the Appurtenances, (whereof the aforeſaid ſeven Acres of Wood with the Appurtenances are, and from Time whereof the Memory of Man is not to the contrary were parcel) to the aforeſaid Lady *Catherine* then his Wife, and Queen of *England*, to have and to hold to her for Term of Life of her the ſaid Lady *Catherine* By Reaſon of which ſaid Gift, Grant, and Act of Parliament, the ſame Lady Queen *Catherine* was of the aforeſaid Manor with the Appurtenances whereof, &c. ſeized in her Demeſn as of Freehold, the Reverſion thereof belonging to the aforeſaid late King *Henry* the *eighth*, and to his Heirs. And the ſame Lady *Catherine* being ſo ſeized thereof, the Reverſion thereof in Form aforeſaid belonging to the aforeſaid late King *Henry* the *eighth*, and to his Heirs, the aforeſaid late King *Henry* the *eighth*, before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, at *Weſtminſter* in the County of *Middleſex* died, after whoſe Death, and before the aforeſaid Time when, &c. the ſame Reverſion of the aforeſaid Manor with the Appurtenances whereof, &c. deſcended to Lord *Edward* the *ſixth* late King of *England*, as Son and Heir of the aforeſaid late King *Henry* the *eighth*, whereby the ſame late King *Edward* the *ſixth* was of the Reverſion aforeſaid ſeized as of Fee, and the ſame late King *Edward* the *ſixth* being ſo ſeized thereof, before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, the ſame late King by his Letters-patent ſealed under his Great Seal of *England*, bearing Date at *Weſtminſter* the *tenth* Day of *July* in the firſt Year of the Reign of the ſaid late King *Edward* the *ſixth*, (which the ſame *Henry Willion* here produces in Court) gave and granted the aforeſaid Reverſion of the aforeſaid Manor of *Weſton* with the Appurtenances whereof, &c. to one *William Herbert* Knight now Earl of *Pembroke*, to have and to hold to the ſame Earl and to his Heirs for ever. By virtue of which ſaid Grant the ſame Earl was of the ſame Reverſion ſeized as of Fee and Right; and being ſo ſeized thereof, and the aforeſaid Lady Queen *Catherine* being in Form aforeſaid ſeized of the ſame Manor with the Appurtenances whereof, &c. the ſame Lady *Catherine* late Queen afterwards at *Sudely* in the County of *Glouceſter* died, after whoſe Death, and before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, the aforeſaid Earl into the aforeſaid Manor with the Appurtenances whereof, &c. entered, and was thereof ſeized in his Demeſn as of Fee. And the ſame Earl being ſo ſeized thereof, before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, of the ſame Manor with the Appurtenances whereof, &c. enfeoffed the aforeſaid *Henry Cock*, to have and to hold to him and to his Heirs for ever. By virtue of which Feoffment the ſame *Henry Cock* into the aforeſaid Manor with the Appurtenances whereof, &c. before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, entered, and was thereof ſeized in his Demeſn as of Fee. And the ſame *Henry Cook* being ſo ſeized thereof, before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, viz. the aforeſaid *fifth* Day of *May* in the *fourth* and *fifth* Years of the Reign of the ſaid Lord *Philip* and Lady *Mary* late King and Queen of *England*, at *Hoddeſdon* aforeſaid in the aforeſaid County of *Hertford*, demiſed the aforeſaid ſeven Acres of Wood with the Appurtenances to the ſame *Henry Willion*, to have and to hold to the ſame *Henry Willion* from the ſaid *fifth* Day of *May* in the *fourth* and *fifth* Years aboveſaid, unto the End and Term of ſeven Years thence next following, and fully to be compleat. By virtue of which Demiſe the ſame *Henry Willion* into the aforeſaid ſeven Acres of Wood with the Appurtenances, before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid done, entered, and was thereof poſſeſſed until the aforeſaid *Henry* Lord *Berkley*, and *Richard*, the aforeſaid *ſixth* Day of *May* in the *fourth* and *fifth* Years aboveſaid, with Force and Arms, viz. Swords, Staves, and Knives, into the aforeſaid ſeven Acres of Wood with the Appurtenances entered, and the ſaid *Henry Willion* from his Farm aforeſaid thereof ejected, againſt the Peace of the aforeſaid late King and Queen *Philip* and *Mary*, as he above complains againſt them; and this he is ready to verify, wherefore for that the aforeſaid *Henry Berkley* and *Richard* the Treſpaſs and Ejectment aforeſaid above confeſs, the ſame *Henry Willion* prays Judgment, and his Damages by Occaſion of the ſaid Treſpaſs and Ejectment to be adjudged to him, &c.

And the aforeſaid *Henry* Lord *Berkley* and *Richard* ſay, that the aforeſaid Plea of the aforeſaid *Henry Willion* in Manner and Form above in replying pleaded, and the Matter in the ſame Plea contained, are inſufficient in Law to maintain the aforeſaid *Henry Willion* to have his Action aforeſaid againſt the ſame *Henry Berkley* and *Richard*, and that they have no Neceſſity, nor are by the Law of the Land bound to anſwer the ſaid Replication in Manner and Form aforeſaid pleaded. And this they are ready to verify, wherefore for Want of a ſufficient Replication in this Behalf, the ſame *Henry* Lord *Berkley* and *Richard* pray Judgment, and that the aforeſaid *Henry Willion* may be precluded from having his Action aforeſaid againſt them, &c. Defendants demur.

And the aforeſaid *Henry Willion*, for that he has above alledged ſufficient Matter againſt the ſaid *Henry* Lord *Berkley* and *Richard* in Maintenance of the Action of him the aforeſaid *Henry Willion* againſt them, which ſaid Matter the aforeſaid *Henry Berkley* and *Richard* do not deny, nor thereunto in anywiſe anſwer, but the ſaid Averment wholly refuſe to admit, prays Judgment and his Damages by Occaſion of the Treſpaſs and Ejectment aforeſaid to be adjudged to him, &c. And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here on the Morrow of the holy *Trinity*, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, &c. Joinder in Demurrer.

The Caſe was recited in this Manner. It appears by the Record that *Henry Willion* has ſued a Writ of *Ejectione firmæ* againſt *Henry* Lord *Berkley* and *Richard Knight*, for ejecting him out of 7 Acres of Wood with the Appurtenances in *Weſton*. And he has declared that *Henry Cock* Eſquire was ſeized of the ſame 7 Acres in his Demeſn as of Fee; and being ſo ſeized, the 5th Day of *May* in the 4 & 5 Years of the Reign of King *Philip* and Queen *Mary*, at *Hoddeſdon* in the County of *Hertford*, he demiſed the ſame to the Plaintiff for the Term of 7 Years thence next enſuing; and that he the ſaid *Henry Willion* was, by virtue of the ſaid Demiſe, poſſeſſed of the ſaid 7 Acres with the Appurtenances, and them occupied until the Defendants the 6th Day of *May* in the Years aforeſaid entered into the ſaid ſeven Acres, and ejected the Plaintiff out of his Farm aforeſaid to his Damage of 10 *l.* And the Defendants plead in Bar that long before the Time of the Ejectment ſuppoſed, one *William* Marqueſs *Berkley* was ſeized of the Manor of *Weſton* near *Baldock* in the County of *Hertford* (whereof the 7 Acres of Wood are, and then, and at all Times before were, parcel) in his Demeſn as of Fee. And he being ſo ſeized, a Fine levied in the Court of King *Henry* 7. here at *Weſtminſter* on the Octave of the *Purification* of our Lady in the 5th Year of his Reign, before *Thomas Brian*, *Roger Townſend*, *William Davers*, and *John Vaviſor* Juſtices, between *Edward Willoughby* and *John Skill* Complainants, and the ſaid Marqueſs Deforceant, of the ſaid Manor with the Appurtenances whereof, &c. viz. the ſaid Marqueſs acknowledged the ſaid Manor amongſt other Things to be the Right of the ſaid *Edward*, as that which the ſaid *Edward* and *John* had of the Gift of the ſaid Marqueſs, and the ſame releaſed to them and to the Heirs of the ſaid *Edward* for ever, with Warranty againſt all Men. And the ſaid *Edward* and *John* by the ſame Fine granted and rendered to the ſaid Marqueſs the ſaid Manor whereof, &c. amongſt other Things, to have and to hold to the ſaid Marqueſs, and to the Heirs of his Body begotten; and if he ſhould die without Heir of his Body begotten, that then the ſaid Manor whereof, &c. ſhould remain to the ſaid King *Henry* 7. and to the Heirs Males of his Body lawfully begotten; and if the ſaid King ſhould die without Heir Male of his Body begotten, that then the ſaid Manor whereof, &c. ſhould remain to the right Heirs of the ſaid Marqueſs. By Reaſon of which Fine the ſaid Marqueſs was of the ſaid Manor whereof, &c. ſeized in his Demeſn as of Fee-tail, the Remainder thereof to the ſaid King *Henry* 7. and to the Heirs Males of his Body begotten, and for Default of ſuch Iſſue, the Remainder to the right Heirs of the ſaid Marqueſs for ever. And the ſaid Marqueſs being ſeized of ſuch Eſtate, thereof died by Proteſtation ſeized, without Heir of his Body begotten; after whoſe Death the ſaid King *Henry* 7. entered into the ſaid Manor whereof, &c. as in his Remainder thereof, and was thereof ſeized in his Demeſn as of Fee-tail, viz. to him and to the Heirs Males of his Body begotten, the Remainder thereof, for Default of ſuch Iſſue, to the right Heirs of the ſaid Marqueſs, by virtue of the ſaid Fine. And he being ſo ſeized of ſuch Eſtate died thereof ſeized, after whoſe Death the ſaid Manor whereof, &c. deſcended to the late King *Henry* 8. as Son and Heir Male of the Body of the ſaid King *Henry* 7. begotten, whereby the ſame King *Henry* 8. into the ſaid Manor whereof, &c. entered, and was thereof ſeized in his Demeſn as of Fee-tail, viz. to him and to the Heirs Males of his Body begotten, and for Default of ſuch Iſſue, the Remainder to the right Heirs of the ſaid Marqueſs, by Force of the ſaid Fine. And the ſame King *Henry* 8. being ſo ſeized thereof, died by Proteſtation thereof ſeized, after whoſe Death the ſaid Manor whereof, &c. deſcended to the late King *Edward* 6. as Son and Heir Male of the Body of the ſaid King *Henry* 8. begotten, whereby the ſame King *Edward* 6. into the ſaid Manor whereof, &c. entered, and was thereof ſeized in his Demeſn as of Fee-tail, the Remainder as before. And afterwards the ſaid King *Edward* of ſuch Eſtate of and in the ſaid Manor whereof, &c. being ſeized, died without Heir Male of his Body iſſuing. And the ſaid King *Henry* 7. before the ſaid Time when, &c. died without Heir Male of his Body begotten, whereby the ſaid Manor whereof, &c. remained and came, by Force of the ſaid Fine, to the aforeſaid *Henry Berkley* and to his Heirs, as Couſin and next Heir of the ſaid *William* Marqueſs *Berkley*, that is to ſay, as Son and Heir of *Thomas* late Lord *Berkley*, Son and Heir of *Thomas Berkley* Knight late Lord *Berkley*, Brother and Heir of *Morice Berkley* Knight, Son and Heir of *Morice Berkley*, Brother and Heir of the ſaid *William* late Marqueſs *Berkley*. By Reaſon of which Premiſſes the ſame *Henry* Lord *Berkley* the 11th Day of *Auguſt* in the firſt Year of the Reign of the Queen aforeſaid, into the ſaid Manor whereof, &c. entered as in his Remainder, as it was lawful for him to do, and thereof was ſeized in his Demeſn as of Fee

The CASE.
The King is bound by the Statute *de donis conditionalibus* as well as a common Perſon. And therefore if a Remainder in tail is limited to the King, and for Default of Iſſue to the right Heirs of A. this is an Eſtate tail in the King, and he ſhall not be at Liberty to take it as a Fee ſimple conditional, as before the Statute *de donis*, and ſo to have Power to alien after Iſſue had, but upon Failure of Iſſue he in Remainder in Fee may well enter. S. C. S. P. cited Dy. 344. pl. 56. 1 Co. 44. b. 48. a. 49. b. 50. a. 5 Co. 14. b. 7 Co. 21. a. 32. a. 11 Co. 72. a. 1 Rol. R. 153. 1 Finch 59. 2 Finch 234. 4 Bac. Abr. 198.

Fee, until the ſaid *Henry Cock* into the ſaid 7 Acres of Wood, before the Time when, &c. entered, and the ſame demiſed to the ſaid Plaintiff for the ſaid Term, as the ſaid Plaintiff has declared; upon whoſe Poſſeſſion the ſaid *Henry* Lord *Berkley* in his own Right, and the ſaid *Richard* as his Servant and by his Command, the ſaid Time when, &c. entered, and the ſaid Plaintiff out of his ſaid Farm ejected; and ſo they demand Judgment *ſi Actio*. And the Plaintiff by his Replication confeſſing that the ſaid Marqueſs was ſeized of the ſaid Manor of *Weſton* whereof, &c. in his Demeſn as of Fee, and that he levied the Fine in manner and Form aforeſaid, and that the ſaid Marqueſs died without Heir of his Body, ſays further, that after the Death of the ſaid Marqueſs the ſaid King *Henry* 7. then having Iſſue of his Body begotten one *Arthur* late Prince of *Wales*, into the ſaid Manor whereof, &c. entered as in his Remainder, and was thereof ſeized in his Demeſn as of Fee, by reaſon of the ſaid Fine, and afterwards the ſaid Prince *Arthur* died without Heir Male of his Body: And the ſaid King *Henry* 7. being ſeized of the Manor whereof, &c. in manner and Form aforeſaid, thereof died ſeized, whereby the ſame deſcended to King *Henry* 8. who entered, and was thereof ſeized in his Demeſn as of Fee, by Reaſon of the ſaid Fine. And the ſaid King being ſo ſeized took to Wife Lady *Catharine Latimer*. And afterwards by an Act made in the Parliament of the ſaid King *Henry* 8. begun at *Weſtminſter* the 14th Day of *January* in the 35th Year of the Reign of the ſame King, and there held and continued unto the 29th Day of *March* in the ſaid 35th Year, amongſt other Things it was enacted, that all Demiſes, Releaſes, Gifts, Grants, Obligations, Recognizances, Patents, Fees, Acquittances, and other Things, from thenceforth to be made by the ſaid Lady *Catherine*, or to the ſaid Lady *Catharine*, by or to the ſaid King *Henry* 8. or by, to, or between any other Perſon or Perſons, ſhall ſtand and be of the ſame Force and Effect in Law, as they ſhould be if they were made by, to, or between any any other Subjects of the ſaid King *Henry* 8. without any Intereſt, Profit, or Benefit to come or accrue by any Means to the ſaid late King *Henry* 8. his Heirs, Executors, or Succeſſors, of, for, or in any of the Premiſſes, or by Reaſon or Occaſion of them, or any Part of them, or otherwiſe, as in the ſame Act is more fully contained. And that afterwards the ſaid King *Henry* 8. by his Letters Patent under his Great Seal of *England*, bearing Date the 25th Day of *February* in the 35th Year of his Reign, gave and granted the ſaid Manor of *Weſton* with the Appurtenances whereof, &c. to the ſaid Lady *Catharine* then his Wife, and Queen of *England*, to have and to hold to her for Term of her Life. By reaſon of which Gift, Grant, and Act, the ſaid Queen was ſeized of the ſaid Manor whereof, &c. in her Demeſn as of Freehold, the Reverſion thereof belonging to the ſaid King *Henry* 8. and to his Heirs. And ſhe being ſo ſeized, the Reverſion *ut ſupra*, the ſaid King *Henry* 8. died, and the Reverſion deſcended to King *Edward* 6. whereby he was ſeized thereof as of Fee. And he being ſo ſeized, by his Letters Patent bearing Date at *Weſtminſter* the 10th Day of *July* in the firſt Year of his Reign, here ſhewn forth, granted the ſaid Reverſion of the ſaid Manor whereof, &c. to Sir *William Herbert* Knight now Earl of *Pembroke*, to have and to hold to the ſaid Earl and to his Heirs. By virtue whereof the ſaid Earl was ſeized of the ſame Reverſion as of Fee and Right, and afterwards the Queen died, and the Earl entered into the ſaid Manor whereof, &c. and thereof enfeoffed the ſaid *Henry Cock* and his Heirs; by virtue whereof he entered and was ſeized in his Demeſn as of Fee. And being ſo ſeized he made the Demiſe *ut ſupra*, by force whereof the ſaid *Henry Willion* entered and was poſſeſſed until the Defendants ejected him *ut ſupra*. And upon this the Defendants have demurred in Law.

Hill. & Eaſter Terms 3 *Eliz.*

And this Demurrer was argued in the ſaid Terms of *St. Hillary* and *Eaſter* by all the Serjeants, viz, by *Harper*, *Southcote*, *Walſh*, and *Cholmley* on the Part of the Defendants, and by *Puttrel*, *Bendloe*, and *Carus* on the Part of the Plaintiff; and divers Exceptions were taken by the Serjeants and Judges alſo, ſome to the Writ, and others to the Pleading. [a] One Exception taken by the Serjeants of Counſel for the Defendants was, for that this Clauſe, viz. *the Goods and Chattels of the ſame* Henry Willion *found in the ſame 7 Acres of Wood they took and carried away*, was left out of the original Writ. And this Exception was alſo maintained by *Anthony Brown* Juſtice, who ſaid, that in Writs a Man ought to purſue the Form and Order of the *Regiſter*, and we cannot now make a new Form, or a new *Regiſter*, and in Writs it is ſufficient to ſay that the *Regiſter* is ſo, and in each of the Writs in the *Regiſter* there is the Clauſe, *the Goods and Chattels, &c. took and carried away*, and this is omitted in none of the Writs in the *Regiſter*, *ergo* it is the common Courſe and uſual Form of Writs, and all Writs ought to be ſo; and tho' *in rei veritate* the Defendant did not take any Goods and Chattels, for perhaps the Plaintiff had none there, nevertheleſs he ought to have theſe Words in the Writ, and make a ſpecial Declaration, omitting *the Goods and Chattles*; as in many Caſes a Man ſhall have a general Writ, and make a ſpecial Declaration according to the Truth of his Caſe. And altho' there is a Rule in the [b] *Regiſter*, that in a Writ of *Ejectione firmæ* there cannot be *(Goods and Chattles)*, becauſe for Goods a Man ſhall have an Exigent, and in the Writ of *Ejectione firmæ* Diſtreſs infinite, yet, he ſaid, this Reaſon is not [c] ſufficient to overthrow the Exception taken for the Omiſſion of the Words, becauſe in this Writ there is [d] *vi et armis*, and in all Writs which have theſe Words [e] Proceſs of Outlawry lies by the Common Law. [f] And *F. N. B.* ſays that Proceſs of Outlawry lies in this Writ, which muſt be by the Common Law, for it is given by no Statute: So that the ſaid Rule in the *Regiſter* is of no Weight. [g] But in Actions on the Caſe Proceſs of Outlawry did not lie until it was given by the Statute of 19. *H.* 7. *cap.* 9. [h] Alſo he ſaid, although it is expreſſed in the *Regiſter* that a Writ of *Ejectione firmæ* lies of a Pool, or of Paſture for an Ox,

Exceptions taken by the Defendants. 1.

[a] See Ante 199 (c) the ſame Exception taken by *A. Brown* J. but *Dyer* C. J. againſt it. Gilb. Law of Ejectm. 7 ſays that the Writ is good either with or without the Clauſe (Goods and Chattles). And 1 Finch 318 ſays that this Clauſe ſhall be put in the Writ where the Ejectment is ſuppoſed of a Manor, becauſe the Law intends it to be ſtocked with Chattles; otherwiſe if of other Lands.

[b] Regiſt. 227. b.

[c] Gilb. Law of Ejectm. 7.

[d] 9 Co. 78. a. 1 Finch 318. 1 Keb. 164. pl. 116. Gilb. Law of Ejectm. 47 a Fine, which Ld. Raym. 987.

[e] M. 35. H. 6. 6. *Wankf. et Noile.* 9 Co. 78. a. Co. Litt. 128. b. 2 Rol. Abr. 805. pl. 1. Salk. 5.

[f] F. N. B. 220. h. Gilb. Law of Ejectm. 7. 1 Finch 318.

[g] P. 10. H. 7. 21. pl. 15. Bro. Diſcontin. de Proceſs 61. Ld. Raym. 587.

[h] Regiſt. 227. b. Yelv. 143.

ſays if theſe Words are omitted in the Writ it is an Error incurable, becauſe there muſt appear ſuch a Treſpaſs in the Writ as will give the King cannot be without theſe Words are inſerted.

yet it may be that there are Goods there, *viz.* Land or Timber in the Pool, and in the Paſture an Ox or a Horſe, and a Bell round the Ox's Neck, and Fetters round the Horſe's Feet, and other ſuch like Things, which are the Goods and Chattles of him that is ejected. So that this is not a ſufficient Cauſe to maintain the Omiſſion of the Words *Goods and Chattles*. And therefore it ſeemed to him and to the Serjeants of Counſel for the Defendants, that the Writ ought to abate for the Omiſſion of the ſaid Words.

But all the Serjeants of Counſel for the Plaintiff, and all the other Juſtices, *viz.* *Weſton* and the Lord *Dyer* held the contrary; for the Clauſes of Ejectment of the Land, and of the taking of the Goods and Chattles, are two diſtinct and ſeveral Clauſes. [a] And if the Truth be that the Defendants did not take any Goods and Chattles, it would be idle to put the Clauſe in; for the Law will not ſuffer a Man to complain of more Things than he has Cauſe. [b] For which reaſon if one Beaſt is taken, the Writ of Replevin ſhall make Mention of that only, as *his certain labouring Beaſt*, or *his certain Ox*, and it ſhall not ſay *his Cattle* in the plural Number, where only one Beaſt is taken, *cauſa qua ſupra*. [c] And in the *Regiſter* the Writs are for an Ejectment of a Manor, and taking of Goods, in which Caſe, the Lord *Dyer* ſaid, it ſhall be intended ſuch a Manor as is ſtored with a Stock; but there is no Writ in the *Regiſter* for an Ejectment of Land, or Meadow, or Paſture, or Wood, and taking of Goods. And if there was, yet the *Regiſter* is not to be purſued in ſuch preciſe Terms, where the Truth of his Caſe who ſues the Writ does not agree with the Words in all Points. And, he ſaid, there were divers Precedents in the Common Pleas, where ſuch Writs as this is here were held good; for which reaſon he and *Weſton* Juſtices held the Writ good enough. And the Lord *Dyer* ſaid that the Words, *then that you cauſe the ſaid Tenements to be reſeized of the Chattles which within it were taken, and the ſaid Tenement with the Chattles to be in Peace until, &c.* ought to be in every Writ of Aſſize, for it is the uſual Form, and the King's Command for the Repoſe of the Party in the mean time, and there is no Precedent to the contrary, but here in our Caſe there are ſeveral to the contrary.

[a] S. P. Ante 199. *Per Dyer* C. J.

[b] Regiſt. 81. b. F. N. B. 68. d. 1 Finch 348. See Kelw. 35. a. pl. 1. 212. a.

[c] Regiſt. 227. b. 1 Finch 318.

Another Exception taken to the Replication by the Serjeants of Counſel for the Defendants was, that in the Replication the Plaintiff has alledged that the Marqueſs died without Heir of his Body, after whoſe Death the ſaid King *Henry* 7. entered into the ſaid Manor whereof, *&c.* and he has not alledged that there was any Office found proving that the Marqueſs died without Heir of his Body, which he ought to have done, for his Death is Matter of Fact, and without his Death King *Henry* 7. had no Title of Entry; and there ought to be Matter of Record to prove the Matter of Fact which gives a Title of Entry to the King. [d] As if the King's Tenant dies ſeized of his Land, which deſcends to his Heir within Age, [e] or if his Villain purchaſes Land, the King cannot enter into the Land without Office firſt finding his Title; [f] and without Office there can be no Intruſion upon the Poſſeſſion of the King, and therefore Office ought to be found. And although the Defendants themſelves in their Bar have ſaid that the Marqueſs died without Iſſue, and that King *Henry* 7. entered, without alledging any Office, yet this Confeſſion of the Defendants ſhall not aid the Plaintiff, for as to the Defendants, the Entry and Seizin of King *Henry* 7. after the Death of the Marqueſs without Iſſue is not for Neceſſity, but only as Conveyance to them, for if the Marqueſs died without Iſſue, and King *Henry* 7. without Iſſue Male, it is ſufficient for the Defendants, whether King *Henry* 7. ever had Seizin or Eſtate, or not. For if the King was never ſeized, it is the better for the Defendants; but as to the Plaintiff, the Strength of his Title depends upon the making his Leaſe good, for he derives his Leaſe from *Cock*, who derived his Title from the Earl of *Pembroke*, who derived his Title from King *Edward* 6. who derived his Title by Deſcent from King *Henry* 8. who derived his Title by Deſcent from King *Henry* 7. who derived his Title from the Fine, and from the dying of the Marqueſs without Iſſue, and Entry by himſelf. So that if the Plaintiff does not ſufficiently prove that the Marqueſs died without Iſſue, and that the King had an Eſtate in the Land after his Death, he does not ſufficiently prove his own Title or Intereſt; wherefore the Proof of that is the Subſtance and Support of the Plaintiff's Title. But although the Defendants have alledged in the Bar that he died without Iſſue, and that King *Henry* 7. entered, this Confeſſion ſhall not prejudice the Defendants, becauſe it is not the Subſtance of their Title, for the Cauſe ſhewn before, but it is the Subſtance of the Plaintiff's Title. And when it is ſhewn that the Marqueſs died without Iſſue, then it is the Subſtance of the Defendant's Title to prove that King *Henry* 7. died without Heir Male, and not to prove whether there was any Office or other Matter of Record to entitle King *Henry* 7. or not. For if he never had Seizin in Deed, it is the better for the Defendants. So that the Confeſſion of that which is not material for the Defendants ſhall not prejudice the Defendants, nor make the Plaintiff's Title better, nor can it give Title by Law to the King, if the Law would not give it without their Confeſſion, for their Confeſſion ſhall not make that to be Law which is not Law. Wherefore it was ſaid, that becauſe there is no Office alledged proving the Death of the Marqueſs, and the Eſtate and Seizin in Deed of the King, the Replication is naught.

Exception 2.

[d] M. 5. Ed. 6. Bro. Office devant Eſcheat. 55. B. N. C. § 415.

[e] Bro. Office devant Eſcheat. 53. Prerogative 113. 5 Co. 52. b. 2 Leon. 124, 135. 1 Finch 162. 2 Finch 232. Infra (l).

[f] Stamf. Prerog. 57. a.

But the whole Court argued againſt this Exception. * For when the Marqueſs died without Iſſue, the Freehold was preſently caſt upon the King. For *Anthony Brown* ſaid, the Freehold muſt of Neceſſity be in ſome one, in order that he who has Title or Right to it may know againſt whom he ought to demand it, for which Reaſon it ſhall not be in Suſpence, and therefore when the Eſtate was determined in the Marqueſs, the Law caſt the Poſſeſſion in Law upon the King. [g] As if the King's Tenant for Life dies, the Freehold in Law is preſently in the King; [h] and ſo if the King's Tenant dies without Heir, the Poſſeſſion in Law is preſently in the King without Office. [i] For he ſaid, an Office is not neceſſary but where the King ſhall take by it; [k] as if the King makes a Gift in Tail upon Condition, and the Condition is broken, there the ſame ought to be found by Office. [l] So ought it where the King's Villain has purchaſed Land, for the King ſhall take the Land thereby, and the Land is not in the King before Office. But here the Freehold

* See 1 Finch 162. 2 Finch 232. S. P. Accord. viz. that upon a Gift in Tail, Remainder to the King, the Freehold is preſently caſt upon the King without Office by the Death of the Tenant in Tail without Iſſue.

[g] T. 9. H. 7. 2. b. *Per Oxenb.* Bro. Eſcheat 25, 33. Office devant Eſcheat. 34. Prerogative 91. Moor 203. 4 Co. 58. b. 2 Leon. 124. Poph. 27. Vin. Abr. tit. Prerogative B. d. 4. pl. 9.

[h] T. 9. H. 7. 2. b. *Per Oxenb.* 4 Co. 58. a. 9 Co. 96. a. Davis 34. a. Lane 5. Crompt. J. C. 15. b. 1 Finch 370. 3 Mod. Entr. 66.

[i] S. P. 2 Leon. 135 *Per Godfrey, arguendo.*

[k] See Ante 213 m). and the Books there cited.

[l] Vide ſupra (e).

hold is in him before Office, and then it is idle to have an Office to convey that to the King which the Law has conveyed to him before the Office found. And as to the Caſe put of the Wardſhip of Land, true it is that there ought to be an Office found to entitle the King, for there the Freehold and the Poſſeſſion in Law is caſt upon the Heir; [a] and the Guardian is at Liberty to take the Wardſhip of the Land, or to diſtrain for the Seigniory, for the Seigniory is not extinct there. [b] But it is not ſo in the Caſe of an Eſcheat, for upon the Eſcheat the Seigniory is preſently extinct, by reaſon that the Law conveys the Poſſeſſion of the Tenancy to the Seigniory: And ſo was this Diverſity taken about the firſt or ſecond Years of King *Edw.* 3. And as in the Caſe of an Eſcheat the Poſſeſſion of the Tenancy is caſt upon another Lord before Entry, ſo is it caſt upon the King, being the Lord, before Office. And in the ſame Manner here the Remainder is preſently caſt upon the King by the Death of the Marqueſs, and then an Office afterwards would be ſuperfluous. And for the ſame Reaſon alſo the Bar is good by the Allegation that King *Edward* 6. died without Heir Male, and that the Lord *Berkley* now Defendant entered, without ſhewing any *Ouſter le main*, or other Matter of Record to deveſt it out of Queen *Mary*; for when King *Edward* 6. died without Iſſue Male, the Freehold was preſently caſt upon the Lord *Berkley* now Defendant, and never came to Queen *Mary*, which is upon the Reaſon ſhewn before. And hereupon *Anthony Brown* ſaid, if Land is leaſed to the King for his Life, upon Condition that if the Leſſor dies his Heir ſhall enter, and the Leſſor dies, there his Heir ſhall not enter without Office finding the Death, and without *Ouſter le main* ſued; but if it was upon Condition that if the King, who is Leſſee, dies, the Leſſor ſhall enter, there if the King dies, the Leſſor ſhall enter without Office, or *Ouſter le main* ſued. For in the firſt Caſe the Condition is meerly a Condition which abbreviates the Eſtate, but in the other Caſe the Condition is joined to the [c] Limitation of the Eſtate, and the Condition and the Limitation tend to one End, and the Condition does not abridge the Limitation, as it does in the other Caſe; and therefore when the King dies, the Freehold is by the Act of the Law caſt upon the Leſſor before Entry. So in our Caſe when King *Edward* 6. died without Heir Male, the Freehold was caſt upon the Lord *Berkley*, and his Entry was lawful without Office or *Ouſter le main*, and the Bar reciting that he entered is good enough in this Point, *quod fuit conceſſum per totam Curiam.* Alſo admitting that an Office was neceſſary here, yet the Defendants by their Plea in Bar have [d] amended the Fault which they have here excepted to. For they themſelves in conveying their Title to them have ſhewn that the Marqueſs died without Iſſue, and that King *Henry* 7. entered, and it is Matter of Subſtance for the Defendants to ſhew the Deaths, for the Fee-ſimple which the Lord *Berkley* one of the Defendants claims could not be executed in him until both the Eſtates-tail precedent were ended. And therefore it is as material for him to ſhew the Death of the Marqueſs without Heir of his Body, as to ſhew that *Henry* 7. died without Heir Male of his Body; and by the Plea in Bar the Defendants have gone further, and have ſhewn that the Marqueſs died without Heir of his Body, and that *Henry* 7. entered, and died without Heir Male of his Body, ſo that they have confeſſed the Eſtate in Deed in *Henry* 7. and the Plaintiff by the Replication hath ſaid, *well and true it is* that the Marqueſs died without Heir of his Body, and that King *Henry* 7. entered, *&c.* whereby he has only affirmed that which the Defendants have affirmed, and which they are therefore eſtopped to ſay is faulty. And *Anthony Brown* ſaid, [e] that in Aſſize if the Defendant will ſay that he enfeoffed the Plaintiff in Fee upon Condition, and the Plaintiff broke the Condition, for the Breach whereof he re-entered, this Plea is not good, becauſe he does not ſhew the Deed of the Condition, for the Condition without the Deed ſhewn does not lie in Averment; but if the Plaintiff ſays, *well and true it is* that the Defendant enfeoffed him upon Condition, and that he broke the Condition, and the Defendant re-entered, and afterwards enfeoffed him, or that after the Condition broken, and before his re-Entry, the Defendant releaſed to him, now the Bar which was faulty is made good by the Affirmance of him that might have taken Advantage of it, and by his Affirmance he is now eſtopped to find fault with it. So is it in our Caſe here, wherefore this Exception was diſallowed by the Rule of the Court.

[a] Co. Litt. 83. b. 2 Co. 68. a.

[b] Same Diverſity H. 1. Ed. 3. 5. pl. 34. Fitz. Avowry 168. Bro. Gard 96. Tenures 91. Vin. Abr. tit. Office D. pl. 15.

[c] S. P. Moor 348, 349.

[d] Like Point N. Bendl. 312.

[e] Litt. § 365. Dr. & Stud. lib. 1. cap. 8. 1 Finch 235.

Exception 3. Another Exception taken to the Replication by the Counſel for the Defendants was, for that the Defendants in the Bar have pleaded the Fine which limits the Remainder in Tail to King *Henry* 7. and have alledged that after the Death of the Marqueſs King *Henry* 7. entered into the ſaid Manor whereof, *&c.* and was thereof ſeized in his Demeſn as of Fee-Tail, *viz.* to him and to the Heirs Males of his Body begotten, the Remainder to the right Heirs of the Marqueſs, by virtue of the ſaid Fine, and the Plaintiff in the Replication ſays, *well and true it is* that the Marqueſs was ſeized in Fee, and levied the Fine, as in the Bar is ſhewn, and afterwards the Marqueſs died without Iſſue, and then he ſays further, that afterwards King *Henry* 7. having Iſſue Male, entered as in his Remainder, and was thereof ſeized in his Demeſn as of Fee, by reaſon of the ſaid Fine, which does not agree with the Plea in Bar wherein it is ſaid that he was ſeized in Tail with the Remainder over, for a Fee-ſimple in Poſſeſſion and a Fee-tail in Poſſeſſion can't ſtand together in one ſame Perſon at one ſame Time, for which Reaſon this Contradiction of the Bar without a Traverſe is not receivable, but the Replication is bad by reaſon of this Variance without a Traverſe taken.

* See S. P. Accord 2 Bulſt. 149. * But the whole Court argued to the contrary. For the Plaintiff and the Defendants have agreed upon the Fine, by which they have ſhewn the Eſtate as it was, and the Defendants have taken it to be a Fee-tail in King *Henry* 7. and the Plaintiff has taken it to be a Fee-ſimple in him, eſpecially after Iſſue had. And whether it be a Fee-ſimple or a Fee-tail is Matter of Law, which belongs to the Court to determine; and then when one of 'em ſays it is a Fee-tail, and the other ſays it is a Fee-ſimple, this is according as they took the Law and would have it to be, and it is no more than to ſignify to the Court that they varied in their Judgment of the Law, whereupon the Court may be the better apprized of the Point of Variance upon which they are to

to adjudge. And when the Matter of Fact is agreed by the one Party and the other, a Traverſe cannot be taken to the Operation of the Law thereupon, [a] for a Traverſe ſhall never be taken but to Matter of Fact, and if the Parties are agreed upon the Matter of Fact, they ſhall not traverſe the Law thereupon, as to ſay, the Law upon this Matter is with me, *without that* that it is with you; but the Judges ſhall adjudge upon it without Traverſe of the Party. For, as *Anthony Brown* ſaid, Matters of Fact being traverſed ſhall be tried by 12 Men, and if the Plaintiff ſhould take a Traverſe here, it would be to make 12 illiterate Men try a Matter of Law whereof they have no Knowledge. And he ſaid, it is not their Office to try Matters of Law, but only to try Matters of Fact; for, he ſaid, at the Beginning of our Law it was ordained that [b] Matters of Fact ſhould be tried by 12 Men of the Country where the Matter ariſes, [c] and Matters of Law by 12 Judges of the Law, for which Purpoſe there were ſix Judges here, and ſix in the King's Bench, who upon Matters of Law uſed to aſſemble together in a certain Place, in order to diſcuſs what the Law was therein. So that if a Traverſe ſhould be here taken, it would be to make 12 ignorant Men of the Country try that whereof they are not Judges, and which does not belong to them to try; and therefore the croſſing of the Bar by the Replication is good enough without a Traverſe. For which reaſon this Exception was diſallowed by the Rule of the Court.

[a] That a Traverſe ſhall be to Matter of Fact only, and not to Matter in Law, Yelv. 200. Ld. Raym. 410, 411, 412. Vin. Abr. tit. Traverſe P. pl. 4, 11.

[b] 9 Co. 25. a. 11 Co. 10. b.

[c] 1 Finch 44, 198. 2 Finch 61, 62.

Another Exception taken to the Replication was, for that it only recites Part of the Act made in 35. *H.* 8. touching the diſtinct Capacity of the Queen. For there is in it a ſaving to every Subject their Right, which is omitted in the Replication; and it was ſaid that it is but a particular Act, whereof the Court is not bound to take notice. Exception 4.

But the whole Court was of Opinion againſt this Exception, for they ſaid that without its being pleaded the Court and all the Realm are [d] bound to take notice of it. For although it be made touching Things between the King and Queen, and touching the Capacity of the Queen, yet it concerns all the Subjects of the Realm. [e] For every Subject has an Intereſt in the King, and none of his Subjects that is within his Law is divided from the King who is his Head and Sovereign. So that his Buſineſs and Things concern the whole Realm; and foraſmuch as the whole Realm has an Intereſt in the King, and by the ſame Reaſon in the Queen, who is his Wife, the ſaid Act concerns the whole Realm, and may well be called a general Act, whereof every one is bound to take Notice. And *Anthony Brown* ſaid, although the Saving had not been in the Act, yet it ſhould have been implied by the Intent of the Makers, for the Intent of the Act was to make the Queen have ſuch Capacity as is expreſſed in the Act, and to this Intent only the Act enures, and not to all other Intents; [f] and whoever would conſider an Act well ought always to have particular Regard to the Intent of it, and according as the Intent appears he ought to conſtrue the Words. Wherefore this Exception was diſallowed by the Rule of the Court.

[d] Herewith agree 8 Co. 28. b. 1 And. 250. 1 Finch 57. 2 Finch 86. Wing. Max. reg. 81. pl. 50.

[e] 4 Co. 77. a.

[f] See Ante 205 (g) and the Books there cited.

Another Exception was taken to the Replication for not ſhewing the Place of the Date of the ſaid Letters-patent of King *Henry* 8. made of the ſaid Manor to the Queen for Term of her Life; for the Plaintiff conveys his Leaſe from *Cock*, and *Cock* conveys his Title from the Earl of *Pembroke*, and the Earl from the King by Grant of the Reverſion, in which Caſe it is neceſſary for the Plaintiff to make the Queen have an Eſtate for Life, for if ſhe had not a particular Eſtate in the Manor, it could not paſs to the Earl by Words of Reverſion. And in order to make her have a particular Eſtate, it is requiſite to ſhew that the Letters-patent made to her were good and perfect, and this the Plaintiff has not done, unleſs he ſhews in what Place they were dated. For in all Matters of Record the Place of the Date ought to be ſhewn, as well as the Time of the Date. And ſo here the Plaintiff (although he is not bound to ſhew the Letters-patent made to the Queen, becauſe he does not * claim by them) ought nevertheleſs to plead them certainly, which he has not done when he has omitted the Place of the Date of them; wherefore for Want of ſhewing the Place of the Date, the Replication is ill. Exception 5.

* S. P. Ante 149 (*).

But the whole Court was of opinion againſt this Exception. [g] For although it is uſual in pleading Deeds to ſhew the Place where they were made, in order to inform the Court of what *Viſne* the Jury ſhall come, if they are denied, this Reaſon does not hold Place here, as the Lord *Dyer* ſaid. [h] For, he ſaid, no Matter of Record ſhall be tried *per pais*, if it be denied, and the Letters-patent are a Record in themſelves, and no Record can be tried *per pais*. So that foraſmuch as the Place of the Date is ſhewn in pleading only for the Certainty of the *Viſne*, and for no other Cauſe, therefore the Place is not neceſſary to be ſhewn here, becauſe no Jury ſhall come from any *Viſne* to try the Letters-patent. Alſo *Anthony Brown* ſaid, if neither the Place nor the [i] Day of the Date be in the Letters-patent, yet the Letters-patent are as good as the Deed of any [k] other Perſon is, which has not the Place or the Day of the Date. [l] For the Grant of the Thing is the Subſtance, and the Place or the Day of the Date is but a Circumſtance of Truth, and not Matter of Neceſſity. For if the King grants an Office to one by his Letters-patent, and afterwards grants the ſame Office to another by other Letters-patent, and neither of the Letters-patent have any Day of the Date, there if he who had the firſt Patent be diſturbed or ouſted, he ſhall have a *Scire facias* or other Suit, and whether his Patent is more ancient than the other ſhall be tried by a Jury of 12 Men upon Iſſue joined thereon. And the Statute of 18. *H.* 6. *cap.* 1. recites a Miſchief in antedating the King's Letters-patent, and gives Remedy for the ſame, but it does not recite any Miſchief ariſing from the Omiſſion of the Date, but ordains *that of every Warrant hereafter ſent by the King or his Heirs to the Chancellor, the Day of the Delivery of the ſame to the Chancellor ſhall be entered of Record in the Chancery, and that the Chancellor ſhall cauſe Letters-patent to be made upon the ſame Warrant, bearing Date the Day of the Delivery of the Warrant into the Chancery, and not before, and if any Letters-patent from henceforth be made to the contrary, they ſhall be void, and holden for none.* [m] By which Statute Letters-patent bearing another Day of Date than the

[g] S. P. M. 20 H. 7. 6. b. *Per Palmes et Pollard.*

[h] P. 11. H. 6. 42. a. M. 20 H. 6. 10. b. M. 20. H. 7. 6. b. *Per Palmes et Pollard.* Co. Litt. 117. b. 260. a. 4 Co. 71. a. 9 Co. 25. a. 2 Rol. Abr. 574. pl. 1. 2 Rol. R. 70. Hob. 110. Cro. J. 375. Hardr. 168. 1 Finch 185. Tri. per Pais. 8.

[i] But in ſuch Caſe he ought to ſurmiſe a Date, *Per Fineux* M. 20 H. 7, 8. a. Noy 21.

[k] See Kelw. 34. b. pl. 1. a Deed held good, tho' there was no Place nor Day of the Date therein, but the Plaintiff ſurmiſed when and where it was made. S. P. Noy 21.

[l] S. P. 2 Co. 5. a. Cart. 153.

[m] Vin. Abr. tit. Prerogative G. b. 3. pl. 2.

the Day of the Entry of the Warrant (where there is a Warrant) are void, and not otherwiſe; and if there is a Warrant, and the Day of the Delivery of it is entered, and the Patent has no Day of Date, it is good, and is out of the Words and Intent of the Act, and remains at common Law. And at common Law Letters-patent were good notwithſtanding they had no Day of Date, and ſo are they at this Day notwithſtanding they have no Day of Date in them, *quod Dyer conceſſit.*

[b] T. 38. H. 6. 34, 37. Fitz. Record 23. Bro. Patents 29.

[b] And yet, he ſaid, in the *Quare Impedit* brought by the King againſt the Abbeſs of *Sion* in 38. *H.* 6. the Abbeſs conveyed the Fee-ſimple of the Advowſon to her Predeceſſoreſs by Fine of a Biſhop, and in order to make a good Eſtate in the Biſhop, ſhe ſhewed that King *Henry* 5. was ſeized of the Manor to which the Advowſon was appendant, and by his Letters-patent leaſed it to Huſband and Wife for their Lives, and afterwards King *Henry* 6. by his Letters-patent bearing Date, *&c.* reciting the ſaid Demiſe to the Huſband and Wife, granted the ſaid Manor to the ſaid Biſhop and others, *habendum una cum Advocatione* to them in Fee, and the Biſhop ſurvived the others, and granted it to the Predeceſſoreſs of the Defendant *ut ſupra:* And the King demurred upon the Plea, and one Cauſe of the Demurrer there ſhewn is, for that the Defendant pleaded the Letters-patent made to the Huſband and Wife, (as of Neceſſity ſhe ought, for the whole Effect of the Letters-patent made to the Biſhop depended upon the firſt Letters-patent made to the Huſband and Wife, for if there was no ſuch Leaſe, conſequently there was no ſuch Reverſion, and if ſo, then the ſecond Letters-patent were void) and did not ſhew the Day, Year, or Place of the Date of them. And there it is argued, that although ſhe ſhould not be compelled to ſhew the ſaid Letters-patent made to the Huſband and Wife, becauſe they don't belong to her, that yet ſhe ought to plead them certainly, and ſhew the Day, Year, and Place of the Date, for they are of Record, and every Matter of Record ought to be pleaded certainly, whether it belongs to him that pleads it or not, and every Matter of Record ought to have the Year, Day, and Place of the Date, or elſe it is no Matter of Record, for if the Letters-patent have no Date, they are worth nothing, and the Party ſhall have Advantage thereof by Demurrer. And although Judgment was there given for the King, yet, he ſaid, he did not take the ſaid Exception to be the Cauſe thereof, but other Matters there moved, ſo that he apprehended this Point was not there adjudged. And he ſaid, tho the Place of the Date be out of the Letters-patent, yet they are good, and therefore that the Replication here ſeemed to him to be good, notwithſtanding the Omiſſion of the Place of the Date. Alſo it was ſaid, that the ſhewing of the Letters-patent made to the Queen is but Matter of Conveyance. And ſo this Exception was diſallowed by the Rule of the Court.

[c] M. 12. H. 7. 13. b. *Per Brian.* Bro. Monſtrans de faits 112, in fine. M. 16. H. 7. 11. b. Co. Litt. 260. a. 6 Co. 15. b. Hardr. 158. Doc. Pla. 307, 308, 352. Crompt. J. C. 24. a, 51. b.

And *Anthony Brown* in ſpeaking to this Exception ſaid, [c] if a Man pleads any Grant of the King by his Letters-patent ſealed with the Great Seal, and ſhews them forth, the other Party cannot ſay, *nul tiel Record*, for if he ſhould have a Day to bring in the Record, he could not prove it by any other Means than by that which he has ſhewn, *viz.* by the Great Seal. And therefore the Party and every other ſhall be eſtopped to deny it, and it is good againſt all by Concluſion. But if a Man pleads a Recovery, Fine, or Indictment, or the like, there the other Party may ſay, *nul tiel Record*, and he ſhall have a Day to bring it in, for there he may bring it in under the Great Seal, which is a greater Authority than he has ſhewn, and ſo is the Diverſity, as he ſaid.

Exception 6.

Another Exception was taken to the Replication, for that in the Bar it is alledged that King *Edward* 6. died ſeized, and the Replication does not warrant that he did not die ſeized, (for he had granted the Reverſion to the Earl of *Pembroke)* and has not taken a Traverſe to the dying ſeized alledged in the Bar; *ſed non allocatur Exceptio*, for it is not of any Effect to be traverſed, nor very material whether he died ſeized or not, for the Eſtate which he had is ended by the Allegation of the Defendant, ſo that the Defendant does not claim by the Deſcent, but by the Remainder before, for which Cauſe the Deſcent is immaterial.

Exception 7.

Another Exception taken to the Replication was, for that it contains that the Earl of *Pembroke* after the Death of the Queen, entered into the ſaid Manor whereof, *&c.* and thereof enfeoffed the ſaid *Henry Cock* and his Heirs, by virtue of which he entered and was ſeized in his Demeſn as of Fee, whereas it is not the Order of pleading upon a Feoffment to ſay that he entered, for the Feoffment contains Livery, and the Livery contains Seizin in Deed, which is as much as an Entry, for an Entry is to no other Purpoſe but to gain Poſſeſſion in Deed, and that is contained in the Livery before, and then the Allegation of Entry makes the Replication bad; *ſed non allocatur Exceptio*, for although the ſaid Reaſon is true, that the Feoffment implies Seizin, which is tantamount to an Entry, yet the Entry alledged does not make the Replication bad, for it is but Surpluſage, [d] which not being contrary to the Matter before, ſhall not vitiate the Plea.

[d] S. P. Co. Litt. 303. b. 4 Co. 42. a. 1 Rol. R. 17.

Exception 8.

The Lord *Dyer* moved another Exception to the Replication, for that it contains, that King *Edward* 6. granted the Reverſion to Sir *William Herbert* Knight now Earl of *Pembroke*, to have and to hold to the ſaid Earl and to his Heirs; in which Caſe if he was then only a Knight, it cannot be well ſaid *to have and to hold to the ſaid Earl*, nor that *by virtue thereof the ſaid Earl was ſeized, &c.* But it ought to be, "to have and to hold to the ſaid Sir *William Herbert*," and, "by virtue whereof the ſaid Sir *William Herbert* was ſeized," ſo that it ſeemed to him not to be as well as it might be. But as he was the firſt that moved this in his Argument, and no other argued after him, therefore none of the reſt of the Juſtices ſhewed their Opinions therein.

And it was moved by ſome of the Counſel for the Plaintiff, that the Grant of King *Henry* 8. to the Queen for her Life was a Diſcontinuance of the Tail, and that the Lord *Berkley* the Defendant might not enter, and that it was a Diſcontinuance for the Life of the Queen, which *Southcote*, who was of Counſel for the Defendants granted: For he ſaid, if the King ſhall be taken as Tenant in Tail, then his

his Grant in Fee, in Tail, or for Life made by his Letters-Patent works a Diſcontinuance, for he cannot make Livery, and therefore the Law ſays that ſome Way he ſhall be able to do as much as a common Perſon may, that is, make a Diſcontinuance. [a] And if a Copyhold is entailed, and he will ſurrender to the Uſe of another in Fee, and a Copy is made to the other accordingly, this ſhall be a Diſcontinuance, for he cannot part with the Land by Livery or any other Way, and this Way which he may uſe ſhall be of the ſame Benefit to him as Livery ſhall be to him that may make it. So in the principal Caſe it ſhall be a Diſcontinuance for Life. But his Companions held that it ſhould not be a Diſcontinuance, becauſe it only paſſed by Grant, [b] which cannot make a Diſcontinuance. [c] And alſo every Diſcontinuance is a Wrong, [d] which the King cannot do. But he, and all the other Counſel for the Defendants, and the whole Court, held, that if the King ſhall be only Tenant in Tail, ſo that the Matter in Law will ſerve the Lord *Berkley* the Defendant, his Entry ſhall be lawful, for if it ſhould be a Diſcontinuance, it could not be a Diſcontinuance longer than for the Life of the Queen. For the Grant of King *Edward* 6. to Sir *William Herbert* could not make a Diſcontinuance in Fee, notwithſtanding it was executed in his Lifetime, becauſe King *Edward* 6. was never ſeized by Force of the Tail, and ſo by the Rule of [e] *Littleton* it is not a Diſcontinuance. And therefore the Lord *Berkley* in the Remainder might enter without Office, or *Scire Facias* againſt the Patentee, or any ſuch Means, for the Intereſt of the King is abſolutely determined, and nothing remains in him.

[a] O. Bendl. 189. *per Yelv.* J. Vin. Abr. tit. Copyhold G. e. pl. 3.

[b] M. 38. H. 8. Bro. Diſcontinuance de poſſeſſ. 35. Patents 101. Taile 39. B. N. C. § 313. Co. Litt. 332. b. 1 Co. 44. b. Bridgm. 96. 2 Finch 240. Kitch. 308.

[c] 1 Rol. R. 153.

[d] See Poſt 246 (l) and the Books there cited.

[e] Littlet. § 637.

And the Lord *Dyer* in his Argument took Exception to the Replication, for that it confeſſes the Eſtate-tail in King *Henry* 7. and then ſays that he having Iſſue Prince *Arthur* entered and was ſeized in Fee; whereas, he ſaid, the having Iſſue did not make him to have the Fee, for the Fee either accrued to him by the Remainder or never, for admitting that it was in the King as the Plaintiff will have it, viz. as it was in others before the Statute, yet the Fee-ſimple veſted at the Beginning, tho' by Iſſue he had Power to alien, which he had not before, but the Iſſue was not the Cauſe of having the Fee, but the firſt Gift. So that, he ſaid, the Iſſue did not make ſuch a Metamorphoſis as the Replication contains, for which Reaſon he ſaid the Replication was not good in this Point. Exception 9.

Alſo he took Exception to the Bar, for that it contains that King *Edward* 6. died without Heir of his Body iſſuing, and that the ſaid King *Henry* 7. before the Time when, &c. died without Heir Male of his Body begotten, which, he ſaid, was a Contradiction in itſelf, for it could not be ſaid that *Henry* 7. died without Heir Male of his Body, when he has ſhewn before that he had Iſſue *Henry* 8. and he *Edward* 6. But if an Eſtate-tail is given to *J. S.* the Remainder to another, and *J. S.* hath Iſſue and dies, and the Iſſue enters and dies without Iſſue, and he in the Remainder brings a *Formedon* in the Remainder, [f] he may ſay that *J. S.* died without Heir of his Body, and the Writ and Declaration there ſhall be good, notwithſtanding the other ſhews that he had Iſſue which ſurvived him, and entered, and died without Iſſue, for when his Iſſue died without Iſſue, he upon the Matter died without Heir of his Body, and this is uſual in Writs of *Formedon* in Remainder, and there is no Repugnancy of his own ſhewing; but to ſhew that he had Iſſue and died, and the Iſſue entered, and died without Iſſue, and then to ſay that the Father died without Iſſue, is a Repugnancy of his own ſhewing; and here he might have uſed other Words to expreſs that there was no other Heir Male of the Body of *Henry* 7. in being, for he might have ſaid that *Edward* 6. died without Heir of his Body, *there being no Heir Male of the Body of the aforeſaid King Henry* 7. *alive*, which would have ſatisfied his whole Intent without any Repugnancy. Exception 10.

[f] See Dy. 14, pl. 75.

Another Exception he took to the Bar, for that it contains that the Lord *Berkley* the Defendant entered as in his Remainder, and was thereof ſeized in his Demeſn as of Fee, until the ſaid *Henry Cock* entered into the ſaid ſeven Acres of Wood, and demiſed them to the Plaintiff for the ſaid Term, as the Plaintiff has declared, &c. Which is not well pleaded, for the Plaintiff has declared of a Leaſe in Deed made to him by *Henry Cock*, which the Defendants ought to confeſs and avoid, or traverſe, and here they have not done either the one or the other, for they have ſaid that the Lord *Berkley* was ſeized until the ſaid *Henry Cock* entered and made the Leaſe, and if *Cock* entered and did not diſſeize the Lord *Berkley*, he had no Eſtate to make the Leaſe, for the Defendants have ſhewn that the Lord *Berkley* was in by good Title until *Cock* entered, in which Caſe his Entry ſhall not gain him Poſſeſſion; [g] for if two are upon the Land, the Law will adjudge the Poſſeſſion in him that has the beſt Right to it. [h] So that the Entry does not imply a Diſſeizin, and without a Diſſeizin he had no Eſtate to make the Leaſe, for which Reaſon it ought to have been ſaid that he entered and diſſeized him, and afterwards made the Leaſe, and that he re-entered, and this would have been a good Confeſſion and Avoidance of the Leaſe, but as it is pleaded it is not ſo, for his Entry does not imply a Diſſeizin, nor ſhall it gain the Poſſeſſion. And ſo it is taken in one of the Years of [i] *Edw.* 4. Wherefore the Bar ſeemed to him not good for theſe two Cauſes, but as he firſt moved theſe two Exceptions in his Argument, and none argued after him, I could not learn the Opinions of the other Juſtices therein. Exception 11.

[g] Litt. § 701. Moor 694. pl. 960. Hob. 322. Bridgm. 57. Perk. § 218. 1 Finch 32. 2. Finch 45.

[h] S. P. 22. H. 6. 43. pl. 27. Bro. Pleadings 27. 1 Rol. R. 322, Bridgm. 57. Salk. 246 Anony. *per Holt* C. J. Heath's Max. 164. Vin. Abr. tit. Poſſeſſion A. pl. 3.

[i] P. 10. Ed. 4. 6. a.

As to the Matter in Law, it was ſaid by the Serjeants above mentioned of Counſel for the Defendants, that firſt the Capacities of the King are to be conſidered, and how many Capacities he has; and if he has ſeveral Capacities, then in what Capacity King *Henry* 7. took the Remainder; and whether or no after Iſſue had he had Power to alien, as every ſuch Donee had before the Statute *de donis conditionalibus*, or if he ſhall be bound and reſtrained by this Statute, as every other Donee is, and if he ſhall, then it follows from thence that when the Iſſues Males coming from King *Henry* 7. were extinct, the Lord *Berkley* now Defendant might enter. And if ſo be that King *Henry* 7. may be ſaid to have a Fee-ſimple, and to have Power to alien *poſt prolem ſuſcitatam*, King *Henry* 8. ſhall alſo be deemed in the ſame Caſe, and ſo ſhall King *Edward* 6. and then he by his

The Argument upon the Matter in Law. For the Defendants.

Letters-patent made to Sir *William Herbert* has lawfully given the ſaid Land in Fee-ſimple, and from thence it will follow that the Lord *Berkley* now Defendant might not enter, but was without Remedy. And as to this it was argued on this Side that the King has two Capacities, [a] for he has two Bodies, the one whereof is a Body natural conſiſting of natural Members as every other Man has, and in this he is ſubject to Paſſions and to Death as other Men are; the other is a Body politic, and the Members thereof are his Subjects, and he and his Subjects together compoſe the Corporation, as *Southcote* ſaid, and he is incorporated with them, and they with him, and he is the Head, and they are the Members, and he has the ſole Government of them; and this Body is not ſubject to Paſſions as the other is, nor to Death, for as to this Body the King never dies, [b] and his natural Death is not called in our Law (as *Harper* ſaid) the Death of the King, but the Demiſe of the King, not ſignifying by the Word *(Demiſe)* that the Body politic of the King is dead, but that there is a Separation of the two Bodies, and that the Body politic is transferred and conveyed over from the Body natural now dead or now removed from the Dignity royal to another Body natural. So that it ſignifies a Removal of the Body politic of the King of this Realm from one Body natural to another. But notwithſtanding that theſe two Bodies are at one Time conjoined together, ‖ yet the Capacity of the one does not confound that of the other, but they remain diſtinct Capacities. [c] So that the King may take in his Body natural Lands or Tenements as Heir to any of his Anceſtors; and † alſo in this Capacity he may purchaſe to him and to his Heirs, * and his Heirs ſhall hold the ſame notwithſtanding he is removed from the Eſtate Royal. [d] And alſo he may take or purchaſe Lands or Tenements in Fee in his Body politic, viz. to him and to his Heirs Kings of *England*, or to him and to his Succeſſors Kings of *England*; ſo that his double Capacity remains as it does in other Perſons that have a double Capacity. [e] As a Biſhop or Dean may take by Deſcent or Purchaſe to them and to their Heirs, or to them and to their Succeſſors, as they pleaſe. [f] And to prove that the Eſtate Royal does not confound the other Capacity, the Caſe in 45. *Aſs. pl.* 6. was alledged, where it appears that King *Henry* 3. gave a Manor to the Earl of *Cornwal* in Tail, ſaving the Reverſion to himſelf, and died, the Earl gave the Manor to another in Fee by Deed with Clauſe of Warranty in Exchange for another Manor, and afterwards the Earl died without Iſſue, leaving Aſſets, and the Warranty and Aſſets deſcended upon King *Edward* 1. being Heir to the Earl; and there it is adjudged that the King was barred by this Warranty with Aſſets, and therefore the Aſſignee of the Alienee had Reſtitution of the Manor out of the Hands of King *Edward* 3. who had ſeized the Manor into his Hands for the Reaſon aboveſaid. Which Caſe proves that the Capacity which the King has in his Body natural remains after he is King, for elſe the Warranty and Aſſets could not have deſcended upon him as Heir to the Earl his Anceſtor; ſo that by this Warranty and Aſſets, which deſcended upon the Body natural of the King, he was barred of the Reverſion which he demanded in his Body politic, for it was parcel of the Poſſeſſions of the Crown, for any Thing that appears to the contrary. And as his Capacity remains to take by Deſcent as Heir, ſo it remains to purchaſe therein. [g] For in 34. *H.* 6. (as *Southcote* ſaid) the Maſter of the *Houſe of God* in *Canterbury* brought a *Quare Impedit* againſt the Abbeſs of *Sion*, and counted that King *Henry* 4. was ſeized of the Advowſon as in groſs in his Demeſn as of Fee and Right, and made Deſcent from him to King *Henry* 5. and from him to King *Henry* 6. who granted it to the Plaintiff; and Exception was taken to the Count, becauſe he ſaid that King *Henry* 6. was ſeized as Heir to his Father of the Advowſon as of Fee and Right, and did not ſay *in jure Coronæ*, which he ought to have ſaid; *ſed non allocatur*, for it is held by the Arguments there, [h] that if the King purchaſes Land, he ſhall have it in the Capacity of his natural Body, and not in right of the Crown. So that his Capacity to take in his natural Body as well by Deſcent as by Purchaſe remains, as well as his Capacity to take in his Body politic, for of the politic Capacity there is no Doubt.

Further, as to the Point in what Capacity King *Henry* 7. took the Remainder, the Counſel for the Defendants held that he took it in the Capacity of his Body natural. For it is limited that if the Marqueſs die without Iſſue, the ſaid Manor ſhould remain to the ſaid late King *Henry* 7. and to the Heirs Males of his Body begotten, by which Name of *Henry* 7. his proper Name is ſignified, and the Capacity of his Body natural; for King he muſt of Neceſſity be called, and the calling him *Henry* 7. is a Demonſtration what King, that is to ſay, not King generally, but King *Henry* 7. which is a particular King known only, and no other, by that Name. And no other Words could have been uſed to ſignify his proper Name, and to give it to his Body natural. [i] And if Land is given to the King and to his Heirs, he takes it in his Body natural, and not in his Body politic. And this is proved by the ſaid Caſe in 34. *H* 6. where the Party declared that the King was ſeized as of Fee, and did not ſay *in jure Coronæ*, and Exception was taken to it becauſe he did not ſay *in jure Coronæ*, and diſallowed. [k] And it is there ſaid, that if the King is ſeized of Land parcel of the Crown, and parcel by Purchaſe, and dies leaving a Son and a Daughter by one Venter, and a Son by another Venter, and the Son enters and dies without Iſſue, the Daughter ſhall have the Lands purchaſed, and the Son the other, *ergo* a Purchaſe of the King does not go to the Body politic, but to the Body natural. [l] And if Lands in Gavelkind are given to the King and to his Heirs, and he dies having Iſſue two Sons, *Southcote* ſaid that both ſhall inherit together, and the eldeſt being King ſhall not have the whole, and ſo, it was ſaid, it is taken in a certain Book, *ergo* a Gift to the King and to his Heirs veſts in the Body natural of the King, and not in the Body politic, for if it had veſted in the Body politic, then the eldeſt alone ſhould have had it. So here the Remainder in Tail to King *Henry* 7. and to the Heirs Males of his Body ſhall veſt in his Body natural, and in that Body he ſhall enjoy it, [m] ſo that if he had been depoſed or removed from the Office of King, yet he ſhould have held this Land as Land purchaſed

[a] 7 Co. 10. a *Calvin's* Caſe. Vin. Abr. tit. Prerogative Y. d. 2. pl. 5. Ante 213 (b).

[b] See Ante 177 (c) and the Books there cited.

‖ See Poſt 242 (d).

[c] S. P. 1 Finch 56. 2 Finch 87, 4 Bac. Abr. 191.

† Ibid. But *per Holt* C. J. Contra for ſuch a Purchaſe to him and to his Heirs ſhall veſt in his politic Capacity, and the King can have nothing in his natural Capacity, unleſs in Right of his Dutchy or an Eſtate-tail by the Statute *de donis* 7 Mod. 78.

* S. P. Poſt 250. (b). and (d) Infra (m).

[d] 1 Finch 56, 57. 2 Finch 87, 88.

[e] Bro. Dean, &c. 2. P. 14. H. 8. 30. b *per Pollard.* 2 Finch 88. Poſt 250 (c).

[f] 45. Aſs. pl. 6. Fitz. Garranty 68. Bro. 52. Aſſets per Deſcent 31. Prerogative 52. Taile 34. Co. Litt. 19. b. 370. b. 7 Co. 11. a *Calvin's* Caſe. 9 Co. 132. b. 2 Rol. R. 217. Poſt 553.

[g] P. 34. H. 6. 34. b. Fitz. Quare Imped. 88. Bro. Pleadings 12. Dy. 86. pl. 95.

[h] Infra (i). Sed Contra Co. Litt. 16. a. 7 Mod. 78. *Holt* C. J. 4 Bac. Abr. 192.

[i] Supra (h). Sed Contra Co. Litt. 16. a. 7 Mod. 78. *Holt* C. J. 4 Bac. Abr. 192.

[k] P. 34. H. 6. 34. b. *per Moile.* Bro. Deſcent 5. Prerogative 4. But Co. Litt. 15. b. ſays contrary, that the Daughter ſhall not have the Lands purchaſed, becauſe they veſt in the politic Capacity, and as ſuch ſhall go to the younger Brother with the other Lands parcel of the Crown. S. P. 4 Bac. Abr. 193.

[l] Lamb. Peramb. 536. follows this Opinion. But ſee the contrary Co Litt. 15. b. Robinſ. of Gavelk. 67. Poſt 247 (c). *per A. Brown* J. 1 Keb. 506. 1 Sid. 138. T. Raym. 77. where this Opinion is denied to be Law by *Twiſden* J.

[m] Supra (*).

ed by him in his Body natural. [a] But, he ſaid, if the King had a Villain in right of his Crown who had purchaſed Land, and the King entered into it, there he ſhould have it in Right of his Crown, and ſhould hold it in his Body politic, becauſe in that Body he enjoyed the Villain. [b] And where a Man has a Thing by Reaſon of another, the Thing which comes by Reaſon of the other ſhall be had in the ſame Capacity in which the other that was the Means thereof was enjoyed. [c] And therefore, he ſaid, in 41. *Ed.* 3. in Aſſize it is taken that if a Biſhop, who has a Villain in right of his Church, enters into the Land purchaſed by his Villain, it ſhall be intended in right of his Church. So if the King has a Seigniory in right of his Crown, and the Tenant ceſſes or diſclaims, whereby the King recovers the Tenancy, he ſhall hold it in right of his Crown, becauſe in that Right he held the Seigniory which was the Cauſe of the Recovery. But here this Remainder in Tail to King *Henry* 7. is a new Thing that came only by Purchaſe, and not by Reaſon of another Thing, and therefore he ſhall be taken to hold and enjoy it in the Capacity of his Body natural.

Then as to the laſt Point, viz. if the King ſhall be reſtrained and bound by the Statute *de donis conditionalibus*, ſo that after Iſſue had he could not have Power to alien: The Counſel for the Defendants ſaid, that firſt the Common Law is to be conſidered, and the Miſchief that was before the Statute; ſecondly, the Purview and Intent of the Statute; and thirdly, the Eſtate and Prerogative of the King. And as to the Common Law before the Statute, there was but then [d] one Eſtate of Inheritance, and that was a Fee-ſimple, but theſe Fee-ſimple Eſtates were in two Manners, the one a Fee-ſimple abſolute, the other conditional. [e] The Fee-ſimple abſolute was when Land was given to a Man and to his Heirs; the other to his Heirs of his Body, which was alſo a Fee-ſimple, but in this laſt Eſtate there was a Condition annexed to it, that if he died without Heirs the Land ſhould revert to the Donor. Which Condition was implied in the Words as well as in the Intent, for in that the Gift is to one and to his Heirs of his Body, and no further, therein it is implied that if he has no Heirs of his Body, the Donor ſhall have the Land again. [f] And hereupon there was a Writ at the Common Law for Recovery of the Land if the Donee died without Iſſue, viz. a *Formedon* in Reverter, which the Statute ſays *is common enough in the Chancery*. [g] But a *Form don* in Remainder for him in the Remainder of ſuch Eſtate lay not at the Common Law; [h] for a Remainder could not be appointed over upon ſuch Eſtate before the Statute *de donis* was made, becauſe a Gift to one and to his Heirs of his Body was a Fee-ſimple, whereupon no Remainder can be appointed over, [i] for a Remainder cannot be limited upon a Fee-ſimple determined. [k] But if the Donee had Iſſue, then he might have aliened, and by this Alienation have barred his Iſſue for ever; for they conſtrued the Gift all one as to this Purpoſe when Land was given to one and to his Heirs of his Body, and when it was given to him and to his Heirs, if he had Heirs of his Body. So that they took this as a Condition, and when the Donee had Iſſue, then they took the Condition to be performed, and that he might then alien, becauſe he had ſuch Heirs as were limited in the Gift. [l] But if he had died without any Iſſue, or if he had had Iſſue, and that Iſſue had died without Iſſue, the Donor ſhould have had a *Formedon* in Reverter. For in *M.* 4. *H.* 3. *Fitz. Formedon* 64. as *Southcote* cited it, a Man brought a *Formedon* in Reverter for Lands given in Frankmarriage, becauſe the Iſſue of the Donee died without Heir of his Body, and it was adjudged that it lay well for the Donor or his Heir. [m] And if the Donee at the Time of the Alienation had no Iſſue, but after the Alienation had Iſſue, who died without Iſſue, ſuch Alienation ſhould not bind the Donor, but the Donor ſhould have a *Formedon* in Reverter. For *Southcote* alledged, that in [n] 30. *Ed.* 1. *in Itinere Cornubiæ* a Man brought a *Formedon* in Reverter, for that the Donee died without Iſſue; and the Tenant ſaid that the Donee aliened before the Statute, and had Iſſue, and the Demandant ſaid that he had not Iſſue when he aliened, and there the Court compelled the Tenant to anſwer if he had Iſſue alive when he aliened, wherefore the Tenant ſaid that he had Iſſue alive when he aliened, and the Demandant *e contra*. By which Caſe it appears that if the Donee had Iſſue at the Time of the Alienation, ſuch Alienation ſhould bind the Donor, but if he had no Iſſue at the Time of the Alienation, then the Alienation ſhould not bind the Donor, altho' he had Iſſue afterwards, becauſe the Condition was not performed at the Time of the Alienation, that is, he had then no Iſſue of his Body. So that they conſtrued the Gift that the Donee might alien after Iſſue had, which was contrary to the Intent of the Donor, for he intended that the Land ſhould come back again to him whether the Donee had Iſſue or not, if ſo be that all the Iſſues were dead, and that the Iſſues (whilſt there were any) ſhould have the Land, and no other. And the Expoſition which they then made of the Gift, viz. that the Donee might alien after Iſſue had, was contrary to the Will of the Donor, as the Preamble of the Statute *de donis* ſays, *it ſeemed and yet ſeems hard, &c.* Which being a great Miſchief, the King and the whole Parliament intended to remedy it, as the Statute itſelf purports, which ſays, *wherefore our Lord the King perceiving how neceſſary and expedient it is to provide Remedy in the aforeſaid Caſes, hath ordained that the Will of the Giver, &c. ſhall be obſerved, &c.* So that for a great Grievance they provided a full Remedy. And the Act ſays afterwards, if a Fine be levied hereafter upon theſe Lands, *ipſo jure ſit nullus*, whereby it is ordained that a Fine (altho' Fines were then greatly regarded) as to the [o] Right ſhall be void againſt the Iſſues or the Donor. Which three Clauſes, viz. *it ſeemed hard, &c.* and, *wherefore the Lord the King perceiving, &c.* and, *that the Fine ſhall be void, &c.* intimate to every Man (as *Cholmley* the Recorder ſaid) the great Conſideration which the Legiſlature had in the making of the Act, and that they apprehended the Grievance to be very great, and intended to make the Proviſion for it general without any Exception; and the Words of the Purview ſhew the ſame, viz. *that the Will of the Giver, according to the Form in the Deed of Gift manifeſtly expreſſed, ſhall be from henceforth obſerved, &c.* Which Will of the Donor

[a] 2 Rol. Abr. 734. G. pl. 1.

[b] See Poſt 292 *Chapman v. Dalton* adjudged upon this Ground, and many other good Caſes there put to the ſame Effect.

[c] M. 41. Ed. 3. 21. pl. 8. Fitz. Mortmain 5. Bro. 5. P. 32. H. 8. Bro. Villenage 46. B. N. C. § 194. Co. Litt. 117. a. 124. b. 2 Rol. Abr. 737. G. pl. 1. Plowd. Quær. § 234.

[d] Litt. § 13. Co. Litt. 19. b. 6 Co. 40. a. 2 And. 137. Gouldſb. 9. Curſon 6 Poſt 239. (d). 241 (i). 245. (c).

[e] 1 Finch 102.

[f] 2 Inſt. 336. Vaugh. 367. Booth 140. 2 Bac. Abr. 589. 2 Finch 268.

[g] 2 Inſt. 336. Vaugh. 367, 369. Gouldſb. 5. pl. 11. Booth 140, 151. 1 Finch 271. 2 Finch 267, 268. Vin. Abr. tit. Formedon A. pl. 2. Poſt 239 (g).

[h] 1 Mod. 109. 1 P. Wms. 366. Rep. *temp.* Hardwick 176. Pig. on Recov. 21. 2 Finch 113. Poſt 239 (e).

[i] 1 Dy. 4. pl. 10. Curſon 28. Poſt. 239 (f). 249 (a).

[k] Co. Litt. 19 a. 2 Inſt. 333 Booth 140. Curſon 6. Poſt 239, (m) 246 (c). 250 (h)

[l] Co. Litt. 19. a. 7 Co. 35. a. 2 Finch 268.

[m] Bro. Formedon 69. Co. Litt. 19. a. 7 Co. 35. a. 2 Finch. 268. Wing. Max. reg. 28. pl. 1. 2 Bac. Abr. 257.

[n] Fitz. Formedon 65.

[o] See Ante 57 (o).

to have the Land continue in the Iſſues, and to have the Land back again after the Iſſues were dead, was as great when the King was Donee as when a common Perſon was Donee. So that there is no Exception of the King either in the Words or in the Intent of the Act, but he is included in the Purview of the Act, as others are, altho' he is not named by expreſs Words. And foraſmuch as the Act is made to ſave Men's Inheritances, we ought to conſtrue it according to the Conſideration of the Common Law, and to admeaſure the Prerogatives of the King upon this Act, which is made for the Safety of the Inheritances of others, in ſuch Manner as the Common Law admeaſures them in Caſes that affect the Inheritances of others at Common Law. And altho' by the Common Law the King has many Prerogatives touching his Perſon, his Goods, his Debts and Duties, and other perſonal Things, yet the Common Law has ſo [a] admeaſured his Prerogatives that they ſhall not take away nor prejudice the Inheritance of any. [b] And therefore the Common Law ſo favours the King, that a Cuſtom which binds all others to pay Toll for Things bought in Markets or Fairs, or which binds Men to pay Through-toll, ſhall not bind the King to pay Toll in ſuch Caſes, but he is excepted by his Prerogative. [c] But yet a Cuſtom for Toll-traverſe ſhall bind the King, as *Harper* ſaid, who cited for it the Book of 46. *Ed.* 3. for Toll-traverſe is for croſſing or going over another's Soil or Freehold, and it affects the Inheritance of a Man to ſuffer any one to go over his Ground, not being a common Way, without paying any Thing for it, for which Reaſon the King's Prerogative by the Common Law cannot prevail againſt ſuch a Cuſtom as ſtands with the Right of Inheritance of another. [d] Alſo he ſaid that the King has ſuch a Prerogative that he may wave Demurrer and plead to Iſſue, or wave Iſſue and demur upon the Plea of the other Party, [e] but yet if he and the Party are at Iſſue he cannot change his Iſſue in another Term, for then he might do it *in infinitum*, and the Party might be diſinherited thereby, and therefore the Common Law will not ſuffer the King to have ſuch a Prerogative. So in general Statutes made for the Safety of Inheritances, or for the public Good, the Expoſitors of them have conſtrued them according to the Courſe of the Common Law, viz. that they ſhall include the King, notwithſtanding he is not named. As the Statute of *Weſtminſter* 2. *cap.* 5. made to redreſs Uſurpations of Advowſons upon Tenants for Life, or during the Minority of Infants, ordains *that as often as any, having no Right, doth preſent, during the Time that ſuch Heirs are in Ward, or during the Eſtates of Tenants in Dower, by the Curteſy, or otherwiſe for Term of Life, &c. at the next Avoidance when the Heir is come to full Age, or when after the Death of the Tenants before named the Advowſon ſhall revert unto the Heir being of full Age, he ſhall have ſuch Action and Exception by Writ of Advowſon poſſeſſory, as the laſt Anceſtor of ſuch an Heir ſhould have had at the laſt Avoidance happening in his Time, being of full Age before his Death, or before the Demiſe was made for Term of Life, &c.* [f] And by the better Opinion of the Court it is held in a *Quare Impedit* in 35. *H.* 6. that if the King uſurps upon Tenant by the Curteſy, or during the Nonage of an Infant, this ſhall not gain the Patronage of him in the Reverſion, or of the Infant, for the Statute was made to ſave the Inheritance of them that had Right, and for the public Good. [g] But the principal Caſe there was that the King uſurped upon an Infant Tenant for Life of an Advowſon of his own Purchaſe, and there it is not held ſo clearly that he ſhould avoid it by Reaſon of his Nonage, for he is not ſo fully within the Purview of the Act, becauſe he had not the Advowſon by Deſcent, and the Statute ſays, *he ſhall have the ſame Action as his laſt Anceſtor ſhould have had.* [h] And ſo it is there held that where the Statute of *Merton cap.* 5. ordains, *that Uſuries ſhall not run againſt any being within Age*, which is as much as to ſay that the Rent ſhall not be doubled during the Nonage of the Heir, if the King gives Land to another rendering Rent payable at a Feaſt annually, and for Default of Payment that he ſhall double the Rent at every Default, and afterwards the Grantee dies, his Heir within Age, there he ſhall not double his Rent to the King, for altho' the Statute is general, yet the King is bound by it, becauſe it is made for Remedy of Infants, and for the public Good. [i] Alſo the Statute of *Merton cap.* 10. which ordains *that every Freeman which oweth Suit to the County, Trithing, Hundred, and Wapentake, or to the Court of his Lord, may freely make his Attorney to do thoſe Suits for him*, includes the King in the general Words, for a Man may make his Attorney to do his Suit to the King's Court, if he be his Lord, as well as to the Court of another, becauſe the Act is made for the Eaſe and Convenience of Subjects. [k] So in *Longo* 5. *Ed.* 4. a Man indicted of Treſpaſs pleaded not guilty, and was convicted, and there he ſhewed to the Juſtices that he wanted an Addition, and that the Court *ex officio* ought to conſider it, altho' he had pleaded to it, and he prayed Remedy, and there it was ſaid that an Indictment is the King's Suit, and that the King is not bound by the Statute to give an Addition, but it is at the King's Election, as it was at the Common Law; but it is there held that the King is bound by the Statute, for of a Law which belongs to a common Perſon, be it the Common Law or a ſpecial Law, every Man ſhall take Advantage, which the King of common Right cannot defeat, for every Man is an Inheritor to this Common Law of Addition as well as to any other Common Law, which the King cannot defeat without Parliament, for of this Law every Man ſhall take Advantage: And to this all the Juſtices there agreed that there ought to be an Addition in the King's Actions, as in Indictments where Proceſs of Outlawry lies, as well as in Debt, Treſpaſs, Appeals, and other ſuch Originals, where Proceſs of Outlawry lies; which, it was ſaid, is a very good Caſe, and the Reaſon there given is well worthy of Obſervation. Yet the King is not generally bound by all Statutes in general Words, unleſs he is ſpecially named. [l] As the Statute which ſays, *Common Pleas ſhall not follow our Court*, does not bind the King; nor the Statutes which give Puniſhment for Diſtreſſes in divers Caſes, nor many other Statutes which give Puniſhment for breaking of Orders, or touching Goods and Chattles, which are intended only between Subjects, and to prevent Diſcord between them; but otherwiſe it is if it concerns the Safety

[a] 4 Inſt. 301. Noy 174.

[b] M. 35. H. 6. 26. *per* Forteſcue *et* Heng ſton. 28 *per* Molle. 29 *per* Priſot *et* Forteſcue Bro. Toll 9.

[c] 23. H. 3. Fitz. Toll. 5. 1 Show. 139.

[d] See Ante 85 (d) and the Books there cited.

[e] P. 13. Ed. 4. 8. a. Fitz. Prerogative 8. Bro. 69. M. 28. H. 6. 2. pl. 8. Fitz. Prerogative 3. Vaugh. 65. Hardr. 83, 455. Litt. R. 115. Heath's Max. 173. 1 Finch 184. 2 Finch 84.

[f] T. 35. H. 6. 60. b. Fitz. Quare Imped. 92. Bro. 18. Moor 309. 1 Rol. R. 151, 161. 2 Inſt. 359. Sed Contra 1 Rol. R. 156 Crompt. J. C. 15. b. Vin. Abr. tit. Statutes E. 10. pl. 2.

[g] Bro. Coverture 70. Parliament 6. 2 Inſt. 358.

[h] T. 35. H 6. 61. b. *per Nedham.* 2 Inſt. 89. 1 Rol. R. 151. 4 Bac. Abr. 199.

[i] 1 Rol. R. 166. 4 Bac. Abr. 199.

[k] P. Long. 5. Ed. 4. 32. b. Bro. Additions 50. Parliament 47. 1 Rol. R. 156, 3 Keb. 143. Crompt. J. C. 16. b. 1 Finch 59. 2 Finch. 234. Vin. Abr. tit. Statutes E. 10. pl. 5. Poſt 240 (g).

[l] T. 31. Ed. 1. Fitz. Prerogative 28. 11 Co. 68. b. 75. a. 1 Rol. R. 164. 4 Bac. Abr. 199, 200. Poſt 240, (f). 244 (a).

Safety of Inheritances, or the public Utility of the Realm. And as in the ſaid Statutes of Uſurpation, of Uſury, and others which concern the Reality or Inheritance, or the public good of the Realm, the Expoſitors of them have conſtrued them to include and bind the King by the general Words, without any ſpecial Mention of him, ſo have they expounded this Act *de donis conditionalibus* to bind the King, and eſpecially upon this Reaſon, *viz.* becauſe the King and the Realm have ordained *that the Will of the Giver, according to the Form in the Deed of Gift manifeſtly expreſſed, ſhall from henceforth be obſerved*, ſo that thereby it has made the Will of the Donor only to be reſpected and regarded, in which Words (as *Walſh* ſaid) the King has ſubmitted his own Will to the Will of another, and that by Act of Parliament. So that every one that can ſay, "this is the Will of "the Donor expreſſed in the Charter or Conveyance," may thereby bind the King, and take from him all Elections to have it as a Fee-ſimple conditional, as well as the Power to alien after Iſſue had, and may ſay to him, "it is not the Will of the Donor that you ſhall have a Fee-ſimple, or "that you may alien after Iſſue had." So that the King may by Juſtice bind himſelf to the Will of another, and cannot go from it; for, he ſaid, the King has in him three Things, *viz.* Power, Juſtice, and Mercy: Power to do, Juſtice to enforce him to do, and Mercy to reſtrain him from doing. The laſt of theſe is exerciſed in Matters that touch himſelf, but Juſtice to enforce him to do has Reſpect to Things which concern the Public, ſo that every Subject may claim from him Juſtice, and the King is forced by Juſtice to do that which he ought. And ſo the Lord *Berkley* might ſay to the King, "you have bound yourſelf by Authority of Parliament to the Will of "another, *viz* of the Donor, and by his Will you ſhall only have an Eſtate-tail, and you have "no Power to alien the Land from the Donor, or him in Remainder, if your Tail be ended; "and your Tail is now ended, and therefore I who am in Remainder ought to have it." So that he may claim from him that to which he is bound by the Act, as another Subject is, and he may object to him the Act, which reſtrains him from ſaying that he has a greater Eſtate than in Tail. And to prove that the King is bound by the Act, and that he cannot ſay ſince the Act that the Eſtate is a Fee-ſimple conditional, as it was before the Act, the Caſe of Tenant in Tail attainted for Treaſon was alledged, in which Caſe, it was ſaid, the Iſſue in Tail ſhould inherit, and the King ſhould not have the Land againſt the Iſſue by reaſon of the Attainder. And to this Effect the Caſe of the Earl of *Kent* was cited, who was Donee in Tail of the King, and committed Treaſon againſt the King, which Caſe is in [a] *Mich.* 7. *H.* 4. *coram Rege*, where the Statute *de donis conditionalibus* is touched to this Purpoſe. And if the Iſſue in Tail might ſay againſt the King, that his Father was not, as to the King, Tenant of a Fee-ſimple conditional, but Tenant in Tail, and therefore that he ſhould not forfeit the Land to the King for Treaſon, this proves that the King ſhall be bound by the ſaid Statute, by reaſon of the Words *(the Will of the Donor ſhall be obſerved)*. [b] And this was always received for Law, and practiſed until the Statute of 26. *H.* 8. *cap.* 13. which enacts *that every one, who ſhall be attainted of Treaſon, ſhall forfeit to the King all his Tenements or Hereditaments which he has of any Eſtate of Inheritance:* by which Words viz. *(of any Eſtate of Inheritance)* it has been taken that Tenant in Tail ſhall forfeit entirely the Lands entailed, but until this Act was made it has always been held and practiſed otherwiſe ſince the Statute *de donis conditionalibus*, *viz.* that the Iſſues in Tail ſhould inherit the Lands againſt the King, *cauſa qua ſupra*. [c] So in 4. *H.* 6. Tenant in Fee-ſimple, who held of the King *in capite*, made a Gift in Tail, to hold of the chief Lord of the Fee, the Donee died, his Iſſue being within Age, and the King ſeized him as his Ward, and the Donor claimed him, and upon the Matter diſcloſed in Traverſe of an Office there was a Demurrer in Law; and there it is well debated whether the Donor or the Donee is Tenant to the King, and other Matters relating to the Point of Wardſhip; and at laſt it was awarded by the Advice of all the Juſtices of the one Bench and of the other, that the Hands of the King ſhould be ouſted, and that the Donor ſhould be reſtored to the Ward, which he ought not to have been, if the King had not been bound by the ſaid Statute *de donis conditionalibus*; for if the Donee, as to the King, ſhould be as he was before the ſaid Act, then he ſhould be Tenant of a Fee-ſimple conditional, in which Caſe he ſhould be immediate Tenant to the King, and then the King ſhould have had the Wardſhip of his Iſſue, but in that it was adjudged that he ſhould be in Ward to the Donor, and not to the King, therein all the Juſtices then took it that the King was bound by the Statute. [d] So *Walſh* cited the Caſe in 4. *H.* 7. and ſaid that it was found by *diem clauſit extremum* after the Death of the Lady *Dacres*, that one by Fine gave Land to another for Life, the Remainder to the Lord *Dacres*, and to the ſaid Lady his Wife in Tail, and the Lord *Dacres* died, and the Lady *Dacres* entered upon the Tenant for Life, and diſſeized him, after which Diſſeizin the ſaid Tenant for Life re-entered, and was ſeized at the Time of the Death of the Lady *Dacres*, and that ſhe did not die ſeized of any other Land: And one came into the Chancery, and ſurmiſed that the Tenant for Life had ſurrendered his Eſtate to the Lady in her Life-time, and ſo ſhe died ſeized, and prayed a new Commiſſion of *melius inquirendum* for the King, and had it, upon which the Commiſſioners ſat, and returned it, and it is there debated whether or no this new Commiſſion was well awarded, and it was held clearly by all the Juſtices that the Commiſſion was badly awarded: [e] And one of the principal Reaſons was, that although the Land was held of the King by Knight's Service, (as the Caſe ought to be taken), yet it was held of the Donor in Tail, and not of the King, and then to enquire for a better Title for the King, where it appears that although it had been as they ſurmiſed, yet the King has no Title, but another, *viz.* the Donor, it ought to be utterly void; for it is there ſaid, although the King might take the Services by the Hands of the Tenant in Tail, becauſe he is in Poſſeſſion, yet notwithſtanding this he is Tenant to the Donor. And it was for this Cauſe chiefly that all the ſaid Juſtices held that the Commiſſion was badly awarded.

[a] M. 7. H. 4. 32. a. Fitz. Livery 21. Bro. 14. Treaſon 4. Poſt 251 (9).

[b] 37. H. 8. Bro. Noſme 1. B. N. C. § 303. Co. Litt. 130. a. 372. b. 11 Co. 72. b. 1 Rol. R. 167. 2 Rol. R. 325. Godb. 308. 2 Lev. 170. T. Jones 240. Pollexf. 189, 190. 3 Inſt. 19. S. P. C. 187. 1. H. H. P. C. 240. 2 Hawk. P. C. 419, § 5. 2 Bac. Abr. 576. Poſt 554.

[c] P. 4. H. 6. 19. pl. 6. Fitz. Gard 50. Bro. 52. Tenures 21. Poſt 240 (c). Sed S. P. Contra M. 27. H. 8. 26. pl. 5 *Per Fitzh.* Bro. Tenures 2. Poſt 241 (c).

[d] M. 4. H. 7. 16. Bro. Office devant Eſch. 33

[e] Bro. Tenures 96.

By which Judgment it is implied (as *Walſh* ſaid) that the Juſtices there held the King to be bound by the Statute *de donis conditionalibus*, for if he had not been bound by it, then the Surmiſe would have been ſufficient to entitle the King, for then the Donee ſhould have been ſaid, as to the King, to have a Fee-ſimple conditional, and ſo ſhould have held immediatly of the King, and not of the Donor: But in that they adjudged that he held of the Donor, and not of the King, therein it is implied that the King was bound, and that he could not ſay that the Donee had a Fee-ſimple conditional. [a] Alſo *Southcote* cited the Caſe in 8. *H.* 4. which, he ſaid, is abridged by *Fitzherbert* in Title *Petition*, and is thus, *viz.* "Tenant in Tail of the Services aliens in Mortmain, and the "Time devolves to the King for Default of the other Lords, whereby the King ſeizes the Services, "and afterwards the Land eſcheats, the Iſſue in Tail ſhall have Remedy by Petition *per Gaſcoign*;" and this he ſhould not have if it was a Fee-ſimple conditional as to the King. So that theſe Caſes prove that the Judges in former Times have taken this Act to bind the King, and to reſtrain him from all Election to take the Eſtate as a Fee-ſimple conditional. And if they have ſo taken it in the Caſes above cited, *a fortiore* the King ſhall be bound in the Caſe here; for in the ſaid Caſes he was bound notwithſtanding he claimed in Right of the Crown, but here the Eſtate veſted in King *Henry* 7. in his Body natural, and in his ſingular Capacity, as it is ſaid before, and not in his Body politic, in which Caſe he ſhall not have his Prerogatives in ſuch Latitude as he ſhall in Things which he enjoys in his Body politic as King. But this here veſts in a more inferior Degree, and more diſtant from Prerogative, for which Reaſon it ſeemed to them that the Alienation of King *Edward* 6. ſhall not prejudice the Lord *Berkley*, but that his Entry is lawful, and that the Plaintiff ſhall be barred.

[a] P. 8. H. 4. 9. b. *Per Powlet et Gaſcoign.* Fitz. Petition 14. Bro. Mortmain 10.

E contra for the Plaintiff.

On the contrary it was argued by the ſaid other Serjeants of Counſel for the Plaintiff. And firſt they admitted that the King has a double Capacity, and that both remain in him at one ſame Time, and that he may take in the one or in the other, according as the Gift is made to him. And although it be ſo, yet here King *Henry* 7. took the Remainder in his Body politic, for it was limited to him by the Name of King *Henry* 7. ſo that it is not *Henry* 7. only, but King *Henry* 7. and he is named by the Name of his Body politic, as well as by the Name of his Body natural, and he has Heirs as well in the one Body as in the other, ſo that the Words are indifferently put, and he may take it in the one as well as in the other. But every Gift ſhall be taken moſt ſtrongly againſt him that gives it, and moſt largely for him to whom it is given. And if the Body politic is more large than the Body natural, then it is more beneficial for King *Henry* 7. to take it in that than in the other Capacity, according to the Arguments made on the other Side, for they agree that in this Body he has a greater Prerogative and greater Liberty than in the other, and if it be ſo, it is more beneficial for him to take the Land in the Body politic than in the other. And therefore upon this Account he ſhall be taken to receive it in that Body, becauſe the Law adjudges it beſt for him. But, they ſaid, it is not neceſſary to reſt upon this Point. For although the Law ſhould adjudge that King *Henry* 7. took it in his Body natural, and not in his Body politic, yet they ſaid that he is not void of Prerogative in regard to Things which he has in his Body natural, but he ſhall have Prerogative and Liberty here, admitting that he took the Land in his Body natural, to have a Fee-ſimple conditional, and to have Power to alien *poſt prolem ſuſcitatam*, as he ſhould have had if he had taken it in his Body politic. [b] For when the Body politic of King of this Realm is conjoined to the Body natural, and one Body is made of them both, the Degree of the Body natural and of the Things poſſeſſed in that Capacity is thereby altered, and the Effects thereof are changed by its Union with the other Body, and don't remain in their former Degree, but partake of the Effects of the Body politic. [c] And therefore it appears in 1. *H.* 7. that the ſame King *Henry* 7. was attainted by Parliament, and it is there agreed by all the Juſtices, that *eo inſtante* that he took upon him to be King, he was a Perſon able, and diſcharged of the Attainder. And the Reaſon thereof is, becauſe the Body natural and the Body politic are conſolidated into one, and the Body politic wipes away every Imperfection of the other with which it is conſolidated, and makes it to be in another Degree than it ſhould be if it were alone by itſelf. [d] So *Walſh* ſaid, where King *Richard* 3. was enfeoffed to the Uſe of others, and afterwards took upon him the royal Eſtate, the Law was taken that the Uſe was gone; and therefore an Act was made in the *firſt* Year of his Reign *cap.* 5. that the Land ſhould be in Fee in the *ceſtuy que Uſe*. And the Cauſe why the Uſe there was gone by the common Law, was not becauſe the Capacity of his Body natural was drowned by the Dignity royal, (for this Capacity remained after he was King, and in this Capacity he held the Land afterwards) but the Reaſon was, becauſe to the Body natural, in which he held the Land, the Body politic was aſſociated and conjoined, during which Aſſociation or Conjunction the Body natural partakes of the Nature and Effects of the Body politic: [e] And the Body politic cannot be ſeized to a Uſe, no more can the Body [f] natural during the Time they are together, for it is drawn to the Quality and Effects of the Body politic which is the greater. For *Richard* 3. taken abſtractedly from King did not hold the Land, but *Richard* 3. being King held it, who might not ſo debaſe himſelf as to have Land to the Uſe of another. So that the Body natural, by partaking of the other, is not in the ſame Degree as it ſhould be if it was disjoined from the other, and the like of the Land which he holds in the Body natural. For *Bendloe* ſaid, [g] as a Villain that purchaſes free-land ſhall make it to be Villain-land according to the Nature of his Perſon who holds it, [h] ſo *e converſo*, the Perſon of the King, which is moſt free, and has the moſt Prerogatives and Franchiſes, ſhall make the Land which he holds to enſue the Nature of his Perſon, and to be demeaned according to his Privileges. [i] And he ſaid, if the King purchaſes a Manor to which a Franchiſe is appendant, and afterwards aliens the Manor, the Franchiſe ſhall not paſs, and ſo, he

[b] See Ante 213 (o). and the Books there cited.

[c] M. 1. H. 7. 4. b. Fitz. Parliament 2. Bro. 37. Co. Litt. 16. a. 7 Co. 12. a *Calvin's* Caſe. 5 Mod. 54. 1 Finch 57. 2 Finch 82. Wing. Max. reg. 62. pl. 2. Poſt 244 (z).

[d] M. 5. Ed. 4. 7. pl. 15. Fitz. Office 2. Bro. Feoffm. al Uſes 31.

[e] That the King can't ſtand ſeized to a Uſe, T. 7. Ed. 4. 17. b. Fitz. Feoffments 21. Bro. Feoffm. al Uſes 37. Dy. 8. pl. 18. Kelw. 12. a 2 Rol. Abr. 780. C. pl. 1. 1 Rol. R. 332, 333. Poph. 72. Cro. J. 50, 51. Jenk. 190. pl. 92. Lane 54. Hardr. 466, 468. 1 Mod. 176. Crompt. J. C. 54, 2. Bac. Read. on Stat. of Uſes 346. Gilb. Law of Uſes, &c. 5, 6, 12, 170, 171. 4 Bac. Abr. 190, 191. Poſt 242 (f). But ſee 1 Vern. 439, where the Maſter of the Rolls ſays that he takes the King to be in Nature of a Truſtee, notwithſtanding the general received Opinion to the contrary.

[f] S. P. Bac. Read. on Stat. of Uſes. 346.

[g] Litt. § 172. 1 Finch 16. 2 Finch 23.

[h] Ibid.

[i] T. 43. Ed. 3. 22. b. Bro. Incidents 12.

he ſaid, *Thorp* held in 43. *Ed.* 3. in a *Quare Impedit:* And the Reaſon is, becauſe notwithſtanding that the King purchaſes the Manor to him and to his Heirs, and that it ſhall veſt in his Body natural, yet to this Body the Body politic is annexed, which will not ſuffer the Franchiſe to be in *Eſſe*. Which Caſe proves that although the Body natural of the King is diſtinct in Capacity from the Body politic, yet it does not remain diſtinct from it to all other Purpoſes. [a] So if the King in his Body natural and another purchaſe Lands in Fee-ſimple jointly, they are not Jointenants, but Tenants in common, between whom Survivorſhip ſhall not hold Place: And ſo if the Purchaſe be before he is King, after he is King the Jointure is ſevered. But if the King in his Body natural was to all Purpoſes as a common Perſon is in his Body natural, then he might hold in Jointure with another, whereas no Body politic can hold in Jointure. And therefore when the two Bodies in the King are become as one, to which no Body is equal, this double Body, whereof the Body politic is the greater, cannot hold in Jointure with any ſingle one. [b] So *(Bendloe* ſaid) if the King has a Seigniory in his Body natural, he may diſtrain for the Arrearages thereof in all the Tenant's Lands holden of others, by reaſon of the Acceſſion of the royal Eſtate to his natural Body. So, he ſaid, if the King in his Body natural before he was King, or after, purchaſes Land in Fee-ſimple upon Condition, and the Condition is broken, the Feoffee cannot enter upon him for the Condition broken, as he might if the Eſtate royal was removed from his body natural. [c] And *Puttrel* put the Caſe in 10. *H.* 4. where the King as Heir of the Duke of *Lancaſter* brought a *Scire facias* to have Execution of Lands, and in the Writ there was the Clauſe, *quod non omittas propter aliquam libertatem*, and the Writ was challenged becauſe theſe Words are uſed in Writs where the King demands, as King, a Thing which belongs to the Crown; but the Writ was awarded good, notwithſtanding that the Poſſeſſions of the Dutchy were ſevered from the Crown by Parliament: So that although he there demanded the Land in his natural Body, he had Benefit of his Body politic, and thereby he maintained the Writ, which he ſhould not have done if the Body politic had been disjoined from the Body natural. Wherefore it appears by theſe Caſes, that although it ſhould be admitted that King *Henry* 7. took the Remainder in his natural Capacity, nevertheleſs he is not deſtitute of Prerogative in this Caſe, but by the Conjunction of the Body natural with the Body politic of King of this Realm and the Eſtate royal he is advanced, and ſhall have his Privileges, and his Election to have a Fee-ſimple conditional, or Power to alien after Iſſue had, as he ſhould have had if he had held it in his Body politic. So that if the Body politic of the King (if the King had taken the Land therein) might have had an Election to have a Fee-ſimple, or Power to alien after Iſſue had, in the ſame Manner he ſhall have here, though he takes it in the Body natural; and this is the only Point that remains to be diſcuſſed. And as to this, true it is that before the Statute *de donis conditionalibus* [d] all Eſtates of Inheritance were Fee-ſimple abſolute, or Fee-ſimple conditional, and the Fee-ſimple abſolute was as it is before recited, and the Fee-ſimple conditional was that which we now call an Eſtate-tail, *viz.* when it was limited that the Heirs who ſhould inherit the Eſtate ſhould iſſue of the Body of one or two Perſons certainly named, which Eſtates were called conditional for the Cauſe ſhewn before. [e] And becauſe theſe Eſtates were Fee-ſimple, no Remainder could be appointed over upon the Determination of them, [f] for a Remainder cannot be limited over upon a Fee-ſimple precedent. [g] And therefore a *Formedon* in Remainder, to claim a Remainder upon ſuch an Eſtate ended, lay not at the common Law, nor before this Statute. [h] And the Heir ſhould have had an Aſſize of *Mortdanceſtor*, before this Statute, againſt an Abator in all Caſes after the Death of ſuch Tenants of a Fee-ſimple conditional. [i] And there was no *Formedon* in Deſcender at the common Law, but in one ſpecial Caſe, in which (by *Bendloe)* it lay at the common Law, and there the Aſſize of *Mortdanceſtor* would not ſerve the Iſſue, and that was, [k] if a Man had Iſſue a Son, and his Wife died, and afterwards he took another Wife, and Land was given to him and to his ſecond Wife, and to the Heirs of their two Bodies begotten, and they had another Son, and the Wife died, and afterwards the Father died, and a Stranger abated, there, he ſaid, before the Statute the Son could not have an Aſſize of *Mortdanceſtor*, [l] for one Point of the Writ is, to enquire if the Demandant be next Heir to his Father, and that he is not, but the eldeſt Son is his next Heir, for which reaſon ſuch Writ would not ſerve upon his Title, and therefore before the Statute he ſhould have had a *Formedon* in Deſcender, which was no other than a Writ founded upon his Caſe. So that, by him, a *Formedon* in Deſcender lay in this ſpecial Caſe at the common Law before the Statute *de donis conditionalibus*; and to prove the ſame he cited the Book of 5. *Ed.* 2. But yet, he ſaid, this Writ was to recover a Fee-ſimple. So that all ſuch Eſtates were Fee-ſimple, that is, Fee-ſimple conditional. [m] And after Iſſue had the Donees had Power to alien, and thereby to bar as well the Iſſues, as the Donor if Iſſues had failed. And this the Statute rehearſes, and the makers of the Act intended to relieve both the one and the other in this Point. And therefore it has ordained *that the Will of the Giver, according to the Form in the Deed of Gift manifeſtly expreſſed ſhall from henceforth be obſerved*; ſo that the Purview is, that the Will of the Donor ſhall be obſerved, and therefore the Donee cannot alien to bind the Right of the Iſſues or of the Donor, and ſo the Statute reſtrains the Power which the Donee had by the common Law. But although the Purview is general, *viz. that the Will of the Giver, &c. ſhall be obſerved, &c.* without any Exception in the Words, yet there is an Exception in the Intent, which in the Expoſition of the Act is as ſtrong and full as if it had been expreſsly mentioned, and that is, that the King is excepted. [n] For it is uſual for the Legiſlature, in Acts of Reſtraint which they intend to bind the King, to name him expreſsly, and if he is not expreſsly named, it has always been taken heretofore that the Legiſlature intended only to bind the Subjects, and to make the Act extend to them, and not to the King, for he is favoured [o] in all Expoſitions of Acts. And becauſe it is not an Act without the King's Aſſent, it is to be intended that

[a] F. N. B. 32. g. Bro. Prerogative 105. Tenant's in Common 23. 2 Finch 83.

[b] M. 44. Ed. 3. 45. a. Fitz. Grants 47. Bro. Diſtreſs 6, 88. Prerogative 77. 1 Finch 109. 2 Finch 130.

[c] H. 10. H. 4. 7. pl. 5. Moor 150, S. C. cited, but there miſprinted (10. H. 7). Crompt. J. C. 15. a. Ante 216 (a). Poſt 243 (q).

[d] See Ante 235. (d) and the Books there cited.

[e] See Ante 235 (h). and the Books there cited.

[f] See Ante 235 (l). and the Books there cited.

[g] See Ante 235 (g) and the Books there cited.

[h] 18. Aſſ. pl. 5. Bro Mortdanceſtor 31. Tayle 19. Latch 74. Booth 141. Poſt 251 (m).

[i] 15. H. 8. Bro. Tenant per Copy 24. B. N. C. § 3. F. N. B. 211. I. 2 Inſt. 336. O. Bendl. 189. Gouldſb. 6. 2 Brownl. 44. Poph 34. Rep. *temp.* Holt 633. 1 Finch 270. 2 Finch 267. Curſon 290. 2 Bac. Abr. 587. Vin. Abr. tit. Formedon B. pl. 1.

[k] S. P. 2 Brownl. 44. O. Bendl. 189, 190. 1 Finch 282. 2 Finch 290. Vin. Abr. tit. Formedon. B. pl. 1. See M. 10. Ed. 2. Fitz. Formedon 55. Co. Litt. 65. b. 3 Co. 9. a. Booth 139, 140, 141.

[l] 1 Dy. 310. pl. 82. 1 Finch 282. 2 Finch 290. Vin. Abr. tit. Mortdanceſtor B. pl. 7.

[m] See Ante 235 (k). and the Books there cited.

[n] That the King is not bound by Statutes of Reſtraint, unleſs he he is ſpecially named, 1 Finch 59. 2 Finch 83, 234. Crompt. J. C. 15. b.

[o] 2 Rol. R. 317. Colb. 308.

that when the King gives his Aſſent, he does not mean to prejudice himſelf or to bar himſelf of his Liberty and Privilege, but he aſſents that it ſhall be a Law among his Subjects. And ſo inaſmuch as the Act is made by the Subjects, who, it is to be preſumed, would not reſtrain the King, and alſo by the King himſelf, who cannot be preſumed to mean to reſtrain himſelf, the Expoſitors of Acts heretofore have well collected from the Intent of them, that the King ſhould be exempted out of the general Words of Reſtraint, unleſs he is expreſsly named and reſtrained. [a] And ſo (*Bendloe* ſaid) in *Stoner*'s Caſe in 12. *H.* 7. where the like Matter was debated, *Frowick* held that where the King has an Intereſt at common Law, and a Statute is made which takes away the Liberty of all Men, yet the King and his Liberty is not taken away, unleſs he be named in the Statute. And to prove that the King is not bound, unleſs he be named in the Act, the Statute of *Weſtminſter* 3. *cap.* 2. was alledged by *Puttrel*, which limits how the Feoffee of the whole Land ſhall hold, and how the Feoffee of Part ſhall hold, and provides that if the Tenant aliens Part of his Tenements, the Feoffee ſhall hold immediatly of the chief Lord, *and ſhall be forthwith charged with the Services for ſo much as appertains or ought to appertain to the ſaid chief Lord for the ſame Parcel, according to the Quantity of the Land or Tenement ſo ſold: And ſo in this Caſe the ſame Part of the Service ſhall remain to the chief Lord, to be taken by the Hands of the Feoffee, &c.* So that hereby it is enacted, that the Feoffee ſhall hold of the Lord *for the ſame Parcel, and that ſuch Part of the Service ſhall remain to the Lord, to be taken by the Hands of the* Feoffee: Which Clauſe is as much as to ſay, that the Lord ſhall have *for Parcel*, and no more; and the Clauſe is general without any Exception, [b] and yet it has been taken ever ſince this Act, that if the King's Tenant makes a Feoffment of Part of his Tenancy, the King ſhall have all the Services by the Hands of the Feoffee, or all by the Hands of the Feoffor, [c] for before the Statute the Law was, that the Lord might have all the Services in every Part of the Tenancy, and might diſtrain for them in every Part if they were not paid, and the King is not ſpecially named in the Purview of the Act, and therefore he is not reſtrained by the Act, as it has been expounded, for the Cauſe aforeſaid. [d] So, he ſaid, the Statute of *Weſtminſter* 2. *cap.* 16. ordains, that where divers Inheritances deſcend at one Time holden of ſeveral Lords by Knight's-Service, *that Lord ſhall from henceforth have the Wardſhip, of whom the Child's Anceſtor was firſt enfeoffed*; yet this does not reſtrain the King, but that ſince this Statute the King ſhall have the Wardſhip where the Anceſtor held of him by Poſteriority, as well as he ſhould have had by his Prerogative before the Statute, becauſe he was not named therein, and therefore he was not intended to be reſtrained by it, according to the Expoſition of the Sages of the Law. And therefore where the Statute or Treatiſe *de Prerogativa Regis cap.* 2. ſays, *that the King ſhall have the Marriage of Heirs within Age, &c. whether the Land of ſuch Heirs have appertained to the Crown of ancient Continuance, or that it came by reaſon of Eſcheat, being in the King's Hands, &c. without any reſpect to the Priority of Feoffment, although they held of others*; this was but an Affirmance of the King's Prerogative, which he had by the common Law before. So, he ſaid, the Statute of 7. *Ed.* 1. *de Religioſis*, which prohibits all religious Men from taking *Lands or Tenements of any one under the Penalty of forfeiting the ſame, &c.* does not bind them from taking Lands or Tenements of the King, for the King not being named is not reſtrained from giving Lands or Tenements to them any more than to any other, without any Forfeiture to enſue to his Patentees upon ſuch Account. So, he ſaid, the Statute of *Marlbridge cap.* 9. enacts *that if any Inheritance (whereof but one Suit is due) deſcend unto many Heirs, as unto Parceners, whoſo hath the eldeſt Part of the Inheritance, ſhall do that one Suit for himſelf and his Fellows*; but this does not reſtrain the King, [e] for if Land holden of him deſcends to many Coparceners, then all the Coparceners ought to do the Suit, as well after Partition as before: And ſo, he ſaid, *F. N. B.* holds in the Writ *de exoneratione ſectæ ad Curiam*, for the King not being named is not reſtrained by the Statute, but he ſhall have his Suit of all, as he ſhould have had before the Statute; but if the Land be held of another, then the eldeſt Siſter only or her Feoffee ſhall do the Suit. [f] And ſo the Statute of *Magna Charta cap.* 11. which ſays, *Common Pleas ſhall not follow our Court*, does not bind the King, but he may ſue in the King's Bench for his Debt, or in other common Pleas in which he is Plaintiff. [g] And the Caſe before cited of Addition in an Indictment was admitted to be as it is there vouched; but, it was ſaid, the Reaſon is, becauſe the Statute of 1. *H.* 5. *cap.* 5. is, *that in Writs original of Actions perſonal, Appeals, and Indictments, in which Exigent ſhall be awarded, Additions be made, &c.* So that an Indictment is preciſely expreſſed in the Statute, which Indictment is the King's Suit only, and therefore the King is plainly contained in the Word *Indictment*, but not in the other Actions, and therefore it was ſaid that in other Actions he ſhall not be bound by the Statute. And as in the Caſes above recited the Law has been taken that the King ſhall not be reſtrained by the Acts, unleſs he be expreſsly named in them, ſo has it been taken heretofore that he ſhall not be bound by this Statute *de donis conditionalibus*. [h] And hereupon *Puttrel* cited the Opinion of Juſtice *Fitzherbert* declared by him in his *Natura Brevium*, in the Writ of *Formedon* in Deſcender called *inſimul tenuit, viz.* [i] that the Land entailed ſhall be charged in the Hands of the Heir for the King's Debt due by the Anceſtor, for Inſufficiency of Land in Fee-ſimple, where *Fitzherbert* further ſays, "for ſome ſay that the King is not "bound by the Statute *de donis conditionalibus*, but that he is in like Caſe as he was before "the Statute." And the Writ of the *Regiſter* is there recited, whereupon ſo much may be collected that the Lands entailed ſhall be charged. [k] Alſo *Carus* ſaid, that if the King be ſeized of a Manor, and gives a Stranger an Acre of the Manor, to have and to hold to him and to his Heirs of his Body begotten, without expreſſing any Service, the Grantee ſhall hold of the King by Knight's-

[a] T. 12. H. 7. 21. a. 1 Rol. R. 151, 164. W. Jones 21. 1 Show. 490. Show. P.C. 185. 4 Bac. Abr. 198. And therefore by *Keble* Serjeant, if an Act of Parliament ordains that all Wears ſhall be put down, yet the Wears of the King ſhall not be put down, for he is not bound by theſe general Words, *quod non fuit negatum*, Kelw. 35. a. pl. 3.

[b] F. N. B. 235. a.

[c] M. 10. H. 7. 10. pl. 26. Bro. Tenures 108.

[d] 4 Bac. Abr. 20.

[e] F. N. B. 179. t. 4 Bac. Abr. 200. Vin. Abr. tit. Suit of Court B. fo. 36.

[f] See Ante 2-6 (l) and the Books there cited.

[g] See Ante 236 (k).

[h] F. N. B. 217. c.

[i] Vide Contra Poſt 249 (g).

[k] M. 29. H. 8. Bro. Livery 57. B. N. C. § 113. Dy 44. pl. 29. in Margine. 6 Co. 6. b. 9 Co. 123. a. Davis 66. b. 2 Rol. Abr. 504. M. pl. 1. Ley's Treat. of Wards, &c. 3.

Knight's Service *in capite*, [a] for in ſuch Caſe it appears in 21 *Aſs.* that upon the Alienation of the Donee without Licenſe, the King ſeized the Land for a Fine by Judgment, which he ought not to have done if the Donee had not held *in capite*. And if it ſhould have been ſo that the Reverſion was left in the King, and that the Donee was only Tenant in Tail, then of Neceſſity the Donee ſhould have held of the King as of the Reverſion, which is not *in capite* any more than where a Man holds of the King as of a Manor; [b] for when one holds of the King by Reaſon of another Thing, there it is not *in capite*. And foraſmuch as he ſhall there hold *in capite*, it is thereby proved that the King for his Advantage, viz. to have a Tenure *in capite*, may ſay that the Donee has a Fee-ſimple conditional, as he had before the Statute *de donis conditionalibus*, and that he is not bound by the Statute. And there is no Doubt but that for his Advantage he may alſo ſay that the Donee has only an Eſtate-tail, and that the Reverſion is in him, but in that he may claim a Tenure *in capite*, therein it is implied that the King ſhall ſay that the Donee has a Fee-ſimple conditional, and that he is not bound by the Statute *de donis conditionalibus*, but that to claim a Seigniory or ſuch other Advantage he is at Liberty as he was before the Statute. [c] So if the King's Tenant makes a Gift in Tail, and the Donee dies, his Iſſue being within Age, he ſhall be in Ward to the King, and ſo it ſeems by the Book of [d] 4. *H.* 6. before cited; but the Reaſon why the King had not the Ward there, but the Donor, was [e] becauſe the King had always accepted the Services of the Donor, and ſo had choſen him for his Tenant; but if he had not done ſo, it was ſaid, it ſeems by the Book that he might well enough have had the Wardſhip of the Iſſue of the Donee, becauſe he remained, as to the King, Tenant of a Fee-ſimple conditional. And yet admitting that the King (if he had not accepted the Donor for his Tenant) could not have had the Iſſue of the Donee in Ward, and alſo admitting that Tenant in Tail (until the Statute of 26. *H.* 8.) ſhould not forfeit his Land to the King for Treaſon, and admitting the other like Caſes put on the other Side, yet they are not like the principal Caſe here; for in thoſe Caſes the King took his Titles under the Title of a Subject, viz. of the Tenant in Tail, who was once bound by the Statute when the Tail was in him, and therefore in that Caſe there is greater Reaſon why the King, who claims by Wardſhip, or for Treaſon, or upon other ſuch Ground under his Eſtate, ſhould be bound as he was; but here there never was any Eſtate-tail in a Subject, for the Eſtate was firſt limited to the King himſelf, in which Caſe there is more Reaſon to give the King, who took the Eſtate in Remainder immediately, the Liberty which he had before the Statute, viz. to have a Fee-ſimple conditional, and ſo to make the Remainder void, than there was in the other Caſes where the King took his Eſtate by others whom the Statute once bound as Subjects, and where he had no Intereſt but under their Eſtate. So that the Reaſon of thoſe Caſes differs greatly from the Reaſon of the principal Caſe, and they are ſtronger againſt the King than the principal Caſe is. And therefore for theſe Cauſes it ſeemed to them that King *Henry* 7. might at his Election take the Eſtate as a Fee-ſimple conditional, in which Caſe the Remainder is void, and after Iſſue he had Power to alien, and the Alienation of King *Edward* 6. is an Election that he and King *Henry* 7. and *Henry* 8. would take the Eſtate as a Fee ſimple conditional; and ſo the Lord *Berkley* had no Title or Right of Entry, and conſequently the Plaintiff ſhall recover.

[f] And *Note*, *Carus* ſaid in his Argument that if the King's Tenant for Life is impleaded, and makes Default after Default, the King ſhall not be received by the Statute of *Weſtminſter* 2. *cap.* 3. becauſe if he ſhould be received the Demandant ſhould count againſt him *de novo*, for he is in the Place of Tenant; [g] and, he ſaid, a Man cannot count againſt the King, but he ought to ſue to him by Petition. And therefore altho' the Statute gives Receipt generally to him in Reverſion, yet the King was not meant therein, for it was not the Intent of the Statute to debaſe him ſo much as to make him ſtand to Defence as Tenant in the Suit, in the ſame Manner as a common Perſon is; and, he ſaid, that in [h] 25. *Ed.* 3. it is adjudged accordingly, viz. in a *Scire Facias* upon Default of Tenant for Life the King in Reverſion ſent his Writ to be received by his Attorney and his Serjeants, and the Court was there adviſed that the King was not receivable *cauſâ qua ſupra*.

Afterwards in *Trinity* Term 4 *Elizabeth*, the Juſtices argued upon the Matter in Law as follows. *Weſton* Juſtice: It ſeems to me that the Plaintiff ſhall recover. Firſt of all it is to be conſidered how the Eſtate which we call an Eſtate tail was before the Statute *de donis conditionalibus*, and how it is ſince; and ſecondly, how the Remainder veſted in King *Henry* 7. and laſtly, if he is reſtrained and bound by the Statute. [i] And by the Common Law before the Statute *de donis conditionalibus* there were two Eſtates of Inheritance, the one a Fee-ſimple abſolute, as where a Man had Lands to him and to his Heirs generally, and the other a Fee-ſimple conditional, as where a Man had Lands given to him and to his Heirs of his Body, which Eſtate to him and to his Heirs of his Body was greater than an Eſtate for Life, for the Word (*Heirs*) makes it greater than for Life; ſo that if he had alien'd before Iſſue the Donor ſhould not have entered for a Forfeiture, as the Leſſor [k] ſhall do upon the Feoffment of Tenant for Life; nor ſhould he have had a Writ of Error upon an erroneous Recovery againſt ſuch Donee, as a Man ſhall have [l] upon an erroneous Recovery againſt his Tenant for Life; nor ſhould he have had a Writ of *ad terminum qui præteriit*, if he had died without Iſſue, for he had a Fee-ſimple, tho' this Fee-ſimple was upon Condition, as the Statute terms it, viz. that if the Donee died without ſuch Iſſues as were limited, then the Land ſhould revert, whether the Donor had expreſſed the ſame by Words in the Deed of Gift, or not, for if he had not expreſly mentioned it, yet ſo much was implied in the Gift, and the Law ſupplied the Words if they were omitted in the Deed of Gift; and if the

[a] 21 Aſs. pl. 15. Bro. Alienation 28. T. 21 Ed. 3. 58. a. Fitz. Livery 32.

[b] M. 29. H. 8. Bro. Livery 57. Tenures 61. B. N. C § 113. F. N. B. 5. k. Co. Litt. 108. a. 2 Rol. Abr. 504. pl. 10, 12. 1 Finch 120.

[c] Contra Ante 237 (c) Poſt 249 (c).

[d] P. 4. H. 6. 20. *per Hales.* 22 *per June.*

[e] Vide Contra Poſt 249 (d).

[f] M. 4. Ed. 3. 38. pl. 4. M. 25. Ed. 3. 48. Fitz. Reſceit 28. 2 Inſt. 346. 1 Rol. R. 156, 165. 3 Bulſt. 47. 1 Finch 43. 2 Finch 59. Poſt 553.

[g] M. 14. H. 8. 3. b. *per Fineux.* H. 21. H. 7. 2. a. Fleta lib. 1. cap. 8. § 4. 4 Co. 58. b. Stamf. Prerog. 42. b. 1 Finch 43, 55, 237. 2 Finch 83. Poſt 555.

[h] M. 25. Ed. 3. 48. Fitz. Reſceit 28.

Trin. Term 4 *Eliz. Weſton* J.

[i] See Ante 235 (d) and the Books there cited.

[k] Litt. § 415.

[l] F. N. B. 21. c. 59. e. 103. a.

Words were expreſſed in the Deed of Gift, yet it was not a Condition in Deed, but only a Condition in Law, becauſe the expreſs Mention of it would have been meerly Surpluſage; for there is no Condition in Deed but what may be broken during the Eſtate given, whereas this Condition could not, and therefore it was a Condition in Law. And Conditions in Law are of two Sorts, the one determines the Eſtate, [t] as a Leaſe to an Abbot during the Time that he ſhall be Abbot, or a Leaſe to one during the Time that he ſhall be Serjeant at Law, or during the Time that he ſhall live ſingle, for in theſe Caſes if he is removed from being Abbot or Serjeant at Law, or if he takes a Wife, the Eſtate is ended. The other Condition in Law does not determine the Eſtate, as the Law adds a Condition to the Eſtate of Tenant for Life, that he ſhall not do Waſt, nor make a Feoffment, and to the Tenant in Fee Simple that he ſhall not ceſſe or diſclaim, but if they break the Condition the Eſtate is not determined until Suit or Entry is made. But in the other Caſes the Eſtate is determined preſently, and the Poſſeſſion is caſt upon the Leſſor. And in ſuch Degree was the Condition in Law in our Caſe before the Statute; for if the Donee had died without Iſſue the Condition was broken, and the Eſtate determined, and the Freehold caſt upon the Donor. But altho' for Default of Iſſues of the Donee the Land ſhould revert to the Donor, [u] nevertheleſs if the Donee had Iſſue he had Power to alien, and thereby the Iſſue was barred of the Land, and the Donor of the Reverſion if Iſſue failed, as the Statute ſhews, which Things are now redreſſed by the Act. And the Act is reſtrictive in three Points; the firſt is, where before the Statute the Donee had Power to alien after Iſſue had, (as it is ſaid above) and thereby to bar the Iſſues, and the Donor of his *Formedon* in Reverter, now this Liberty of the Donee is reſtrained, ſo that upon ſuch Alienation the Iſſue ſhall have a *Formedon* in Deſcender, and the Donor a *Formedon* in Reverter if the Iſſues fail, and by ſuch Suit the Alienation ſhall be defeated, and the Land taken from the Alienee. The ſecond is, [x] if the Gift had been to Huſband and Wife and to the Heirs of their Bodies begotten, and the Wife had ſurvived, there her ſecond Huſband, if he had Iſſue by her, ſhould have been Tenant by the Curteſy, which is now [y] reſtrained. The third is, [z] where the Eſtate of the Donee before the Statute was a Fee-ſimple, now by the Operation of the Act and by the Intent of the Makers of it the Eſtate is abridged, and made an Eſtate-tail, and the Fee-ſimple is in the Donor, and a Reverſion made of it, and the Fee-ſimple may now be given over in Remainder, ſo that the Eſtate is divided, and whereas the Donee had the whole Eſtate before, now by the Effects of the Statute he has but Part of it, ſo that there are great Reſtrictions made by the Statute. And thus was the Eſtate before, and thus is it ſince the Statute, as I apprehend.

Then as to the ſecond Matter, the King has two Capacities, and he comes to ſome Things meerly as King, as [a] Treaſure-trove, [b] Lands eſcheated for Treaſon, and the like; and to ſome other Things he comes not as King, as if Lands deſcend to him from any of his Anceſtors. But here the Remainder was entailed to King *Henry* 7. ſo that there is both the Name of Baptiſm, and the Name of his Body politic, viz. King, [c] and he may take in his Body politic as King to him and to his Heirs, or as King to him and to his Succeſſors; for he may have Heirs in his Body politic, and he may have Succeſſors in his Body politic. And therefore a Gift to him his Heirs and Succeſſors is good to the Body politic in both the Limitations, for if the Heirs fail it ſhall go to the Succeſſors; and his Heirs, as Heirs to the King, may take in their Bodies politic. For there are Diſtinctions of Bodies politic, that is to ſay, between thoſe which are made by the King's Letters-patent, and thoſe which exiſt at Common Law. For thoſe which are made by the King's Letters-patent, as Dean and Chapter, and Mayor, and ſuch like, cannot purchaſe in Succeſſion by the Name of Heirs, but only by the Name of Succeſſors. But the Body politic of the King is a Body politic by the Common Law, which may take in the politic Capacity, by the Name of King, to him and to his Heirs, or by the Name of King, to him and to his Succeſſors; and notwithſtanding this be ſo, [d] yet his Capacity to take in the Body natural is not confounded by the Body politic, bnt remains ſtill. And here the Remainder was entailed to King *Henry* 7. by the Name of King *Henry* 7. and to the Heirs Males of his Body begotten, and by this Limitation it veſted in his Body natural, becauſe this Body is diſtinguiſhed in the Limitation, for no other Heir but ſuch as is begotten by the Body natural ſhall inherit the Land by this Limitation. But notwithſtanding it be ſo that he took the Eſtate in the Capacity and Perſon of the Body natural, yet it is to be conſidered that to this Body the Body politic of King is annexed, and both of them are together in him; [e] for a Man cannot by any Means make Livery to the King of Land which he limits to the Body natural of the King, [f] and a Gift to the King cannot be to a Uſe, by 7. *Ed.* 4. becauſe he has the Body politic of King in him; and none can diſtrain for, nor have Execution of, a Seigniory or Rent in the Land of the King whichhe took in the Capacity of his Body natural, nor can the King part with ſuch Land but by Letters-patent, and if he grants ſuch Land in Fee, the Grantee ſhall hold of him *in capite* by Knight's Service. *Ergo* the Body natural and the Body politic are not diſtinct, but united, and as one Body, and the Land which he takes in the Capacity of his Body natural he has not meerly as a common Perſon, but as a natural Man and as a King alſo, and as to ſuch Land he ſhall have the Prerogatives of King, becauſe the royal Eſtate is conjoined to the Perſon who holds the ſame.

Then as to the third Point, it ſeems to me that the Eſtate ſhall be adjudged a Fee-ſimple conditional in the King, and that the Remainder ſhall be void, and that the King ſhall not be bound by the Statute *de donis conditionalibus*. For inaſmuch as all Juſtice, Tranquillity, and Repoſe is derived from the King, as the Fountain thereof, the Law ſhews him ſpecial Favour in all his Buſineſs

[t] See Litt. §380, 382. 10 Co. 41. b. 42. a. 1 Finch 86. 2 Finch 105. Poſt 413 (g).

[u] See Ante 235 (k) and the Books there cited.

[x] That in this Caſe the ſecond Huſband ſhould have been Tenant by the Curteſy before the Statute, See P. 18. Ed. 1. in C. B. Rot. 27. 30 Ed. 1. Itin. Cornub. Fitz. Formedon 66. Bro. Eſtates 71. 2 Inſt. 336. 2 And. 157. But 2 Finch 126, and Poſt 245(c). *per A. Brown* J. are to the contrary, for that the Iſſue was not inheritable to the Land.

[y] 1 Finch 103, 104. 2 Finch 125.

[z] Co. Litt. 22. a. b. 2 Inſt. 335. O. Bendl. 187 *Copyholder*'s Caſe. 2 Finch 122. Curſon 97. Poſt 248 (c).

[a] 8 Ed. 2 Fitz. Corone 436. P. 22. Ed. 3. Fitz. Ibid. 241. Expoſit. Vocab. 108. 1 Finch 146. 2 Finch 177. Cowel's Inſt. 67. Poſt 322 (f).

[b] 22 Aſs. pl. 49. Bro. Eſcheat 14. 36. H. 6. 26. a. *per Forteſcue.* Poſt 322 (g).

[c] Vin. Abr. tit. Prerogative Y. d. 2. pl. 6. Ante 234 (d).

[d] Ante 234 (f).

[e] See Ante 213 (k) and the Books there cited.

[f] T. 7. Ed. 4. 17. Fitz. Feoffments 21. Bro. Feoffm. al Uſes 37. Ante 238 (e). and the Books there cited.

ſineſs and Things, as being the Cauſe and Origin thereof. [a] And the Law of this Land is divided into three Parts, viz. Common Law, Cuſtoms, and Statutes, in each of which the King has his Prerogatives and Exemptions. For in the Common Law, [b] the Grant of every common Perſon is taken moſt ſtrongly againſt himſelf, and moſt favourably towards the Grantee; [c] but the King's Grant is taken moſt ſtrongly againſt the Grantee, and moſt favourably for the King, altho' the Thing which he grants came to the King by Purchaſe or Deſcent. And this is proved by the Treatiſe *de Prerogativa Regis cap.* 15. which is only the Common Law in this Point, viz. [d] that by the King's Grant of a Manor, an Advowſon appendant ſhall not paſs without ſpecial Words. [e] So the King may grant a Choſe in Action, but another cannot. So if Part of a Thing entire comes to the King, the Common Law gives him the whole, [f] as if an Obligation is made to two, and one of them is outlawed, the King ſhall have the whole Duty; ſo he ſhall have an entire Ox or Horſe which the Perſon outlawed held in common. [g] So if one grants to the King the next Avoidance of an Advowſon, altho' a Stranger preſents when it next becomes void, and his Clerk is in by ſix Months, and afterwards dies, yet the King ſhall preſent when he pleaſes, *quia nullum tempus occurrit Regi*, and therefore he may take the Preſentment when he thinks proper. [h] So if one grants to the King all Preſentments which ſhall happen within 20 Years, if ten Preſentments happen within this Time, and a Stranger preſents to them all, and his Clerk is in, and dies, the King after the 20 Years ſhall have all the Preſentments, for the Latches of not preſenting ſhall not hurt the King, but he may take it when he will. [i] And if a Right of Entry deſcends to the King, the dying ſeized of the Diſſeizor ſhall not take away the King's Entry, for Latches ſhall not prejudice him. [k] So if his Villain aliens his Land, the King may enter when he pleaſes, *cauſâ qua ſupra*. [l] And the King's Declaration in a *Quare Impedit* ſhall not be double by alledging two Preſentments, [m] or twelve Matters in Bar, and the other ſhall anſwer thereto, and the King may take Iſſue upon it when he pleaſes. [n] So if the King's Title is traverſed by the Party, the King may maintain his Title againſt the Traverſe of the other, or may traverſe the Affirmative of the other. [o] So the King may amend his Declaration the ſame Term that it is put in. [p] So by 28. *H.* 6. the King may wave Demurrer and traverſe the Plea of the other. [q] So the King in his Writs ſhall have a *Non omittas* notwithſtanding any Liberty, for none ſhall ſerve his Proceſs but his own Officers. [r] So if the King grants Land in Fee with Warranty againſt all Men, the Patentee ſhall not have in Value upon Recovery without expreſs Words to have in Value. [s] So by 2. *H.* 7. if the King makes a Leaſe for Years reſerving Rent with Re-entry for Default of Payment, if the Rent be in Arrear he ſhall enter without any Demand, altho' the King held the Land in his Body natural. [t] So by 35. *H.* 6. the King may make a Leaſe rendering Rent to a Stranger, and this Reſervation is good, and the Stranger ſhall diſtrain for it, or have an Action of Debt after the Leaſe determined. [u] So by 13. *Ed.* 4. the King may diſtrain in all the other Lands of the Grantor for the Arrears of a Rent-charge granted to him. [w] So if Title appears for the King upon Pleading between other Parties, the Court *ex officio* ſhall adjudge for the King, altho' he is not Party to the Iſſue. All which Caſes ſhew that in the Common Law the King has Pre-eminence and Prerogative above all other Perſons, and that he is not ſo ſtrictly bound by the Law as others are. And as the Common Law cannot bind him, ſo cannot private Cuſtoms. [x] And therefore in 35. *H.* 6. there is a Cuſtom in *London*, that if one pledge Goods, he to whom they are pledged ſhall retain them whoſeſoever they are, until the Money for which they were pledged be paid him, yet this does not bind the King where his Goods are pledged by a Stranger. [y] So a Sale of his Goods by a Stranger in Market-overt ſhall not alter the Property nor bind him. [z] And where a Man has Wreck of the Sea, if the King's Goods are wrecked he ſhall not gain Property thereby againſt the King. [*] So he who by Preſcription has Goods waived, or Eſtrays, ſhall not gain Property in the Goods of the King, if they are waived or eſtrayed. [†] So in 21. *Ed.* 3. one had a Hundred of the King in Fee-Farm, by Reaſon whereof he ought to levy the Debts of the King, and all Things leviable, and he diſtrained by a Bailiff for the King's Debt, and an Abbot made Reſcous, and he brought an Action of Treſpaſs againſt the Abbot, who ſaid that he was Lord of the Manor of B. and therein had a common Park, within which Manor there was a Cuſtom that when any Diſtreſs was taken within the Precinct of the ſaid Manor, the Bailiff who took the Diſtreſs ſhould carry it to the ſaid Park of the Abbot, and he ſhewed that the Bailiff of the Plaintiff took the Diſtreſs within the Manor, and that he would not ſuffer the Bailiff of the Plaintiff to drive the Diſtreſs out of the Manor, and it was adjudged that this Cuſtom ſhould not bind the Plaintiff, becauſe the Diſtreſs was for the King's Debt: So that the Cuſtom did not affect the King. Which Caſes ſhew that no Cuſtom can reſtrain the Liberty of the King; and ſo cannot any Statutes which don't make Mention of the King in expreſs Terms. [§] But yet the King, tho' not named in Statutes, ſhall take Advantage of them as another ſhall do; as he ſhall take Advantage of the Statute *of Waſt*, and of the Statute of 9. *R.* 2. *cap.* 3. of Error and Attaint for him in Reverſion upon Recovery againſt their Tenant for Life, notwithſtanding he is not named in them. So if the King as Heir to his Mother brings a *Sur cui in vita*, the Plea ſhall not be delayed for the Nonage of the Heir of the Huſband, but the King ſhall take Advantage of the Statute of *Weſtminſter* 2. *cap.* 40. notwithſtanding he is not named. And on the other Hand if he is not named in a Statute he ſhall not be

[a] 2 Brownl. 198. Cowel's Inſt. 4, 5. Ante 9 (b).
[b] Godb. 205. Pollexf. 418. Ante 10 (i). and the other Books there cited.
[c] T. 8. H. 7. 1. a. Pollexf 418. 4 Bac Abr. 210. Vin. Abr. tit. Prerogative O. c. 2. pl. 3.
[d] M. 2. R. 3. 4. pl. 9. T. 8. H. 7. 1. a. b. H. 41. Ed. 3. 5. b. *per Thorp.* Bro. Patents 5. Fundamenta legum 71. See 10 Co. 64. b.
[e] M. 2. H. 7. 8. pl. 25. Fitz. Prerog. 10. Bro. 101. Choſe in Action 6. M. 5. Ed. 4. 8. pl. 22. Fitz Grants 16. Bro. Choſe in Action 11. H. 32. H. 8. Bro. Patents 98. Dy. 30. pl. 208. 2 Finch 84. Cowel's Inſt. 187. Vin. Abr. tit. Prerogative M. b. pl. 25.
[f] See Poſt 323. (e) and the Books there cited.
[g] 4 Bac. Abr. 201, 202. But ſee this Opinion denied to be Law Poſt 249, *per A. Brown* J. 1 Rol. R. 155. Hob. 166. Dy. 35. pl. 29. in margine. And ſee 7 Co. 28. a *Baſkerville's* Caſe adjudged contrary.
[h] 4 Bac. Abr. 202. But ſee this Opinion denied to be Law, Poſt 249 *per A. Brown* J. 1 Rol. R. 155.
[i] M. 35. H. 6. 27. a. *per Litt.* Bro. Diſcents 60. Godb. 313. 4 Bac. Abr. 201.
[k] See Poſt 321 (b). and the Books there cited.
[l] P. 43. Ed. 3. 14 pl. 2. Fitz. Prerog. 14. Bro. 76.
[m] T. 16. H. 7. 12. b. *per Curiam.*
[n] H. 3. H. 7. 3. a. *per Keble.* Bro. Prerog. 59. Traverſe per &c. 176. M. 3. H. 7. 14. a. *per Townſend.* Bro. Prerog. 60.
[o] P. 13. Ed. 4. 8. a. Fitz. Prerog. 9. Bro. 69. B. N. C. § 128.
[p] M. 28. H. 6. 2. pl. 8. Fitz. Prerog. 3. Bro. 3. See Ante 85 (d) and the other Books there cited.
[q] See Ante 216 (a) and (b) 239 (c)
[r] H. 9. H. 6. 56. b. Fitz. Prerog. 1. Bro. Garranty 3. Recov. in Value 22. Poſt 334 (d).
[s] M. 2. H. 7. 8. pl. 25. Fitz. Prerog. 10. Bro. 101. Condition 125. Entry congeable 88. 1 Rol. R. 152. 2 Bulſt. 4. 3 Leon. 125. Moor 296. Latch 28. 1 Finch 55. 2 Finch 84, 85. 4 Bac. Abr. 196. Ante 213 (l).
[t] M. 35. H. 6. 36. Fitz. Prerog. 5. 2 Rol. Abr. 447. pl. 8. Co. Litt. 143. b. Litt. R. 48. Gouldſb. 19. 1 Finch 91. 2 Finch 84.
[u] See Poſt 323 (a). and the Books there cited.
[w] T. 11. H. 4 71. b. *per Hank. et Hill.* Fitz. Brief al Eveſque 13. Bro. 8. Office de Court 20. Prerog. 16. T. 16. H. 7. 12 a. *per Fineux.* P. 21. Ed. 4. 3. b. *per Choke.* F. N. B. 38 c. S. P. C. 95. a. 1 Rol. R. 208, 468. Jenk. 25. pl. 47. 219. pl. 65. 2 Finch 85.
[x] M. 35. H. 6. 25. b. Fitz. Cuſtom. 2. Bro. 5. Prerog. 5. Moor 205. Litt. R. 91. 1 Keb. 301.
[y] M. 35. H. 6. 28. b. *per Haltoft.* Dr. & Stud. lib. 1. cap. 25. fo. 73. 2 Inſt. 713. Moor 205. 1 Rol. R. 166. 2 Rol. R. 301. Litt. R. 91. Godb. 297. Hardr. 25. Crompt. J. C. 221. b.
[z] M. 35. H. 6. 27. b. *per Nottingh.* Bro. Wreck 2. 2 Inſt. 168. 4 Bac. Abr. 201. Vin. Abr. tit. Prerogative T. pl. 25.
[*] M. 35. H. 6. 26. b. *per Litt.* Moor 205. 4 Bac. Abr. 201.
[†] H. 21. Ed. 3. 4. b. Bro. Cuſtom. 20.
[§] 2 Sid. 69.

reſtrained

reſtrained by it. As the Statute of *Magna Charta cap.* 10. provides *that none ſhall be diſtrained to do more Service for a Knight's-Fee, or for any Freehold, than is therefore due*, upon which the ‖ *Ne injuſte vexes* is founded to avoid Incroachment, † yet if the King incroaches more Rent or Service, the Party ſhall not have any Remedy by this Statute againſt the King either by Petition or otherwiſe, becauſe the King is not named, and therefore he ſhall not be deprived of the Advantage of Incroachment which the Common Law permitted. So the Statute of *Magna Charta cap.* 11. ordains *that Common Pleas ſhall not follow our Court, but ſhall be holden in ſome certain Place*, [a] yet in 31. *Ed.* 1. the King brought a *Quare Impedit* in the King's Bench, and it was there objected that the ſaid Court ſhould not have Power to hold Plea thereof contrary to the Statute, but it was awarded to be maintenable, for the King is not preciſely named in the Act, and therefore he ſhall not be reſtrained. So in a *Quare Impedit* Plenarty is no Plea by the Statute of *Weſtminſter* 2. *cap.* 5 ſo that the *Quare Impedit* be purchaſed within ſix Months, and if it is not, then by the Intent of the Statute it is a good Plea, [b] but yet if the King is Plaintiff in the *Quare Impedit*, Plenarty is no Plea againſt him, altho' he does not purſue the Writ within ten Months, but he is at Liberty to purſue it when he will, by 47. *Ed* 3. for the King is not named. [c] So the Statute of 32. *H.* 8. *cap.* 2. of Preſcription or Limitation does not reſtrain the King, becauſe he is not mentioned in the Act. From which Caſes it appears that the Common Law, Cuſtoms, and Statutes, which don't make expreſs Mention of the King, exempt the King from all Reſtraint, and leave him at Liberty. So does this Statute *de donis conditionalibus*, which is reſtrictive in three Points, as it is ſhewn before, that is to ſay, it reſtrains the Donee or his Iſſues from aliening ſo as to bar the Iſſues or the Donor, and it reſtrains the ſecond Huſband from being Tenant by the Curteſy, and it diminiſhes the Eſtate of the Donee, in all which three Points the Common Law was otherwiſe. And theſe Reſtraints are made by general Words, viz. *that the Will of the Giver, according to the Form in the Deed of Gift manifeſtly expreſſed, ſhall from henceforth be obſerved, &c.* and *that the ſecond Huſband ſhall not be Tenant by the Curteſy*, without any Mention of the King, which is not ſufficient to reſtrain the King, as I apprehend. And, Sir, here the Remainder is appointed to King *Henry* 7. and to the Heirs Males of his Body, and ſuch Eſtate is not mentioned in the Act, but yet as to the Subject it is taken * by Equity to be within the Purview of the Act: [d] But as to the King, nothing ſhall ever be taken by Equity againſt him in the Conſtruction of a Statute. Alſo the Act ſays, *that the Will of the Giver, &c, ſhall be obſerved, &c. ſo that they to whom the Land was ſo given upon Condition ſhall not have Power to alien, &c.* ſo that the Words only reſtrain the Alienation of them to whom the Lands were given, and not of their Iſſues. And here the Lands were given to King *Henry* 7. and the Alienation was made by King *Edward* 6. which is out of the Words, and ſhall not be taken by Equity againſt the King, for which Reaſons he is at Liberty as he was before the Statute. And, Sir, if the King ſhould be reſtrained, he would be in a worſe Condition than any other, for every one elſe may ſuffer a common Recovery, and ſo make the moſt of the Land, and bar their Iſſues, but no Recovery can be had againſt the King, for no [e] *Præcipe* lies againſt him, wherefore if it ſhould not be a Fee-ſimple in him, he would be in a much worſe Degree than another. For which Cauſes it ſeems to me that the King is not reſtrained by the Act, but that he might claim a Fee-ſimple, which will make the Remainder void, and might bar every one by Alienation, and ſo the Plaintiff ſhall recover.

Anthony Brown Juſtice, I am of Opinion to the contrary. And firſt, where the Remainder is limited to King *Henry* 7. by the Name of King *Henry* 7. it ſeems to me to be well limited to him by ſuch Name. [f] For the King naturally, properly, and fully cannot purchaſe by any other Name than by the Name of King, for the Name of King has drowned his Surname, and in the Name of King his Surname and proper Name alſo are included. And this Name of King cannot be omitted in his Purchaſes, or in his Patents or Writs, for it is his Name, and by it he is known and commonly called. And ſo in this Statute it is ſaid, *The Lord the King perceiving, &c. hath ordained, &c.* ſignifying by the Name of *the Lord the King*, King *Edward* 1. So we ſay *nullum tempus occurrit Regi*, and a Man ſhall forfeit to *the Lord the King*, and *the Lord the King ſent his Writ in theſe Words*, without expreſſing his Name of Baptiſm. So that the Name of *the Lord the King* contains the King in certain, viz. the King which then is, or the King ſpoken of. And altho' it is uſual at this Day to ſay King *Henry* 8. or King *Edward* 3. or King *Edward* 4. this is but for Diſtinction's Sake, to know what King we mean, for ſeveral of them had one ſame Name, as *Henry* or *Edward*, and the Addition of Number, as firſt, ſecond, or third, ſhews which of them we mean that have reigned heretofore, and it is to no other Purpoſe. For the Word *(King)* is a Name of Subſtance by itſelf without the Name of Baptiſm, and this politic Name of *King* includes the King's natural Name, as the Name of Duke of *Norfolk*, or Earl of *Arundel* include their natural Names. And if Land is given to *Edward* 6. or *Henry* 8. omitting the Word *King*, they ſhall take nothing. But *e contra* if a Patent is made by King *Henry* 8. by the Words, *the King hath granted*, omitting *Henry*, or by the preſent Queen by the Words, *the Queen hath granted*, omitting *Elizabeth*, the Gift is good. And ſo a Gift to the King or Queen, omitting their Name of Baptiſm, is good, for the natural Name is included in the politic Name of *King* or *Queen*. But, Sir, the Majeſty and Name of the King, when they are conjoined with the natural Perſon, alter the Quality and Degree of the natural Perſon, in the Eye of the Law, ſo that if he was within Age before, he ſhall then be adjudged of full Age to all Purpoſes; [g] and if his Body natural was attainted before, (as *Henry* 7. was) *eo inſtante* that the Dignity Royal comes to it, the Diſability is gone, for the greater removes the Imperfection of the leſſer, and the Body politic has the Pre-eminence over the Body natural. So that if Land is given to the King by the Name of Baptiſm, and by the Name of King alſo, as to *Henry* the

‖ Contra 2 Inſt. 21. 1 Rol. R. 165.

† Vin. Abr. tit. Incroachment C. pl. 1.

[a] T. 21. Ed. 1. Fitz. Prerog. 28. 11 Co. 68. b. 1 Rol. R. 164. 4 Bac. Abr. 199, 200. See Ante 236 (l). 240 (f).

[b] T. 47. Ed. 3. 4. b. Bro. Quare Impedit 39. P. 43. Ed. 3. 14. pl. 2. Fitz. Prerog. 14. Bro. 76. Plenarty 1. T. 35. H. 6. 63. a. *per Priſot.* 2 Inſt. 361. 11 Co. 68. b. 74. b. W. Jones 21. 1 Leon. 226. Crompt. J. C. 15. b. Booth 225. Watſ. Compl. Incumb. 277. 4 Bac. Abr. 200.

[c] 11 Co. 68. b. 74. b. 1 Rol. R. 151. 4 Bac. Abr. 200.

* See Poſt 248 (i) 251 (f).

[d] S. P. 2 Rol. R. 317. Godb. 308. See Poſt 248.

[e] M. 12. H. 7. 12. b *per Conſtable.*

A. Brown J.

[f] Litt. R. 201. Vin. Abr. tit. Prerogative Z. d. pl. 1. in Margine.

[g] See Ante 238 (c) and the Books there cited.

the King, and to his Heirs, this ſhall go in Succeſſion as the Crown ſhall go. [a] And if a Man that is King by Deſcent on the Part of his Mother purchaſes Lands to him and to his Heirs, and in the Purchaſe he is called by the Name of Baptiſm and by the Name of King alſo, if he dies without Iſſue, the Heir on the Part of his Mother, who has the Dignity royal, ſhall have the Land; for the Name of King being greater than the Name of Baptiſm, which ſignifies only the natural Body, ſhall have the greater Pre eminence in the Purchaſe, and ſhall draw the Land with it. [b] So if Land is given to *Edward* King of *England*, and to his Heirs, if he dies without Iſſue, his Brother of the half-Blood being King ſhall have it, *cauſa qua ſupra*. And, Sir, altho' ſuch is the Nature of the King's Perſon, yet it ſeems to me that the Eſtate here limited to King *Henry* 7. veſted in his Body natural, and that in that Capacity he took it. For although it was limited to him by the name of King *Henry* 7. ſo that there is as well the politic Name of *King* as his Name of Baptiſm, yet the Body natural may be ſignified by this Name of King, as it has been ſaid, for it includes the Body natural, and the Donor is at Liberty to give the Land to the one Body or to the other. And here he has given it to him and to his Heirs Males of his Body, which is a Limitation to the natural Body that may beget Iſſues, for the Body politic cannot beget Iſſues. And by this Limitation none ſhall have the Land after the Death of *Henry* 7. but thoſe who were begotten of his Body. And if it had ſo happened that after the Death of *Henry* 7. another had been King who was not Iſſue of the Body of *Henry* 7. it would not have been reaſonable that he ſhould have had the Land, for the Donor did not appoint it to him, but directed his Gift to thoſe who ſhould iſſue of the Body of *Henry* 7. for which Reaſon it cannot veſt in the Body politic, and go in Succeſſion to him that ſhall be King, whoſoever he is, for ſuch is not the Limitation of the Donor. And if the Donor intended to give it to the Body natural, he could not have uſed more proper Words, for they are ſuch as he ought to have uſed to a Stranger if he had given it to a Stranger in his Body natural. And therefore it is limited meerly to the Body natural, and in that Body it veſted, becauſe to that Body the Donor was pleaſed to give it.

[a] Co.Litt. 15.b. Vin. Abr. tit. Prerogative Y. d. 2. pl. 2.

[b] Co. Litt. 15.b.

Further, it ſeems to me that before the Statute *de donis conditionalibus* the King might take a Fee-ſimple conditional. For as the Donor might limit the Body of the King, to which he would give it, and in which the King ſhould take it, ſo might he limit the Eſtate that he would give, and alſo limit how the King ſhould take it, for he might give it for Life, or for Years, and ſo the King ſhould take it, and not otherwiſe. So he might give to the King and to his Heirs upon Condition in Deed, and ſo the King ſhould take it, and not otherwiſe. So before the Statute when there were two Fee-ſimples, *viz.* one conditional, (that is, upon Condition in Law) and the other abſolute, if a Gift had been made, the Donor might have given either the one or the other, and according as he limited the Gift, ſo and in no other Manner the King ſhould have taken it, ſo that if before the Statute the Gift had been to the King and to his Heirs, he ſhould have taken a Fee-ſimple abſolute, and if it had been to the King and to the Heirs of his Body, he ſhould have taken a Fee-ſimple conditional, and if he had died without Heir of his Body, it ſhould have reverted to the Donor, for if he had not Title but by the Donor, he ought to take it as the Donor gave it to him, and the Donor limited ſuch Eſtate to him and to no other, and the Gift being the Cauſe of his having the Land, it ſhall rule the Manner in which he ſhall have it. And therefore as it ſhould have reverted before the Statute if the Gift had been to a Stranger, and the Stranger had died without Iſſue, ſo ſhould it have reverted before the Statute if the Gift had been to the King, and he had died without Iſſue, for the Donor made the ſame Limitation of the Eſtate of the one as of the other, and therefore he ſhould have had as large Benefit againſt the one as againſt the other. And therefore the Freehold ſhould have been caſt upon him where the King Donee died without Iſſue, and he ſhould have entered without Office, as well as he ſhould have done if any other had been Donee. And if the King before the Statute had given Land to one and to his Heirs of his Body, there the King ſhould not have had the Reverſion any more than a common Perſon, and ſuch Donee might have aliened after Iſſue had, as well as he might have done if a common Perſon had been Donor. For the Perſon of the King is not to be reſpected in Gifts of Land, but the Quality of the Eſtate is to be conſidered; and the Perſon of the King ſhall not rule the Eſtate in the Land, but the Eſtate in the Land ſhall rule the Perſon of the King. So that before the Statute if Land had been given to the King and to the Heirs of his Body, he ſhould have had a Fee-ſimple conditional, and no other Eſtate. And ſo it was before the Statute. Then as to the Statute, it was intended to redreſs a Miſchief and a Grievance at the common Law. [c] And at the common Law there was no Eſtate of Inheritance but what was Fee-ſimple. But theſe Eſtates in Fee-ſimple were of two Sorts, the one abſolute, and the other conditional, as hath been ſaid. And the Fee-ſimple conditional was, where Land was given to a Man to the Heirs of his Body begotten, and herein the Abuſe was after Iſſue had rather than before Iſſue had. For before Iſſue had, if he had aliened, this ſhould not have bound the Iſſues had afterwards, nor the Donor if there had been no Iſſue, for until Iſſue had the Donee had no Power to alien, though he had after Iſſue. For when the Gift was to one and to the Heirs of his Body, they took it that he could not lawfully alien until he had ſuch Heirs, and that if he did alien, the Donor (although he could not enter preſently) after the Death of the Donee, if he had no Iſſue, might have a *Formedon* in Reverter. For the Gift being to one and to the Heirs of his Body, they adjudged it not to be a [d] full Fee-ſimple until he had Heirs of his Body, for when it was incertain whether he ſhould have an Heir of his Body or not, they did not take him to have a full Inheritance. [e] And therefore the Law was taken in ſuch Caſe, that if the Gift was to Huſband and Wife and to the Heirs o ftheir two Bodies begotten, and the Huſband had died before Iſſue had, and the Wife had taken a ſecond Huſband, and had Iſſue, there the ſecond Huſ-

[c] See Ante 235 (d). and the Books there cited.

[d] Poſt 250 (e).

[e] S. P. 2 Finch 126. But ſee to the contrary Ante 242(x). and the Books there cited.

† The Law was ſo in this Point beyond Diſpute.

Huſband ſhould not be Tenant by the Curteſy, nor ſhould their Iſſue † inherit, and if the Wife had died, the ſecond Wife of the Huſband ſhould not be endowed; for until ſuch Heir as the Donor had appointed was begotten, they took it that the Inheritance was not conſummate in him. And if there had been two Brothers, and the one was diſſeized, and a Deſcent caſt, and the Heir who was in by Deſcent before the Statute *de donis conditionalibus* had given the Land to the Brother that was diſſeized, and to the Heirs of his Body begotten, and he had died without Iſſue, the other Brother ſhould not have been remitted, becauſe the Land did not deſcend to him; [a] for although the Right of the Land deſcended to him, yet if the Poſſeſſion alſo did not deſcend to him, he ſhould not be remitted. [b] And this is the Reaſon of the Caſe in 19. *H.* 6. where a Woman Tenant in general Tail had Iſſue a Daughter, and by a ſecond Huſband had Iſſue another Daughter, and ſhe and the ſecond Huſband diſcontinued in Fee, and took back an Eſtate to them and to the Heirs of their two Bodies, and died, and the Land deſcended to the youngeſt Daughter, and it was there adjudged that the eldeſt was not remitted, for although ſhe had the Right deſcended, yet ſhe had not any Poſſeſſion deſcended, and therefore ſhe ſhould not be remitted. But in the ſaid firſt Caſe, if the Heir in by Deſcent had given the Land to the Brother and to his Heirs, and afterwards the Brother had died, there the other Brother ſhould have been remitted, becauſe the Land ſhall deſcend to him. [c] But after Iſſue had ſuch Donee at the common Law had Power to alien, and thereby to bar the Iſſues and the Donor, for by having Iſſue the Condition was performed, and his Inheritance was made more full, * ſo that the ſecond Huſband ſhould have been Tenant by the Curteſy, and the Iſſue of the Wife and of the ſecond Huſband ſhould have inherited, if the Iſſues of the Wife and of her firſt Huſband had died. [d] And in 7. *Ed.* 3. in a *Formedon* in Deſcender brought upon the Seizin of the third Iſſue of the Donee, it appears that the Donee himſelf before the Statute was attainted of Felony, having Iſſue, and there it appears that the Land ſhould eſcheat to the chief Lord of whom it was held, for after Iſſue had it was taken as a full Fee-ſimple. [e] And in 8. *Ed.* 3. in a *Formedon* in Deſcender brought by the Iſſue in Tail, a Releaſe of the Donee made to the Grandfather of the Tenant before the Statute *de donis conditionalibus* was pleaded in Bar, and held a good Bar: And herewith agrees the Book in 5 & 6. *Ed.* 3. So that after Iſſue had it was taken that the Donee had Power to alien, and by the ſame Reaſon to do other Acts to entitle others to the Land, as the Lord by Eſcheat, or the ſecond Huſband and his Iſſue, and the like. And becauſe ſuch Donee might bar his Iſſues by his Alienation, and foraſmuch as it was a frequent Caſe, and many had done ſo, the Statute did not remedy the Alienations of Donees made before the Statute, but there is a Clauſe in the Statute ſignifying that they left it as it was before, *viz. and it is to wit, that this Statute ſhall hold Place touching Alienations of Land contrary to the Form of the Gift hereafter to be made, and ſhall not extend to Gifts made before*; which Words, *to Gifts made before*, are intended Gifts, or Feoffments, or Alienations of Tenants in Tail made to others before the Statute, and after Iſſue had, and not Gifts made by the Donors before the Statute. For if one before the Statute gave Lands to a Man and to the Heirs of his Body, and after the Statute the Donee makes a Feoffment of it, the Iſſue ſhall have a *Formedon* of this Alienation well enough, for the Statute remedies all Alienations made ſince the Statute, as well where the Gift of the Donor was before the Statute, as where it was after it. So that the Words, *to Gifts made before*, are not to be intended of Gifts made in Tail by the Donors before the Statute, but of Gifts made to others before the Statute by the Donees in Tail after Iſſue had, for ſuch Gifts were not avoidable by any, and therefore they are excepted by this Clauſe, as the ſaid Caſe in 8. *Ed.* 3. proves. [f] So in 44. *Ed.* 3. the Caſe is that Tenant in Tail made a Leaſe for Life, and afterwards releaſed to the Tenant for Life before the Statute *de donis conditionalibus*, and after the Statute, *viz.* in 44. *Ed.* 3. the Iſſue brought a *Formedon*, and it was adjudged that it did not lie, becauſe the Statute excepts ſuch Alienations, for neither before the Act nor by the Act are they voidable by any, if they were made by him who had the Tail only, and were made fully according to the Power which the common Law gave him, but if they were not, then a *Formedon* in Deſcender lies ſince the Statute. [g] For in 4. *Ed.* 2. the Caſe is thus, *viz.* a Woman Tenant in Tail took Huſband, and had Iſſue, and after Iſſue had, and before the Statute the Huſband and Wife aliened in Fee to a Stranger, and died, the Iſſue ſhall have a *Formedon* in Deſcender of this Land after the Statute, notwithſtanding the Alienation; but if the Alienation had been by Fine, then the Iſſue had been barred by the Alienation; ſo is the Book. And, Sir, the Reaſon of the Caſe is, becauſe the Alienation was not lawful, for it was a Diſcontinuance to the Wife being covert at the Time of the Alienation, and when ſhe died, the Right deſcended to the Iſſue, [h] and he could not have a *Sur cui in vita*, unleſs he claimed a Fee-ſimple, [i] and the Words *(to Gifts made before)* are to be intended Gifts lawfully and in due Manner made by the Donees before the Statute, and becauſe this Alienation without Fine was not done ſo, it is not excepted by the Statute, and therefore the Iſſue ſhall have a *Formedon*, and not a *Sur cui in vita*; but if the Alienation was by Fine, in which Caſe the Wife is examined, then it had been duly made, and had bound all. From whence it appears that after Iſſue had the Donee before the Statute had full Power to alien, but not before Iſſue had. [k] And if Land had been given to the King and to the Heirs of his Body, before the Statute he could not have aliened in Fee before Iſſue had, for ſuch Alienation would have been a Wrong in another Perſon, and ſo ſhould it have been in the King, if it were adjudged an Alienation in Fee, and therefore he could not do it, [l] for the King cannot do any Wrong, nor will his Prerogative be any Warrant to him to do an Injury to another. And the Eſtate which the King had would not lawfully ſuffer ſuch an Alienation, for his Eſtate was not large nor full enough to permit it, and his Prerogative could not alter his Eſtate, nor make it greater than the Donor gave it to him. [m] Not but that the Perſon of the King ſhall ſometimes change the Courſe of Things, and that not in reſpect of the Nature of the Eſtate, but of the Quality of the Perſon. [n] As if a common Perſon purchaſes Land, and has two Daughters, and no Son, the Land ſhall deſcend

[a] S. P. Co. Litt. 348. a. See Dy. 221. pl. 16.

[b] 19. H. 6. 59. a. 78. b. Fitz. Entry conge ab. 3. Bro. 33. Remitter 12. Vin. Abr. tit. Remitter G. pl. 10.

[c] See Ante 235 (k) and the Books there cited.

* Poſt 247 (d).

[d] M. 7. Ed. 3. 70. pl. 80. 2 Inſt. 334. 1 Finch 101. 2 Finch 122. Poſt 247 (e). 250 (l). 251 (n).

[e] H. 8. Ed. 3. 11. 12. Fitz. Formedon 39.

[f] H. 44. Ed. 3. 3. pl. 13. Fitz. Formedon 25. Bro. 13. Feoffments 5.

[g] T. 4. Ed. 2. Fitz. Formedon 50. Co. Litt. 19. a. Like Caſe T. 12. H. 4. Fitz. Formedon 15.

[h] 46. Ed. 3. Fit. Cui in vita 33. F. N. B. 193. a. 1 Finch 276. 2 Finch 265.

[i] 9 Co. 26. b.

[k] Co. Litt. 19. b. 1 Co. 44. b. 1 Show. 211.

[l] P. 13. Ed. 4. 8. a. Co. Litt. 19 b. 2 Inſt. 187, 631. 1 Co. 44. b. 5 Co. 55. b. 7 Co. 12. b. 11 Co. 72. a. 12 Co. 12. Moor 204. Davis 75. a. 1 Rol. R. 167. Hardr. 26, 84. 1 Show. 211. 1 Finch 33, 57. 2 Finch 83, 85. Ante 233 (d). Poſt 487.

[m] Co. Litt. 15. b.

[n] Litt. § 241. Dr. & Stud. lib. 1. cap. 7. fo. 22. cap. 10. fo. 36. Hale's Hiſt. Com. Law 238.

deſcend to both the Daughters; [a] but if the King purchaſes Land, and has Iſſue two Daughters, and dies, having no Son, this Land ſhall deſcend only to the eldeſt Daughter, and that is by reaſon of the Quality of the King's Perſon, as it is ſaid before. But if Land deſcends to the King and to another, the King ſhall take only a Moiety, for if he ſhould take the whole, he would do a Wrong to the other, which his Prerogative will not ſuffer him to do. [b] So if Land in Gavelkind deſcends to the King and to his Brother, each of them ſhall take but a Moiety; [c] but there if the King has two Sons, and dies, the King's Moiety ſhall not deſcend to his two Sons, but the eldeſt only ſhall have it by Prerogative, for there the Quality of the Perſon alters the Deſcent, but not the Eſtate, for the Eſtate is as it was before, whether it be Fee-ſimple or Fee-tail, ſo that the Eſtate ſhall be in the King as in another. And therefore the Eſtate before Iſſue had was, before the Statute, the ſame in the King as it was in a Stranger. And before Iſſue the Donee had not Power to alien, ſo that in this Point there was no Miſchief, but the Miſchief lay in the other Point, *viz.* after Iſſue had, for after Iſſue he had before the Statute ſuch a Fee-ſimple as he might indefeaſibly have given to another, [d] and ſuch as would have made the ſecond Huſband to be Tenant by the Curteſy, and the Iſſue of him and of the Wife to inherit, and the ſecond Wife to be endowed, and ſuch as he might forfeit [e] by Eſcheat, and ſuch as by divers other Acts done by the Donee might be conveyed from the Iſſues and from the Donor, all which was contrary to the Will and Intent of the Donor, for his Intent was, that if the Donee had Iſſues, the Iſſues ſhould have it and none other, and that if Iſſues failed, the Land ſhould revert. And yet the common Law permitted him to do contrary to this Will of the Donor, *viz.* to alien, and to do other Acts, whereby to bar the Iſſues and the Donor, but notwithſtanding the common Law did ſuffer it, nevertheleſs it was not well done, but a Wrong. And ſome Things the common Law does permit to be done, which are tortious and wrong. [f] As before the Statute which gave an Action of Waſt, the common Law ſuffered Tenant for Years or for Life to make Waſt and Deſtruction of Houſes and Woods, yet the doing thereof was diſcommendable and wrong. [g] And if there are two Jointenants, and the one takes all the Profits of the Land, the common Law permits it, and leaves the other without Remedy, yet this is a Wrong. And if the King kills a Man, there is no Remedy in the Law, and yet it is not well done. Wherefore ſometimes it is not right but wrong to do that which the common Law ſuffers to be done, or for which the common Law has not provided a Remedy. So was the Alienation of the Donee after Iſſue had, before the Statute *de donis conditionalibus*, a great Wrong, although the common Law permitted it to be done, which one may perceive from the Letter of the Statute itſelf, which ſays, *in all the Caſes aforeſaid, after Iſſue begotten, &c. heretofore ſuch Feoffees had Power to alien the Land ſo given, and to diſherit their Iſſue of the Land, contrary to the Minds of the Givers, and contrary to the Form expreſſed in the Gift.* [h] And if the Alienation was *to the Diſheriſon of the Iſſues, ergo*, it was tortious, for to diſinherit one is not lawful; [i] and if it was *contrary to the Minds of the Givers*, then it was ill done, [k] for men ought to obſerve the Intent of others in a lawful Thing, and it is not right to break it; and if it was *contrary to the Form expreſſed in the Gift*, it was not well done, for he that has a Thing given him in a certain Form, and accepts of it in that Form, and afterwards breaks the Form, does not right. So that the Letter of the Act recites that the Alienation was a Tort and a Wrong, and the Intent of the Donor was thereby violated, and his Right taken away. For notwithſtanding that the Donee had Iſſue, yet the Donor had a Right to have the Land again, if the Iſſue failed; and ſo if there were four Deſcents and the laſt Iſſue died without Iſſue, the Donor ſhould have had it again before the Statute, for the Fee-ſimple after Iſſue had was not abſolute to this Purpoſe, *ergo* the Donor had a Right after Iſſue, to take away which by the Alienation was a great Wrong. So that ſuch Alienation after Iſſue had, being to the Diſinheritance of the Iſſues and of the Donor, and in Violation of the Will and Intent of the Donor, and as ſuch tortious and injurious, was a very great Miſchief, for the full Redreſs whereof this Statute was made. And the Words which make Proviſion for the ſame are theſe, *that the Will of the Giver, according to the Form in the Deed of Gift manifeſtly expreſſed, from henceforth ſhall be obſerved*, which Words alone redreſs the whole Grievance, and the other Words following, *viz. ſo that they to whom the Land was ſo given, ſhall not have Power to alien, &c.* as alſo the other Words, *viz. neither ſhall the ſecond Huſband of any ſuch Woman from henceforth have any Thing in the Land ſo given, &c. by the Law of England, nor ſhall the Iſſue of the ſecond Huſband and Wife ſucceed in the Inheritance, &c.* are but [l] conſequential to the ſaid Words of the Purview, and are only explanatory, and not of Subſtance, but of Abundance, which might well enough have been omitted. For if the Will of the Donor ſhall be obſerved, from thence it follows that the Alienation of the Donee ſhall not bar the Iſſues, and that the ſecond Huſband ſhall not be Tenant by the Curteſy, and that the Iſſues of him and of the Wife ſhall not inherit, for ſuch is the Will of the Donor, for in that the Gift is to the Donees, and to their Heirs of their two Bodies begotten, therein it is contained that no other but ſuch Iſſue ſhall have the Land by the Will of the Donor. So that the Purview lies only in the ſaid Words, *that the Will of the Donor, &c. ſhall from henceforth be obſerved*, which Words contain the Things following, and more. But, Sir, although the Act provides that the Will of the Donor ſhall be obſerved, yet there is no Word in the Act that divides the Eſtate, and makes the Fee-ſimple to remain in the Donor, and the Donee to have a leſſer Eſtate than he had before the Act. For although the Land ſhould revert to the Donor before the Act, this is no Proof that he had a Reverſion, for an abſolute Fee-ſimple ſhall eſcheat to the Lord at this Day, and yet the Lord has no Reverſion. So the Reverter of the Land to the Donor upon Condition in Law does not prove that the Donor had a Reverſion, for indeed he had no Reverſion, but the Donee had the Fee-ſimple, and conſequently the whole Eſtate. But the Caſe is, that the wiſe Sages of the Law, who had the Conſtruction of the Statute immediately after it was made, did, upon the Reaſon of the Statute, divide the Eſtate in order to fulfil and execute the Will of the Donor. For when the

[a] See Co. Litt. 165. a.

[b] M. 35. H. 6. 28. a. *Per Moile.* 2 Sid. 139. Robinſ. of Gavelk. 67. 1 Bac. Abr. 670. 2 Bac. Abr. 642. 4 Bac. Abr. 192. Vin. Abr. tit. Gavelkind E. pl. 3.

[c] Herewith agree Co. Litt. 15. b. 1 Keb. 506. 1 Sid. 138. T. Raym. 77 *Per Twiſden.* J. Robinſ. of Gavelk. 67. 1 Bac. Abr. 670. 2 Bac. Abr. 642 4 Bac. Abr. 192. Vin. Abr. tit. Gavelkind E. pl. 4. againſt the Opinion of Lamb. Peramb. 536. and of *Southcote* Ante 234 (l).

[d] Ante 246 (*).

[e] See Ante 246 (d) Poſt 250. (i). 251 (n).

[f] M. 14. H. 8. 6. a. *Per Shelley.* P. 21. H. 6. 38. a. *Per Aſcue.* Bro. Waſt 88.

[g] Dr. & Stud. lib. 1. cap. 19. fo. 58. Fundamenta Legum 65. But the Law is now beneficially altered in this Point by the Stat. of 4. Ann. cap. 16. § 27. by which an Action of Account may be brought by one Jointenant againſt the other, as his Bailiff, for receiving more than his Share. But *Note* Crompt. J. C. 49. b. ſays it ſeems that in this Caſe the Party might have an Action of Account at the common Law, as well as where two have a Ward or a Parſonage, and the one takes all the Profits, in which Caſe an Account of the Moiety lies for the other. But the Law ſeems to have been generally agreed otherwiſe in this Caſe.

[h] 1 Co. 44. b.

[i] 1 Show. 211.

[k] 11 Co. 73. a. 1 Show. 211.

[l] 2 Inſt. 336. Poſt 251 (b). *Per Dyer* C. J.

the Statute ordained that the Will of the Donor ſhould be obſerved, from thence it followed conſequentially that the Donee was reſtrained from aliening lawfully the Fee-ſimple, and from doing other Acts which Tenant in Fee-ſimple might do; and when he was thereby reſtrained from doing lawfully thoſe Acts which attend a Fee-ſimple Eſtate, and from meddling with the Fee-ſimple, from thence they took it to be the Intent both of the Legiſlature and of the Donor, that he ſhould not have [a] a Fee-ſimple, for it would have been an idle Intent to have adjudged the Fee-ſimple in him, when he could not lawfully do any thing with it. And therefore upon this Reaſon they took it that the Fee-ſimple was left in the Donor, and yet that the Eſtate of the Donee was an Eſtate of Inheritance, becauſe the Heirs of his Body ſhould inherit it; but this Inheritance could not be a Fee-ſimple, for then there would be two [b] Fee-ſimples of the ſame Land, but they took it to be a baſer Eſtate of Inheritance, and gave it the Name of an Eſtate-tail, which is an Eſtate of Inheritance certainly limited. So that upon good Reaſon, in order to perform the Will of the Donor and of the Legiſlature alſo, they took it by the Purview that the Eſtate was [c] divided, and that the Donee had an Eſtate-tail, and the Donor the Fee-ſimple, which he might grant over to another, or give to another by Way of Remainder, and that he could not do before the Statute, for then the Donee had a Fee-ſimple, and one Fee-ſimple cannot depend upon another. For in 3. *Ed.* 3. a Man levied a Fine *ſur conuſance de droit come ceo que il ad de ſon done*, and he could not make a Remainder over upon ſuch Fine, becauſe the Gift ſhall be taken [d] as a Fee-ſimple. But now that the Eſtate is divided, the Donor may grant the Fee-ſimple over by Way of Remainder. So that the Reaſon of the Purview of the Act inſtructed the Expoſitors of it to divide the Eſtate, and continual Uſe ever ſince has confirmed the Expoſition. Wherefore the Eſtate is divided by the Intent of the Act without preciſe Words as fully and perfectly as if the Act had expreſsly divided it, [e] for that which is done by the Intent of any Act, without preciſe Words, is equivalent to that which is done by preciſe Words. So that now the Eſtate is reſtrained, and abridged, and altered by the Act, and therefore when the King took the Eſtate, he took it reſtrained and abridged, and he could not take it otherwiſe; for the Prerogatives of the King are in reſpect of his Perſon, and have relation to his Perſon, and his Perſon ſhall by Prerogative be exempt from Reſtraint in many Caſes, but here the Reſtraint is not in the Perſon, but it is in the Eſtate which the King took, for the Eſtate which the Donee had at the common Law was a Fee-ſimple, which is now reſtrained and abridged, and the Miſchief at the common Law was not in the Perſon of the Donee, but in the Eſtate of the Donee, and therefore the Statute was not made in Reſtraint of the Perſon of the Donee, but in Reſtraint of the Eſtate of the Donee; and ſo the Eſtate was the Cauſe of the Act, and is reſtrained by the Act, which the King cannot enlarge by his Prerogative without another Act of Parliament, but in taking the Eſtate he is reſtrained along with the Eſtate. And as to what has been ſaid, that the King and his Eſtate ſhall be left at large, and that he ſhall have Power to give the Fee, as another Perſon might before the Act, Sir, the Matter of the Act ſhews the contrary, for the Act ſhews that ſuch Alienation was to the Diſinheritance of the Iſſues, and that which is to the Diſinheritance of any is a Wrong. Alſo the Act ſays that it was contrary to the Will of the Donor, and that which a Man does contrary to the Will of his Donor is not well done. Alſo it ſays that it was contrary to the Form expreſſed in the Gift, which alſo is not well done: So that by the Judgment of the Act, ſuch Alienation was a Tort and a Wrong. And he that will maintain that the King is in a Degree to make ſuch Alienation, muſt at the ſame time maintain that the King may do Wrong, and that the Law ſuffers him to do Wrong, which none can maintain; [f] and it is a difficult Argument to prove that a Statute, which reſtrains Men generally from doing Wrong, leaves the King at Liberty to do Wrong. And as to what has been ſaid, that the King ſhall not be reſtrained by the Act, unleſs he is ſpecially named in the Act, Sir, if I ſhould be inclined to admit the Law to be ſo, yet here he is named, [g] for the Act ſays, *wherefore the Lord the King perceiving how neceſſary and uſeful it is to provide a Remedy in the Caſes aforeſaid, hath ordained that the Will of the Giver, &c. ſhall from henceforth be obſerved:* So that the King is named, and effectually named, as one that perceived the Miſchief, and ſaw that it was neceſſary and profitable to provide a Remedy, and therefore he ordained a Remedy; and when he ordained a Remedy for the Miſchief, it is not to be preſumed that he intended to be at Liberty to do the Miſchief. Wherefore the King is named in the Act, and ſo named that every one may gather from thence that he was content to be bound, and that he is bound as another is. And great Inconvenience would follow if he was not, for by the Intent of the Act the Eſtate is divided, as it is ſhewn before. And the Fee is in him in the Remainder, *viz.* to the right Heirs of the Marqueſs, as it is limited by the Fine. And if the King ſhould have a Fee-ſimple conditional, then there would be two Fee-ſimples of one ſame Land, for the Law will not deveſt the Fee out of him in the Remainder, for that would be a Wrong to him, which the Law will never do, and two Fees there cannot be by any Means, for which reaſon there ſhall be no Fee in the King, nor in his Patentee. And as to that which was laſt ſaid, *viz.* [h] that the Eſtate limited to King *Henry* 7. was to him and to the Heirs Males of his Body, and ſuch Eſtate is not mentioned in the Act, and therefore ſhall not be taken by Equity againſt the King, Sir, [i] *Littleton* in his Book has ſhewn us a Learning touching this Point, *viz.* that an Eſtate-tail to one and to the Heirs Males of his Body is taken by Equity of the ſaid Statute, as divers other Eſtates-tail are, which are not expreſſed in the ſaid Statute. For every thing which is the Intent of the Donor is as fully within the Statute, as if the Thing itſelf had been preciſely expreſſed. For when the Statute ordains *that the Will of the Donor ſhall be obſerved*, it makes his Will to be a Law, as well againſt the King as againſt another. And foraſmuch as it was his Will to limit the Eſtate in the Manner it is here limited, it ſhall be good, and ſhall enure accordingly. And, Sir, if the King would ſay that the Eſtate was not divided at common Law, and that as to him it ſhall be at this Day as it was at the common Law, whereby he would have a Fee-ſimple, and the

[a] H. 5. H. 7. 14. b. Fitz. Taile 10. Bro. 27. Eſtates 40. P. 12. Ed. 4. 3. b. Fitz. Taile 9. Bro. 28. Poſt 251 (i). (k).

[b] Dy. 12. pl. 51. *Per Fitzh.* Co. Litt. 18. a. 2 Rol. R. 423. O. Bendl. 143 *Croker v. Kelſey.* Carth. 258. Poſt 349, 560.

[c] See Ante 242 (z). and the Books there cited.

[d] H. 42. Ed. 3. 5. b. *Per Finchd.* Bro. Eſtates 65. in fine. Fines levies 13. T. 1. H. 5. 8. pl. 19. Fitz. Scire Facias 57. Bro. Reſervation 41. M. 19. H. 6. 17. b. 22. b. Co. Litt. 9. b.

[e] Hardr. 208.

[f] 11 Co. 72. a.

[g] 7 Co. 32. b.

[h] See Ante 244 (d).

[i] M. 18. Ed. 3. 45. b. Fitz. Taile 16. 18 Aſſ. pl. 5. Bro Eſtates 33. Taile 19. M. 33. Ed. 3. Fitz. Taile 5. Litt. § 21. See Poſt 251 (f).

the Remainder would be void, by this, I ſay, he deſtroys his own Eſtate, for the Eſtate-tail precedes his Remainder, and if it ſhould be a Fee-ſimple conditional, then the Remainder of the King would be void, [a] for a Remainder cannot be limited upon a Fee-ſimple precedent. And if the King would ſay that his Remainder is a Fee-ſimple, he cannot ſay otherwiſe but that the Eſtate precedent is alſo a Fee-ſimple, for both the Eſtates were made by one ſame Fine at one ſame Time, and both the Eſtates are by the Donor limited to be in Tail. And the King cannot ſay that the one is in Tail and the other in Fee, for thereby he affirms and diſaffirms at the ſame Time, that is, he affirms that in the firſt Eſtate the Statute divided the Eſtate and made it in Tail, and then in his own Eſtate he diſaffirms it, viz. that the Statute did not divide the Eſtate, but that it remains a Fee ſimple conditional; and by this Means he would be within the Purview and out of the Purview in one ſame Matter and at one ſame Time, which he cannot be, but he ſhall be eſtopped to ſay ſo, *nam qui ſentit commodum, ſentire debet et onus.* And alſo by ſuch Affirmative he would in Part of the Eſtate deſtroy the Fine by which he himſelf claims, that is, he would deſtroy the Remainder to the right Heirs of the Marqueſs, and make the Fine void for the ſame, for if he himſelf has a Fee-ſimple the Remainder to the right Heirs of the Marqueſs is void; but it does not ſtand with his Eſtate to impeach the Fine which conſtitutes his Eſtate, nor will his Prerogative extend to deſtroy the Remainder in Fee to the right Heirs of the Marqueſs, for thereby he would take away an Eſtate from another, and do Wrong to another. [b] And therefore I deny the Caſes put of a next Avoidance granted to the King, or of the Grant of all Preſentments which ſhall happen within 20 Years: For after the next Avoidance, or the 20 Years paſſed, the King ſhall not preſent, for the Grantor did but grant that which ſhould happen within ſuch a Time, and after that Time the Law ſays that the Grantor ought to have the Advowſon, and the Preſentments which fall from it, and if the King will ſuffer a Stranger to have thoſe Preſentments which belong to him, he ſhall not have the Preſentments which belong to the Grantor after the Time elapſed, for thereby he would do a Wrong to the Grantor, and injure the Eſtate of the Grantor; for whereas the Grantor only granted the Advowſon for 20 Years, perhaps he might not have any Profit of it for 40 or 50 Years, if the King was at Liberty to preſent when he pleaſed, which is very unreaſonable, and the King's Prerogative ſhall not injure the Grantor ſo much. So that for the Reaſon before given it ſeems to me that the Eſtate of the King ſhall be only a Fee-tail, and that he is bound by the Statute as well as another. [c] And as a Proof that it has been ſo taken before, the Caſe of 4. *H.* 6. has been well cited, where the Tenant, who held of the King *in capite* by Knight's Service, made a Gift in Tail, and the Donee died, his Iſſue within Age, and it was there adjudged that the King ſhould not have the Ward, but the Donor ſhould have it, for the Eſtate is divided, and the Reverſion is in the Donor, and the Donee held of him, and he ſhall not be ſaid, as to the King, to have a Fee-ſimple conditional, and ſo to hold of the King, but he ſhall be adjudged Tenant in Tail, and the Donor ſhall be adjudged Tenant to the King. And as to what has been ſaid, [d] that the Reaſon upon which the Book was ſo ruled is, becauſe the King accepted the Services of the Donor, and ſo took him for his Tenant, and therefore he was eſtopped to take the other for his Tenant, Sir, altho' this is there debated, I don't take this to be the Cauſe of the Judgment, (and ſuch Cauſe would be a very weak one, [e] for the King ſhall not be eſtopped by ſuch Acceptance) but it appears in the Argument there *fo.* 22. that *Martin* put a Queſtion, whether if the King ſhould have the Wardſhip of the Heir of the Donee, it ſhould be by Reaſon of his ancient Seigniory, or by Reaſon of a new Seigniory upon the Gift, and it is there anſwered that it ſhould be by Reaſon of his ancient Seigniory; to which he ſaid that it could not be, for this Seigniory was by Reaſon of a Tenancy in Fee-ſimple, and as long as the Fee-ſimple continues in the ancient Tenant the Seigniory cannot be upon any other Perſon, or upon any other Eſtate, but upon him; ſo that upon the Gift the Tenancy was not changed, nor conſequently the Seigniory, in which Caſe, notwithſtanding the Gift, the Donor continues Tenant, and no other, of whom he ſhall have the Ward: And upon this Reaſon of *Martin* I take the Judgment of the Book to proceed, and not upon the other Point. And this Caſe being ſo adjudged proves that the Eſtate is divided as to the King, and that the Donee does not remain as to him Tenant in Fee-ſimple, and that the King ſhall be bound by the Act in this Point, as well as another Perſon. And ſo it is proved by the ſaid Caſe of Mortmain before alledged. [f] So in 22 *Ed.* 4. Tenant in Tail with Remainder over to another in Fee forfeited the Land for Treaſon, as it ſeems, and died without Iſſue, and he in Remainder was received to ſue to the King by Petition; but if the Tenant in Tail ſhould be adjudged, as to the King, Tenant in Fee-ſimple, then the Remainder ſhould have been void as to the King, and he in Remainder diſabled to ſue, but he was not, which proves that the Judges then took it that as to the King he was but Tenant in Tail, and ſo the King was bound by the Act. [g] Another like Caſe I know by Experience, which is, that Land which belonged to *William Brown* my Father was ſeized into the King's Hands in the Exchequer for the King's Debt, and it was adjudged that it ſhould be diſcharged, becauſe the Land was entailed, and my Father had it by Deſcent as Iſſue in Tail of him who was the King's Debtor; and afterwards the ſame Matter came again in Queſtion in the Court of Surveyors, and I ſuggeſted the ſame Matter in Diſcharge of the Land, and thereby the Land was there alſo diſcharged. Which proves that the King was bound by the Statute *de donis conditionalibus*, for if the King might have ſaid that the Land, as to him, was a Fee-ſimple conditional, then the Land ſhould not have been

[a] Dy. 4. pl. 10. Curſon 28. Ante 235 (i).

[b] See theſe Caſes ſo put by *Weſton* J. Ante 243 (g). and (h). *Note* with this Opinion of *A. Brown* agree Hob. 166. 1 Rol. R. 155. Dy. 35. pl. 29. in Margine. 7 Co. 28. a. *Baſkervil's* Caſe.

[c] See Ante 237 (c).

[d] See Ante 241 (e).

[e] F.N.B. 143. b. Bro. Eſtoppel 206. Prerogative 131. in fine. Crompt. J. C. 119. b. *dubitatur.*

[f] P. 22. Ed. 4. Fitz. Petition 9.

[g] 7 Co. 21. a. Crompt. J. C. 111. a. Kitch. 314. Contra Ante 240 (i). *per Putrel.*

been discharged. Wherefore for these Reasons it seems to me that the King shall be only Tenant in Tail, and so the Remainder is good, and the Plaintiff upon the Matter in Law shall be barred.

Dyer C. J. *Dyer* Chief Justice. As to the Matter in Law, I am of the same Opinion. And as to the Name of the King, by which he may purchase, Sir, if in the Purchase he be named only *King*, omitting his Christian Name, he may well enough take thereby, for *King* is the highest Name of Honour in this Realm, which for the Greatness of it drowns all other Names of Honour or Dignity which the Person that is King may have within this Realm, and because there is not, nor ought to be more than one that bears the Name of King in this Realm, the Name of King contains Certainty enough to signify who it is that has this Name, and therefore a Purchase by this Name only contains Certainty enough, and is good enough. But I have never seen this Name only used in Purchases, or Grants, or Letters-patent, but the Practice is to add the Name of Baptism also, as to say, *Henry King*, or *Edward King*, for else it would be doubtful what King was meant, for there have been many Kings that have had the same Name of Baptism; and therefore for the Sake of Distinction and Certainty the Christian Name of the King is used to be inserted. But if it be omitted it shall be good enough, and it may be tried what King it was.

Further, the King has two Bodies, viz. a Body natural and a Body politic, and he has Capacity both in the one and in the other. And the Name *(King)* contains them both, and *Heirs* implies both Heirs and Successors, [a] for it is but of late Time that *Successors* have been added in the King's Grants. And he that gives to the King may give to him in the one Body or in the other, as the Donor pleases to limit it; but here the Gift itself distinguishes in what Capacity the King shall take it, for the Remainder is to him and to his Heirs Males of his Body begotten, and such Heirs must come from the natural Body, for the Body politic cannot beget Issues. So that the Limitation of the Inheritance here to the Heirs Males of his Body distinguishes the Body in which the Donor had a Mind that the King should take it. [b] For if King *Henry* 7. after the Remainder limited to him, had been removed from the Royal Estate, and another had been made King, neither the succeeding King nor his Heirs should have had the Land, because the Donor limited it to *Henry* 7. and to the Heirs Males of his Body, and if the Heirs of the other Body should inherit it, it would be contrary to the Limitation and Will of the Donor, for there is not any such Inheritance limited by the Gift; wherefore the Gift here has Respect to the natural Body of King *Henry* 7. and to the Heirs Males which this natural Body shall beget, and so the Capacity and Body in which he should take it is distinguished and limited in the Gift. [c] As if a Man gives Land to a Bishop and to his Heirs, thereby he distinguishes in what Capacity he has a Mind to place the Inheritance, and in what Capacity the Bishop shall take it, and as the Donor pleases to limit it, so it shall enure; for if he had given the Land here to King *Henry* 7. and to the Heirs of his Body and of the Body of *Elizabeth* his Wife begotten, such Heirs and none other should take it. And Land may be entailed to the King as well as to another, for King *Henry* 4. entailed the Dutchy to him and to his Heirs of his Body begotten, and the Crown was entailed to King *Henry* 8. and to the Heirs of his Body, so that the King may take an Entail as well as another. And the Remainder here vested in the Body natural of King *Henry* 7. [d] So that if he had resigned the Crown to King *Henry* 8. yet he should have held the Land to him and to his Heirs of his Body, as Land distinct from, and no Part of the Crown.

Further, as to the Common Law before the Statute, if Land had been given to a Man and to his Heirs of his Body begotten, this was not taken to be a [e] full and perfect Inheritance, until the Donee had Issue of his Body. For *Britton* in his Book in the Title of *conditional Purchase cap.* 36. says, that before Issue he had but a Freehold, and the Inheritance accrued by the Issue, and if he had Issue, and the Issue died, the Land should descend to the [f] collateral Heir. And of this Opinion *Bracton* seems to be, for he says, if Land be given to a Man and to his Heirs *si hæredes de corpore suo habuerit*, and he has Issue, and dies, the Land shall descend *remotioribus hæredibus*; for, as it seems, they took it that by such Gift he had only the Inheritance upon Condition, and when he had Issue he had satisfied the Condition, and then he had Power to alien, and then it should descend to the collateral Heirs, as other Land. [g] But (as I take it) it was a Fee-simple presently before Issue, but the having of Issue made it more full and perfect than it was before; [h] For after Issue he had Power to alien, and thereby to bar the Issues and the Donor, [i] and it should escheat for Felony, as it is taken by 7 & 8. *Ed.* 3. and by other Means he might disinherit the Issue and the Donor, which was contrary to the Will of the Donor, and was a *hard* Case, as the Statute says, and very injurious and unreasonable. And thus the Makers of the Act looked upon this Permission of the Common Law, or this common Error, whereby they took it that the having Power to alien was a full Injury, and a Thing against Reason, and the Words after, viz. *that it is necessary and useful to provide a Remedy in the Cases aforesaid*, have in them a Kind of Vehemence purporting great Necessity of a Reformation. For that which is necessary and useful to be reformed requires to be reformed in all, and not in Part only, and the rest to be left unreformed, and therefore for the full and perfect Reformation of this Abuse, viz. as well in the King as in others, the Act has ordained, *that the Will of the Giver, according to the Form in the Deed of Gift manifestly expressed, shall from henceforth be observed.* So that the Observance of the Will of the Donor is become the Reformation of all that was amiss before, and the Will of the Donor is the Effect of the Statute. And from thence it follows, that the Alienation of the Donee shall not bind

[a] 4 Bac. Abr 193. Vin. Abr. tit. Prerogative Z. d. pl. 7.

[b] That the King shall retain the Land which he takes in his natural Capacity, notwithstanding he is removed from the Estate royal, 1 Finch 56. 2 Finch 87. 4 Bac. Abr. 191. Ante 234 (*). Infra (d).

[c] See Ante 234 (e). and the Books there cited.

[d] Supra (b).

[e] See Ante 245 (d). *per A. Brown* J.

[f] See the contrary M. 18. Ed. 3. 46. a. *per Hussey*. P. 12. Ed. 4. 3. b. *per Brian*. Co. Litt. 19. a. 7 Co. 35. a. 1 Rol. Abr. 841. D. pl. 1. Vin. Abr. tit. Estate Y. pl. 2. 3.

[g] Herewith agree 1 Finch 100. 2 Finch 121.

[h] Ante 235 (k).

[i] See Ante 246 (d).

bind the Iſſues nor the Donor; [a] nor ſhall the ſecond Huſband be Tenant by the Curteſy, nor ſhall the Iſſue of him and of the Wife inherit. [b] So that it was ſuperfluous to expreſs this in the Act, for theſe Clauſes are but conſequential to the firſt Purview, and are included in the firſt Purview, and only ſerve to explain the ſame, for the firſt Purview, viz. *the Will of the Donor*, includes theſe Clauſes and many others. [c] For the ſecond Wife ſhall not be endowed, [d] nor can the Donee charge the Land with a Rent-charge or other Incumbrance, [e] nor ſhall he forfeit the Land for Felony, nor can he do other Acts to the diſinheriting of the Iſſues; and all this is included in the firſt Purview, viz. *that the Will of the Donor ſhall be obſerved*, for theſe Acts are contrary to his Will, and every Thing that is contrary to his Will is reformed by this Act, as every Thing that is his Will is made a Law by this Act. [f] And therefore an Entail to the Heirs Males of the Body of the Donee is within the Purview of the Act, as it is taken in 18. *Ed.* 3. and in *Carbonnel*'s Caſe in 33. *Ed.* 3. [g] So an Entail to the Heirs Females of the Body of the Donee, and all other Entails, are within the Purview of the Statute, becauſe they are within the Will of the Donor; for as *Fleta* (who wrote a long Time ſince) ſays in his third Book, *modus legem dat donationi*; ſo that the Manner of the Gift which the Donor limits makes a Law to the Gift. [h] And the three Eſtates limited in the Preamble of the Act, that is to ſay, Eſpecial Tail, Frank marriage, and General Tail, are but put there for Examples, and not as containing all the Entails intended in the Statute, for the Donor might make other Entails by his Limitation, for his Will is a Law as to the Eſtates-tail. [i] And where an Eſtate to one and to the Heirs of his Body was a Fee ſimple before the Statute, now ſince the Statute it is taken in 12. *Ed.* 4. that he has but a Fee-tail, and this is included in the Statute, altho' it is not expreſſed, as the Book ſays. And herein the Book ſays true, [k] for when the Statute reſtrained the Donee from aliening the Fee-ſimple, or from doing other Acts which he that has a Fee-ſimple may do, it was preſently taken that the Fee was not in him, for it would be idle to adjudge it in him, when he could not do any Thing with it, and therefore it was taken, by Collection and Implication of the Act, that the Fee-ſimple continued in the Donor. So that he has one Inheritance, viz. a Fee-ſimple, and the Donee has another Inheritance of an inferior Degree, viz. a Fee-tail. And the Name of the Eſtate was taken from the Certainty of the Limitation of the Inheritance, as *Littleton* ſays, [l] for he ſays, *Taliare idem eſt quod in certitudinem ponere*, and becauſe in the Gift it is expreſſed of what Body the Heirs which ſhall inherit ſhall iſſue, for this Reaſon he took it that it was called a *Tail*, or rather it might have the Name of the *French* Word (*tailer*) which is *to cut*, for to dock Wood is to cut Wood, and becauſe the Eſtate is docked, or cut off, (for before it was a Fee-ſimple, and now the Fee is cut off from it, and the Eſtate thereby is docked, cut off, or made leſs) it may well be called an Eſtate-tail, viz. an Eſtate docked, cut off, or abridged; and immediately upon the making of the Act it had this Name given it. And it was alſo taken that the Reverſion in Fee was left in the Donor, for in the ſame Seſſion of Parliament, and in the Act which is the *fourth* Chapter after, viz. in the Chapter which gives the *quod ei deforceat*, it is recited, that if one had loſt his Land by Default, he had no other Writ to recover the Land again but a Writ of Right, which did not ſerve for them who had not a Fee-ſimple, *as Tenants for Term of Life, in Free-marriage, or in Fee-tail, in which Caſes a Reverſion is reſerved*, there it is provided that ſuch ſhall have a *quod ei deforceat*. So that it is there called a *Fee-tail*, and that in ſuch Caſe a *Reverſion is reſerved*. Wherefore they of the ſame Parliament immediately took it that the Eſtate was divided, and that the Donor had the Fee-ſimple, and the Donee a Fee-tail, and this Conſtruction was gathered from the Will of the Donor. For it is to be preſumed that he who would not have the Donee to do any Act that Tenant in Fee-ſimple might do, did not chuſe that he ſhould have a Fee-ſimple Eſtate. So that by the Implication of the Act, the Eſtate which was a Fee-ſimple conditional is divided, and the Fee continues always in the Donor, and the Donee has an Eſtate-tail. And therefore the Eſtate of the Donee is altered, [m] for before the Statute the Iſſue ſhould have had an Aſſize of *Mortdanceſtor*, but now he ſhall not; [n] and before it ſhould have eſcheated for Felony after Iſſue had, [o] but now it ſhall not; [p] and before the Donee ſhould forfeit it for Treaſon, [q] and now as appears in 7. *H.* 4. he ſhall not; [r] and before the Donee might charge the Land, and the Iſſue ſhould have held it charged, [s] but now he cannot, for it is not the ſame Eſtate that it was before, nor in the ſame Degree. Then ſeeing the Eſtate of the Donee is changed, and is ſuch as is ſhewn before, and no other, the King ought to take it ſo, and in ſuch Manner as it is, and not otherwiſe, for the King cannot have any other Eſtate than that which the Donor has given him, and the Donor has given him ſuch an Eſtate as does not contain the Fee, and therefore the King cannot have the Fee, for if the Donor had given him an Eſtate upon Condition, he ſhould not have had it without Condition. And ſo if the Donor gives it to the King and to his Heirs of his Body, he ſhall not have it to his Heirs generally, for that is contrary to the Eſtate, for the Donor has a Right to the Fee. And this is proved by the Words of the *Formedon* in Reverter, which are, *which to the Donor ought to revert by the Form of the Gift aforeſaid*, which Word *ought* implies the Right of the Fee. And as to what is ſaid, that the King ſhall not be bound by the Act, and that there ſhall not be any Reſtraint in the Eſtate which he takes, unleſs the ſame be preciſely expreſſed in the Act, Sir, in ſome Caſes I admit that the King ſhall not be reſtrained by general Words, without expreſs Reſtraint in the Act, and that is according to the Matter of the Act; but in this Act he ſhall be bound, [t] for it is made for the Furtherance of Reſtitution, that is to ſay, where it was a great Abuſe that the Donee had the Power of aliening after Iſſue had, (which being a common Error was

[a] H. 46. Ed. 3. 5. a. Bro. Ejectione Cuſtodiæ 12. Tenant per le Curteſy 1. 1 Finch 103, 104. 2 Finch 125.

[b] 2 Inſt. 336. Ante 247 (l). *per Brown.* J.

[c] M. 46. Ed. 3. 24. b. Bro. Dower 18. 1 Finch 103. 2 Finch 125.

[d] 3 Ed. 3. Fitz. Formedon 46. H. 5. H. 7. 14. b. Fitz. Tail 10. M. 14. H. 8. 6. a. *per Rowe.* Infra (s).

[e] Litt. § 747. Old N. B. 100. Infra (o).

[f] M. 18. Ed. 3. 45. b. Fitz. Tail 16. 18. Aſs. pl. 5. Bro. Eſtates 33. Tail 19. M. 38. Ed. 3. Fitz. Tail 5. Dy. 96. pl. 42. Litt. § 21. Curſon 8. Ante 244 (*). 248 (i).

[g] Litt. § 22. Curſon 8.

[h] Co. Litt. 24. a. Ante 53.

[i] P. 12. Ed. 4. 3. b. Fitz. Tail 9. Bro. 28. H. 5. H. 7. 14. b. Fitz. Tail 10. Bro. 27. Eſtates 40. Ante 248 (a).

[k] Ante 248 (a).

[l] Litt. § 18. Curſon 5.

[m] See Ante 239 (h). and the Books there cited.

[n] M. 7. Ed. 3. 70. pl. 80. 2 Inſt. 334. 1 Finch 101. 2 Finch 122. Ante 246 (d). 250 (i).

[o] Supra (e).

[p] 2 Inſt. 334. 1 Finch 101.

[q] M. 7. H. 4. 32. a. Fitz. Livery 21. Bro. 15. Treaſon 4. But this is to be underſtood according as the Law was immediately after the making of this Statute of *Weſtm.* 2. and before the Statute of 26. *H.* 8. *cap.* 13. which has altered the Common Law in this Point,

[r] Co. Litt. 19. a. 2 Inſt. 334.

[s] Supra (d).

[t] Vin. Abr. tit. Taile C. fo. 164.

was taken for the Common Law) this Statute was made to reform the Abuſe, and to reſtore the Common Law in this Point to its right and juſt Courſe, which it did by reſtoring to the Donor the Obſervance of his Intent. So that the Deſign of the Act is to give Reſtitution, [a] and in Reſtitutions the King has no Favour, nor has his Prerogative any Exemption, but the Party reſtored is favoured. [b] And therefore if the King reſtores the Heir by Livery to his Manors, the Advowſons ſhall paſs to him without any Mention of them. [c] So if he makes Reſtitution of the Temporalties to a Biſhop, Knight's Fees and Advowſons ſhall paſs without being mentioned. So alſo ſhall it be in caſe of a Reſtitution upon Petition of another to have that to which the King has no Right; for where a Thing which the King ought not to hold is reſtored to the right Owner who ought to have it, the Words ſhall be taken moſt ſtrongly againſt the King, and his Prerogative ſhall not hold Place, nor ſhall he be favoured more than another Perſon. So here the Act was made to reſtore the Common Law in this Point, wherein it was miſuſed, and to reſtore to the Donor that which was due to him, viz. to have his Will obſerved, where it had been violated by the Donees. So that there is a Reſtitution here made to the Donor, viz. of the Obſervance of his Will, which before was broken, in which Caſe, by the Reaſon of the Common Law in like Caſes that happen at the Common Law, the King is not exempted. For he who will maintain it to be reaſonable that the King being Donee ſhall be exempted, and that the Makers of the Act did not intend to bind him, undertakes to prove that the Makers of the Act thought it reaſonable to ſuffer the King to violate the good Intent of him that gave him the Land, and to break his Will, and to exceed the Meaſure limited to him, and ſo to do an Injury. And this cannot be taken to be the Intent of the Makers of the Act, but they meant to reform the Abuſe in all, viz. as well in the King as in others. Wherefore, as it ſeems to me, the King ſhall be included in the Act, and his Eſtate ſhall not be a Fee-ſimple conditional, but a Fee-tail, upon which the Remainder here may well depend. And ſo it muſt have ſeemed to the Juſtices before recited in the Record who took the Fine, viz. *Brian*, *Townſend*, *Davers*, and *Vaviſor*, who were Men of great Learning; and ſo alſo the Counſellors of the King and of the Marqueſs muſt have been of Opinion. For if the Eſtate of the King ſhould be a Fee-ſimple conditional, it was idle and in vain to limit the Remainder over in Fee, and the ſaid Juſtices would not have taken ſuch a Fine containing Eſtates which could not ſtand together, but they took it that the Eſtate of the King was but an Eſtate-tail, and that the Remainder might depend upon it well enough, and in this Light alſo it appears to me. Wherefore the Lord *Berkley* now Defendant may enter and avoid the Leaſe, and ſo the Plaintiff ſhall be barred. And afterwards on the *Quinzime* of *St. Martin* in the *fifth* Year of the Reign of Queen *Elizabeth*, the Juſtices, at the Prayer of the Lord *Berkley*, who had often prayed his Judgment after their Arguments, gave Judgment for him againſt the Plaintiff. For the Lord *Dyer* and *Anthony Brown* ſaid, that with Regard to the Matter of Law they continued of the ſame Opinion that they were of at the Time when they argued; and therefore they commanded the Judgment to be entered, which was entered as follows.

[a] Dy. 360. pl. 5. 1 Rol. R. 151. Latch 255. 3 Inſt. 241. 2 Sid. 26, 138. Vin. Abr. tit. Blood corrupted C. pl. 26. tit. Stricti juris A. pl. 8.

[b] M. 5. Ed. 2. 66, 67. Fitz. Livery 7. H. 4[1]. Ed. 3. 5. b. *per Thorp*. Bro. Livery 45. Fundamenta legum 79. Dy. 360. pl. 5. Co. Litt. 77. a. 10 Co. 64. b. O. Bendl. 182. Latch. 255. 3 Mod. Entr. 61. Wing. Max. reg. 80. pl. 28.

[c] H. 41. Ed. 3. 5. b. *per Thorp*. Bro. Livery 45. 10 Co. 64. b.

The reſt of the Record.

And now here at this Day came as well the aforeſaid *Henry Willion*, as the aforeſaid *Henry Berkley* and *Richard Knight* by their Attornies aforeſaid, whereupon the Premiſſes being ſeen and by the Court here more fully underſtood, it ſeems to the Juſtices here that the Replication of the aforeſaid *Henry Willion* above pleaded is inſufficient in Law to maintain the aforeſaid *Henry Willion* to have his Action aforeſaid againſt the aforeſaid *Henry Berkley* and *Richard Knight*. Therefore it

Judgment.

is conſidered that the aforeſaid *Henry Willion* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim thereof: And the aforeſaid *Henry Berkley* and *Richard Knight* may go thereof without Day, &c.

Nota Bene by the Reporter.

Note, in M. 21. Ed. 3. 45. *a* Formedon *was brought of Lands given to the Father and Mother of the Demandant, and to the Heirs of their two Bodies, which were alien'd before the Statute* de donis conditionalibus. *And* Thorp *ſaid that the Demandant could not have a* Cui in vita, *but where he can make Title in his Writ* quæ clamat eſſe jus et hæreditatem ſuam, *which he cannot do unleſs he claims a Fee-ſimple. And it ſeems by him that the Heir cannot have a Writ* quæ clamat tenere ſibi et hæredibus de corpore ſuo exeuntibus, *which agrees with the Opinion of* A. Brown Ante fo. 246. *and with the ſaid Book in* 4. Ed. 2. *And Note, that* Fitzherbert *tit.* Formedon *has abridged a Caſe out of* * M. 12. H. 4. *as follows, viz. A Man gave Land in Frank-Marriage with his Daughter, the Donees had Iſſue before the Statute, the Huſband gave the Land to his Daughter in Frank-Marriage, and died, and his Wife ſurvived until after the Statute, and died, and the Heir brought a* Formedon, *and this Matter was pleaded, and the Opinion of the Court was with the Plaintiff, wherefore it was awarded that the Demandant ſhould recover Seizin of the Land. Which Caſe alſo agrees with the Opinion of* A. Brown.

* M. 12. H. 4. 9. pl. 15. Eitz. Formedon 15.

A Report of a Caſe argued and adjudged in the Common Bench *in* Michaelmas *Term in the* fourth *and* fifth *Years of the Reign of Queen* Elizabeth *upon Demurrer in Law in an Action of* Treſpaſs *brought by Lady* Margaret Hales, *late Wife of Sir* James Hales *late one of the Juſtices of the* Common Bench, *Plaintiff, againſt* Cyriack Petit *Defendant. And the Record appears amongſt the Records of* Trinity *Term* 3 Elizabeth, *Rot.* 921. *and was as follows.*

Cyriack Petit late of *Boughton under Blane* in the County aforeſaid Gentleman was attached to anſwer *Margaret Hales* Widow of a Plea, wherefore with Force and Arms the Cloſe of the ſaid *Margaret* at *Graveney* he broke, and her Graſs to the Value of 40 *l.* there lately growing with certain Cattle, eat up, trod down, and conſumed, and other Wrongs to her did, to the great Damage of the ſaid *Margaret*, and againſt the Peace of the Lady the Queen now, *&c.* And whereupon the ſame *Margaret* by *John Goldwell* her Attorney complains, that the aforeſaid *Cyriack* the *twentieth* Day of *November* in the *ſecond* Year of the Reign of the Lady the Queen now, with Force and Arms, *&c.* the Cloſe of the ſaid *Margaret* at *Graveney* broke, and her Graſs to the Value, *&c.* there lately growing, with certain Cattle, *viz.* Horſes, Oxen, Cows, Hogs, and Sheep, eat up, trod down, and conſumed: And other Wrongs, *&c.* to the great Damage, *&c.* and againſt the Peace, *&c.* Wherefore ſhe ſays that ſhe is damnified, and has Damage to the Value of 100 Marks, and therefore ſhe produces the Suit, *&c.*

Trin. Term 3 *Eliz. Rot.* 921. *Kent.* Declaration. Same Precedent Raſt. Entr. 608, a.

And the aforeſaid *Cyriack* by *Hugh Charnock* his Attorney comes and defends the Force and Injury when, *&c.* And as to the coming with Force and Arms, he ſays that he is not guilty thereof, and of this he puts himſelf upon the Country, and the aforeſaid *Margaret* likewiſe. And as to the reſt of the Treſpaſs aforeſaid above ſuppoſed to be done, the ſame *Cyriack* ſays that the aforeſaid *Margaret* her Action aforeſaid againſt him ought not to have, becauſe he ſays that the Cloſe aforeſaid, and alſo the Places in which the Treſpaſs aforeſaid is ſuppoſed to be done, are, and at the aforeſaid Time of the Treſpaſs aforeſaid above ſuppoſed to be done were, ſixteen Acres of Land with the Appurtenances called *Bentcloſe* in *Graveney* aforeſaid. Which ſaid ſixteen Acres of Land with the Appurtenances are, and at the aforeſaid Time of the Treſpaſs were, the Soil and Freehold of him the ſaid *Cyriack*, whereby the ſame *Cyriack*, the ſame Time when, *&c.* the Cloſe aforeſaid, as the proper Cloſe and Soil and Freehold of him the ſaid *Cyriack*, in the ſame ſixteen Acres of Land, as in the proper Soil and Freehold of him the ſaid *Cyriack*, broke, and the Graſs aforeſaid, as the proper Graſs of him the ſaid *Cyriack* there then growing, with the Cattle aforeſaid eat up, trod down, and conſumed, as it was lawful for him to do; and this he is ready to verify, Wherefore he prays Judgment if the aforeſaid *Margaret* her Action aforeſaid againſt him ought to have, *&c.*

Bar, Juſtifies as his Freehold.

And the aforeſaid *Margaret* ſays, that by any thing before alledged ſhe ought not to be precluded from having her Action aforeſaid, becauſe ſhe ſays that the Cloſe aforeſaid, and alſo the Place in which the Treſpaſs aforeſaid, whereof ſhe above complains, was done, is, and at the aforeſaid Time of the ſaid Treſpaſs above ſuppoſed to be done, was, 200 Acres of Marſh with the Appurtenances lying in *Graveney* aforeſaid called *Graveney* Marſh, otherwiſe *Cliff* Marſh, that is to ſay, to the Lands of the late *James Hales* Knight deceaſed, and to the Lands of the College of *St. John* in *Oxford* towards the Eaſt, and to the Lands of the Lady the Queen towards the North, and to the Lands of the Manor of *Graveney* towards the Weſt, and to the Lands of one *Robert Colwell* towards the South and Eaſt, other than the aforeſaid ſixteen Acres of Land with the Appurtenances in *Graveney* aforeſaid called *Bentcloſe* in the Bar of the aforeſaid *Cyriack* ſpecified. And this ſhe is ready to verify, wherefore for that the aforeſaid *Cyriack* to the Treſpaſs aforeſaid in the aforeſaid 200 Acres of Marſh called *Graveney* Marſh, otherwiſe *Cliff* Marſh, of new Aſſignment done, does not anſwer, the ſame *Margaret* prays Judgment, and her Damages by Occaſion of that Treſpaſs to be adjudged to her, *&c.*

Replication by new Aſſignment. See P. 27, H. 8. 7. a. 1 Finch 319. Heath's Max. 11, 12.

And the aforeſaid *Cyriack*, as to the aforeſaid Treſpaſs in the aforeſaid 200 Acres of Marſh of new Aſſignment above ſuppoſed to be done, ſays that the aforeſaid *Margaret* her Action aforeſaid thereof againſt him ought not to have, becauſe he ſays that long before the aforeſaid Time when the Treſpaſs aforeſaid is ſuppoſed to be done, one *Thomas* then Archbiſhop of *Canterbury* was ſeized of the ſame 200 Acres of Marſh of new Aſſignment with the Appurtenances in his Demeſn as of Fee, in Right of his then Archbiſhopric aforeſaid. And the ſame Archbiſhop being ſo ſeized thereof, before the aforeſaid Time when, *&c. viz.* the *eighth* Day of *March* in the *twenty ſixth* Year of the Reign of Lord *Henry* late King of *England* the *Eighth* from the Conqueſt, at *Thanington* in the County aforeſaid, by a certain Indenture made between the aforeſaid then Archbiſhop on the one Part, and one *John Hales*, and *James Hales* Knight, by the Names of *John Hales* one of the Barons of the Exchequer of the Lord the King, and *James Hales* Son and Heir apparent of the ſame *John* on the other Part, (one Part whereof, ſealed with the Seal of the aforeſaid then Archbiſhop, the ſame *Cyriack* produces here in Court, the Date whereof is the ſame Day and Year) granted, delivered, and demiſed to the ſame *John Hales* and *James* the Site of the Manor of *Boughton* in the County of *Kent*, with all Houſes, Edifices, Lands, Meadows, Leaſows, Paſtures, and Demeſns to the ſame Manor belonging, together with the Paſture of *Middlewood*, and the Paſture called *Bentley*; and alſo the Marſh called *Graveney* Marſh, with all and ſingular the Appurtenances of the ſame Marſh, whereof the aforeſaid 200 Acres of Marſh of new Aſſignment with the Appurtenances are, and at the aforeſaid Time when, *&c.* were Parcel, (all Rents, Cuſtoms, Works, Services of Tenants, and Perquiſites, View of Frankpledge, the Court there, and alſo Wards, Marriages, Reliefs, Eſcheats, Waifs, Eſtrays, and other Liberties and Franchiſes, and alſo the Advowſon of the Church, and ſixty Acres of arable Land there next adjoin-

Bar to the new Aſſignment, by Aſſignment of a Term forfeited.

ing to the Rectory of *Boughton* in the County aforeſaid on the ſouth Side, there lately demiſed to the Abbot and Convent of *Feverſham*, yearly to the aforeſaid then Archbiſhop and his Succeſſors excepted and reſerved) to have and to hold the aforeſaid Site and other the Premiſſes aforeſaid with the Appurtenances whereof, *&c.* (except as before excepted) to the aforeſaid *John Hales* and *James Hales*, and to their Aſſigns, from the Feaſt of *St. Michael* the Archangel which ſhould be in the Year 1540, unto the End of the Term of 20 Years from thence next following, and fully to be compleat, as by the ſame Indenture amongſt other Things more fully appears. Which ſaid Demiſe to the aforeſaid *John Hales* and *James Hales* by the aforeſaid then Archbiſhop in Form aforeſaid made, and all and ſingular the Things therein contained, one *Thomas* then Prior of the late Priory of *Chriſt's-Church* in *Canterbury*, and the then Chapter of the ſame Church, before the aforeſaid Time when, *&c. viz.* the *third* Day of *April* in the aboveſaid *twenty-ſixth* Year of the Reign of the aforeſaid late King *Henry* the *Eighth* by their certain Writing (which the ſame *Cyriack* likewiſe produces here in Court, ſealed with the common Seal of the ſame then Prior and Chapter, the Date whereof is in the Chapter-houſe the ſame Day and Year) ratified, approved, and confirmed, as by the ſaid Writing more fully appears. By virtue of which ſaid Grant, Demiſe, Ratification, and Confirmation, the aforeſaid *John* and *James* on the Morrow of the aforeſaid Feaſt of *St. Michael* the Archangel in the aboveſaid Year of our Lord 1540. into the aforeſaid Site and other the Premiſſes with the Appurtenances whereof, *&c.* entered, and were thereof poſſeſſed. And the ſaid *John* and *James* being ſo thereof poſſeſſed, the ſame *John Hales* afterwards died, and the aforeſaid *James* ſurvived, and held himſelf in the aforeſaid Site and other the Premiſſes with the Appurtenances whereof, *&c.* and was thereof ſole poſſeſſed by Right of Survivorſhip, *&c.* And the ſaid *James* being ſo thereof ſole poſſeſſed, the aforeſaid then Archbiſhop being ſeized of the Reverſion thereof in Form aforeſaid, before the aforeſaid Time when, *&c. viz.* the *twenty ſecond* Day of *April*, in the *fifth* Year of the Reign of Lord *Edward* late King of *England* the *ſixth* from the Conqueſt, at *Thanington* aforeſaid, by a certain other Indenture made between the aforeſaid then Archbiſhop of the one Part, and the aforeſaid *James Hales* Knight, and the aforeſaid *Margaret* then his Wife of the other Part, (one Part whereof ſealed with the Seal of the aforeſaid then Archbiſhop, the ſame *Cyriack* here likewiſe produces in Court, the Date whereof is the ſame Day and Year) reciting in the ſame Indenture, that whereas the ſame then Archbiſhop by a certain Indenture bearing Date the *eighth* Day of *March* in the *twenty-ſixth* Year of the Reign of Lord *Henry* late King of *England* the *eighth* from the Conqueſt, had granted and demiſed to *John Hales* then one of the Barons of the Exchequer of the Lord the King, deceaſed, and to the aforeſaid *James Hales*, the Site of the Manor of *Boughton* in the County of *Kent*, with all Houſes, Edifices, Lands, Meadows, Leaſows, Paſtures, and Demeſnes to the ſame Manor belonging, together with the Paſture of *Middlewood*, and the Paſture called *Bentley*; and alſo the Marſh called *Graveney* Marſh, with all and ſingular the Appurtenances of the ſame Marſh, (all Rents, Cuſtoms, Works, Services of Tenants, and Perquiſites, View of Frankpledge, the Court there, and alſo Wards, Marriages, Reliefs, Eſcheats, Waifs, Eſtrays, and other Liberties and Franchiſes, and alſo the Advowſon of the Church, and ſixty Acres of arable Land there next adjoining to the Rectory of *Boughton* in the County aforeſaid on the ſouth Part, there lately demiſed to the Abbot and Convent of *Feverſham*, yearly to the aforeſaid late Archbiſhop and his Succeſſors excepted and reverſed) to have and to hold the aforeſaid Site of the Manor aforeſaid, and all and ſingular the Lands and Tenements aforeſaid with their Appurtenances whereof, *&c.* (except as before excepted) to the aforeſaid *John Hales* and *James Hales* and to their Aſſigns, from the Feaſt of *St. Michael* the Archangel, which ſhould be in the Year of our Lord 1540. unto the End and Term of 20 Years from thence next following, and fully to be compleat, as by the ſame Indenture amongſt other Things more fully appears, for certain Conſiderations him the ſaid Archbiſhop moving, ratified, approved, and confirmed to the aforeſaid *James Hales* his Title, Term, and Intereſt of and in the Premiſſes; and alſo the aforeſaid then Archbiſhop, by his Indenture aforeſaid to the aforeſaid *James* and *Margaret* made, granted, delivered, and to Farm-let to the aforeſaid *James Hales* and the aforeſaid *Margaret* then his Wife the aforeſaid Site of the Manor aforeſaid, and all and ſingular the Lands and Tenements aforeſaid with the Appurtenances whereof, *&c.* to the aforeſaid *John Hales* and *James Hales* by the aforeſaid former Indenture demiſed (except and to the aforeſaid then Archbiſhop and his Succeſſors wholly reſerved all and ſingular Things by the ſaid former Indenture excepted and reſerved) to have and to hold the aforeſaid Site of the Manor aforeſaid and other the Premiſſes aforeſaid with the Appurtenances whereof, *&c.* (except as before excepted) to the aforeſaid *James Hales* and the aforeſaid *Margaret* then his Wife, and to their Aſſigns, from the Feaſt of *St. Michael* the Archangel which ſhould be in the Year of our Lord 1560. unto the End and Term of 12 Years from thence next following, and fully to be compleat, as in the ſame Indenture to the aforeſaid *James* and *Margaret* (as it is ſaid) made amongſt other Things is more fully contained. By reaſon of which ſaid Indenture the ſame *James* and *Margaret* were of the ſaid Indenture, and of the Intereſt therein contained poſſeſſed. And they being ſo thereof poſſeſſed, and the aforeſaid *James* of the aforeſaid Site and other the Premiſſes aforeſaid with the Appurtenances whereof, *&c.* (except as before excepted) being likewiſe poſſeſſed by virtue of the former Indenture to the aforeſaid *John Hales* and *James Hales*, as is aforeſaid, made, the ſame *James* before the aforeſaid Time when, *&c. viz.* the *fourth* Day of *Auguſt* in the *firſt* and *ſecond* Years of the Reign of Lord *Philip* and Lady *Mary* late King and Queen of *England*, in a certain common River or common Water-courſe of the ſame late King and Queen, in the Pariſh of *St. Mildred* the Virgin in the County of the City of *Canterbury*, feloniouſly and voluntarily drowned himſelf. And afterwards by a certain Inquiſition taken at the aforeſaid City of *Canterbury*, in the aforeſaid County of the City of *Canterbury*, the aforeſaid *fourth* Day of *Auguſt* in the aboveſaid *firſt* and *ſecond* Years, before *George Toſtes* then Coroner of the ſaid late King and

Queen

Queen in the aforeſaid County of the City aforeſaid, upon the View of the Body of the aforeſaid *James Hales* there lying dead upon the Ground, by the Oath of twelve, *&c.* it was preſented that the aforeſaid *James*, not having God before his Eyes, but ſeduced by the Art of the Devil, the ſame *fourth* Day of *Auguſt* in the aboveſaid *firſt* and *ſecond* Years, at the aforeſaid City of *Canterbury* in the Pariſh of the bleſſed *Mary* of *Bradne*, and in the Ward of *Redingate* in the ſame City, and in the County of the ſaid City, went out of the Manſion-houſe of him the ſaid *James Hales*, ſituate and being in the Pariſh and Ward aforeſaid, and in the aforeſaid County of the City aforeſaid, and paſſing through Ways and Streets in the ſame City unto the aforeſaid River or common Water-courſe in the aforeſaid Pariſh of *St. Mildred* the Virgin, and in the Ward of *Worgate* in the ſame City, and in the County of the City aforeſaid, voluntarily entered into the ſaid River, and himſelf therein then felonioufly and voluntarily drowned, againſt the Peace of the ſaid late King and Queen, as by the ſame Inquiſition before the aforeſaid Coroner remaining of Record more fully appears. By reaſon of which ſaid Felony of himſelf, and by Force of the aforeſaid Inquiſition before the aforeſaid Coroner taken, the aforeſaid *James Hales* forfeited to the aforeſaid late King and Queen as well the aforeſaid former Indenture to the aforeſaid *John* and *James*, as is aforeſaid, made, and all the Intereſt and Term therein contained, as the aforeſaid Indenture to the aforeſaid *James* and *Margaret*, as is aboveſaid, made, and all the Intereſt and Term of Years therein contained. And afterwards the aforeſaid late King and Queen, by their certain Commiſſion ſealed with their Seal of their Exchequer, and iſſuing out of their Court of Exchequer aforeſaid, bearing Date at *Weſtminſter* the *twenty-ſixth* Day of *October* in the aboveſaid *firſt* and *ſecond* Years, aſſigned *Martin Bowes* Knight, *William Roper*, *Chriſtopher Roper*, *Roger Appleton*, Eſquires, and *John Bear* Gentleman, four, three, or two of them, to enquire by the Oath of good and lawful Men of the aforeſaid County of *Kent*, as well within Liberties as without, by whom the Truth of the Matter might be better known, amongſt other Things, what and what Kind of Goods, Chattles, as well real as perſonal, or Demiſes whatever, of what Nature, Sort, or Kind ſoever they be, the aforeſaid *James* ſolely or jointly with any other Perſon or Perſons had in the aforeſaid County of *Kent*, as well within Liberties as without, at the Time when the ſame *James* killed and murdered himſelf, and alſo to whoſe Hands and Poſſeſſion the ſame Goods and Chattles and Demiſes aforeſaid after the Death of the ſame *James* came, or in whoſe Hands they then remained, and of what Value they were. And further the aforeſaid late King and Queen *Philip* and *Mary* by the ſame Commiſſion commanded the aforeſaid *Martin Bowes*, *William Roper*, *Chriſtopher Roper*, *Roger Appleton*, and *John Bear*, four, three, or two of them, that they ſhould not omit by reaſon of any Liberty of the aforeſaid County of *Kent*, but into the ſame ſhould enter, and at a certain Day or Days, and Place or Places which they ſhould appoint for that Purpoſe, they or four, three, or two of them ſhould perſonally go and enquire diligently, touching all and ſingular the Premiſſes, and Circumſtances thereof: So that the Inquiſition thereupon before them, four, three, or two of them taken they might have before the Barons of the Exchequer aforeſaid at *Weſtminſter* on the Morrow of *All Souls* then next coming, under the Seals of them five, four, three, or two of them, and under the Seals of thoſe by whom it was made, and the Commiſſion aforeſaid. Alſo the aforeſaid late King and Queen *Philip* and *Mary* commanded the aforeſaid *Martin*, *William*, *Chriſtopher*, *Roger*, and *John Bear*, four, three, or two of them, by the aforeſaid Commiſſion, that all and ſingular the ſame Goods and Chattles and Demiſes, in whoſeſoever Hands or Poſſeſſion they ſhould then be, they ſhould take into the Hands of the ſaid late King and Queen *Philip* and *Mary*, and them ſafely keep, ſo that they might anſwer to the ſame late King and Queen for the Goods, Chattles, and Demiſes aforeſaid, and that they five, or four, three, or two of them ſhould make appear to the Barons of the Exchequer aforeſaid, at the Day and Place aforeſaid, what and what Kind of Goods, Chattles and Demiſes they had taken into the Hands of the ſaid late King and Queen *Philip* and *Mary*, by reaſon of the Premiſſes, and where, together with the Day of taking the ſame into the Hands of the aforeſaid late King and Queen *Philip* and *Mary*. Alſo the aforeſaid late King and Queen *Philip* and *Mary* by the aforeſaid Commiſſion commanded the then Sheriff of the aforeſaid County of *Kent*, that at the Day or Days, and Place or Places, which the aforeſaid *Martin*, *William*, *Chriſtopher*, *Roger*, and *John*, or four, three, or two of them, on behalf of the ſame late King and Queen ſhould make known to him, he ſhould cauſe to come before them five, or four, three, or two of them, ſuch and ſo many good and lawful Men of his Bailiwick by whom the Truth of the Matter, touching the Premiſſes, might be better known and enquired, as by the ſame Commiſſion amongſt other Things more fully appears. By virtue of which ſaid Commiſſion the aforeſaid *Martin Bowes*, *William Roper*, *Chriſtopher Roper*, *Roger Appleton*, and *John Bear* afterwards, *viz.* the *twenty-ſeventh* Day of *October* in the *firſt* and *ſecond* Years aboveſaid, made their Precept in Writing ſealed with their Seals to one *Robert Southwel* Knight then Sheriff of the aforeſaid County of *Kent*, commanding the ſame then Sheriff on behalf of the aforeſaid late King and Queen, that he ſhould cauſe to come before them five, or four, three, or two of them, at *Deptford* in the aforeſaid County of *Kent*, the *thirtieth* Day of *October* then next following, twelve good and lawful Men of the aforeſaid County of *Kent*, to enquire of and upon all and ſingular the Premiſſes and Circumſtances thereof. At which ſaid *thirtieth* Day of *October*, before the aforeſaid *William Roper*, *Chriſtopher Roper*, and *Roger Appleton* at *Deptford* aforeſaid the aforeſaid Sheriff returned the Precept aforeſaid to him in Form and aforeſaid directed, together with a Panel of all the Jurors to the ſame Precept annexed, in all Things ſerved and executed, whereof certain of them ſo empannelled, and by the aforeſaid Sheriff returned, *viz.* *Thomas Hunt* Gentleman, *Thomas Hinde*, *Richard Clerk*, *Thomas Ward*, *William Clerk*, *John Batt*, *William Audley*, *John Brodhouſe*, *Alexander Patenſon*, *John Simonds*, *Thomas Ward*, and *Henry Buckley*, twelve, *&c.* then and there came, and were ſworn before the ſame Commiſſioners, to enquire of and upon the Premiſſes. Which ſaid Jurors being

ing ſo charged, then and there ſaid upon their Oath, that the aforeſaid *Thomas* Archbiſhop of *Canterbury* aforeſaid, the *eighth* Day of *March* in the aboveſaid *twenty-ſixth* Year of the Reign of the aforeſaid late King *Henry* the *Eighth*, by the aforeſaid former Indenture above alledged, and then and there ſhewn to them in Evidence, granted, delivered, and to Farm-let to the aforeſaid *John Hales* and *James Hales* the aforeſaid Site and other the Premiſſes aforeſaid with the Appurtenances whereof, *&c.* (except before excepted, as is aforeſaid), and that the aforeſaid *Thomas* then Prior of the late Priory of *Chriſt's-Church* in *Canterbury*, and the then Chapter of the ſame Church, by their Writing ſealed with their common Seal, bearing Date in their Chapter-houſe the aforeſaid *third* Day of *April* in the aboveſaid *twenty-ſixth* Year of the Reign of the aforeſaid late King *Henry* the *Eighth*, and to the Jurors aforeſaid then and there likewiſe ſhewn in Evidence, the aforeſaid Demiſe to the aforeſaid *John* and *James Hales* (as is aforeſaid) made, ratified, approved, and confirmed. By virtue of which ſaid Grant, Demiſe, Ratification, and Confirmation, the aforeſaid *John Hales* and *James Hales* were of the aforeſaid Site and other the Premiſſes with the Appurtenances whereof, *&c.* (except as before excepted) poſſeſſed. And the ſaid *John Hales* and *James Hales* being ſo thereof poſſeſſed, the ſame *John Hales* afterwards died, and the aforeſaid *James Hales* ſurvived him, and held himſelf in the aforeſaid Site and other the Premiſſes with the Appurtences whereof, *&c.* and was thereof ſole poſſeſſed by Right of Survivorſhip, *&c.* And the ſaid *James Hales* being ſo thereof ſole poſſeſſed, the aforeſaid *Thomas* then Archbiſhop of *Canterbury*, by the aforeſaid other Indenture ſealed with his Seal, bearing Date the aforeſaid *twenty-ſecond* Day of *April* in the aboveſaid *fifth* Year of the Reign of the aforeſaid late King *Edward* the *Sixth*, and to the ſame Jurors then and there likewiſe ſhewn in Evidence, ratified and confirmed to the aforeſaid *James Hales* the aforeſaid Demiſe to the aforeſaid *John Hales* and *James Hales*, as is aforeſaid, made; and by the ſame other Indenture demiſed, granted, and to Farm-let to the aforeſaid *James Hales* and the aforeſaid *Margaret* then his Wife, the aforeſaid Site and other the Premiſſes aforeſaid with the Appurtenances whereof, *&c.* by the aforeſaid former Indenture demiſed (except as before excepted) in Manner and Form as is above alledged. And further the Jurors aforeſaid ſaid upon their Oath, that the whole Right, Title, Intereſt, and Term of Years which the ſame *James Hales* then had ſolely, by reaſon of the aforeſaid former Indenture, of and in the Premiſſes with the Appurtenances, as is aforeſaid, demiſed, as alſo the aforeſaid other Indenture to the aforeſaid *James* and *Margaret* made, and the Demiſe and Intereſt aforeſaid which the ſame *James* and the aforeſaid *Margaret* together or jointly had in the aforeſaid Site and other the Premiſſes aforeſaid with the Appurtenances whereof, *&c.* (except as before excepted) the aforeſaid *fourth* Day of *Auguſt* in the *firſt* and *ſecond* Years aboveſaid, to the aforeſaid late King and Queen came and ought to come, belong, and appertain by reaſon of the Felony aforeſaid. Alſo the ſame Jurors ſaid, that the aforeſaid *James Hales* at the Time of his Death was poſſeſſed of ſeven Oxen, one Heifer, one Cow, five Geldings, and one thouſand Sheep and Lambs. And that the aforeſaid two ſeveral Indentures, *viz.* the aforeſaid former Indenture made to the aforeſaid *John Hales* and *James Hales*, and the aforeſaid other Indenture made to the aforeſaid *James Hales* and *Margaret*, at the Time of the Inquiſition aforeſaid taken, were in the Hands of one *John Webb* Gentleman; and that the Oxen, Heifer, Cow, Sheep, and Lambs, at the ſame Time of taking the ſaid Inquiſition were under the Care and Management of the ſaid *Cyriack*, by the Command of the honourable *William* Marqueſs of *Wincheſter*, Treaſurer of *England*. And that the aforeſaid ſeveral Demiſes, and the aforeſaid Oxen, Geldings, Heifer, Cow, Sheep, and Lambs were then worth 80*l.* in the whole to be ſold, beſides the aforeſaid annual Rent reſerved upon the ſame Demiſes: Which ſaid ſeveral Demiſes, and the aforeſaid Oxen, Geldings, Heifer, Cow, Sheep and Lambs the aforeſaid *William Roper*, *Chriſtopher Roper*, and *Roger Appleton* the laſt Day of *October* in the *firſt* and *ſecond* Years aboveſaid, by virtue of the Commiſſion aforeſaid at *Deptford* aforeſaid, took into the Hands of the ſaid late King and Queen, according to the Form and Effect of the ſaid Commiſſion. Which ſaid Inquiſition before the aforeſaid Commiſſioners in Form aforeſaid taken, together with the Commiſſion aforeſaid, the aforeſaid *William Roper*, *Chriſtopher Roper*, and *Roger Appleton*, on the aforeſaid Morrow of *All Souls*, before the Barons aforeſaid in the Exchequer aforeſaid, certified under their Seals, and the Seals of the aforeſaid twelve Jurors by whom the ſame Inquiſition was taken. And the ſame *Cyriack* further ſays, that by reaſon of the Premiſſes as well the Right, Title, Intereſt, Poſſeſſion, and Term of Years, which the aforeſaid *James Hales* at the aforeſaid Time of his Death had ſolely of and in the aforeſaid Site and other the Premiſſes with their Appurtenances above in Form aforeſaid demiſed, by virtue of the aforeſaid former Indenture, as the aforeſaid Right, Title, and Intereſt of and in the aforeſaid Site and other the Premiſſes with the Appurtenances, and of and in the aforeſaid other Indenture made to the ſame *James* and *Margaret*, which the ſame *James* and the aforeſaid *Margaret* together or jointly had in the ſame Premiſſes, by reaſon of the Felony aforeſaid by the aforeſaid *James Hales* in Form aforeſaid perpetrated and committed, were totally forfeited and loſt to the aforeſaid late King and Queen, and the whole Right and Intereſt of the aforeſaid *Margaret* of and in the ſame Premiſſes were ended and extinct; by Means whereof all and ſingular the Premiſſes juſtly came and belonged to the Hands and Poſſeſſion of the ſame late King and Queen. By reaſon of which ſaid Premiſſes the aforeſaid late King and Queen were as well of the aforeſaid Site of the Manor aforeſaid and other the Premiſſes with the Appurtenances whereof, *&c.* in Form aforeſaid above demiſed to the aforeſaid *John Hales* and *James Hales*, as of the aforeſaid ſeveral Indentures, poſſeſſed. And the ſame late King and Queen being ſo thereof poſſeſſed, afterwards, *viz.* the *twenty-firſt* Day of *November* in the *firſt* and *ſecond* Years aboveſaid, at *Weſtminſter* in the County of *Middleſex*, by their Letters-patent ſealed with their great Seal of *England* (which the ſame *Cyriack* here produces in Court, the Date whereof is the ſame Day and Year) by the Advice of their well beloved Couſin and Counſellor *William* Marqueſs of *Wincheſter*, Treaſurer of *England*, as well

well for the Sum of 80 *l.* of lawful Money of *England* at the Receipt of their Exchequer at *Weſtminſter* to the Uſe of the ſame late King and Queen then paid by the ſaid *Cyriack* and the aforeſaid *John Webb*, by the Names of their beloved and faithful Subjects *Cyriack Petit* Eſquire, and *John Webb* Gentleman, as for divers other Cauſes and Conſiderations the ſaid late King and Queen then ſpecially moving, gave, granted, and aſſigned to the ſame *Cyriack*, and to the aforeſaid *John Webb*, amongſt other Things, as well the aforeſaid Indenture made to the aforeſaid *John Hales* and *James Hales*, as is aforeſaid, and the aforeſaid Indenture in Form aforeſaid made to the ſaid *James Hales* and *Margaret* then his Wife, as the whole Right, Eſtate, Title, Term and Terms of Years, and Intereſt of them the ſaid late King and Queen, which the ſame late King and Queen then had or ought to have the aforeſaid *fourth* Day of *Auguſt*, or at any Time after had or ought to have, by Reaſon of the Premiſſes or any of them, of and in the ſame ſeveral Indentures, and of and in the aforeſaid Site of the Manor aforeſaid, and all and ſingular other the Premiſſes with the Appurtenances whereof, &c. (except as before excepted) to have, hold, and enjoy the aforeſaid two ſeveral Indentures, and all the aforeſaid Right, Title, Eſtate, Term and Terms of Years, and Intereſt aforeſaid, amongſt other Things, to the ſame *Cyriack* and the aforeſaid *John Webb*, their Executors and Aſſigns, from the aforeſaid *fourth* Day of *Auguſt* in the *firſt* and *ſecond* Years aboveſaid, during all the Reſidue of the Term, and during the Reſidue of the ſeveral Terms of Years in the ſame ſeveral Indentures and in both of them expreſſed and ſpecified, as fully, freely, and entirely, and in as ample Manner and Form, as all and ſingular the ſaid Premiſſes to the Hands of the ſaid late King and Queen by Reaſon or Force of the Felony aforeſaid, or by any other Right, Title, or Means came or ought to come, and as the ſame then were or ought to be in the Hands of the ſaid late King and Queen, as by the ſame Letters patent amongſt other Things more fully appears. By Reaſon of which ſaid Letters-patent the ſame *Cyriack* and the aforeſaid *John Webb* were poſſeſſed as well of the aforeſaid ſeveral Indentures, as of the aforeſaid Site and other the Premiſſes aforeſaid with the Appurtenances whereof, &c. (except as before excepted). And the ſaid *Cyriack* and *John Webb* being ſo thereof poſſeſſed, the aforeſaid *John Webb* afterwards and before the aforeſaid Time when &c. viz. the *firſt* Day of *January* in the *third* and *fourth* Years of the Reign of the aforeſaid late King and Queen *Philip* and *Mary*, at *London* in the Pariſh of *St. Ellen* within *Biſhopſgate* in the Ward of *Biſhopſgate*, died, and the ſame *Cyriack* ſurvived him, and held himſelf in the aforeſaid 200 Acres of Marſh with the Appurtenances newly aſſigned, amongſt other Things, and was and yet is thereof ſole poſſeſſed by Right of Survivorſhip, &c. by Reaſon of the Premiſſes; and the aforeſaid *Margaret* claiming the aforeſaid 200 Acres of Marſh with the Appurtenances newly aſſigned after the Death of the aforeſaid *James* by Right of Survivorſhip, &c. by Colour of the aforeſaid other Indenture to the aforeſaid *James* and the ſame *Margaret* in Form aforeſaid made (where nothing of the ſame 200 Acres of Marſh newly aſſigned by reaſon of the Felony aforeſaid by the ſaid *James* in Form aforeſaid committed, and of the aforeſaid Forfeiture thereon, ever paſſed by the ſaid Indenture into the Poſſeſſion of the aforeſaid *Margaret* after the Death of the aforeſaid *James*) into the aforeſaid 200 Acres of Marſh newly aſſigned with the Appurtenances before the aforeſaid Time when, &c. upon the Poſſeſſion of the ſaid *Cyriack* entered, upon the Poſſeſſion of which ſaid *Margaret* thereof the ſame *Cyriack* afterwards, viz. the ſame Time when, &c. into the aforeſaid 200 Acres of Marſh newly aſſigned with the Appurtenances re-entered, and the Cloſe aforeſaid in the ſame broke, and the Graſs aforeſaid there then growing with the Cattle aforeſaid eat up, trod down, and conſumed, as it was lawful for him to do; with this that the ſame *Cyriack* will aver that the aforeſaid 200 Acres of Marſh newly aſſigned with the Appurtenances are not parcel of the Tenements aforeſaid in the aforeſaid former Indenture, or in the aforeſaid other Indenture excepted: And this he is ready to verify, wherefore he prays Judgment if the aforeſaid *Margaret* her Action aforeſaid againſt him ought to have, &c.

Colour.

And the aforeſaid *Margaret* ſays that the aforeſaid Plea of the aforeſaid *Cyriack* above pleaded in Bar of the new Aſſignment aforeſaid is inſufficient in Law to preclude her the ſaid *Margaret* from having her Action aforeſaid againſt the ſame *Cyriack*, and that ſhe has no Neceſſity, nor is by the Law of the Land bound to anſwer that Plea in Manner and Form aforeſaid pleaded. And this ſhe is ready to verify, wherefore for Want of a ſufficient Anſwer in this Behalf, the ſame *Margaret* prays Judgment, and her Damages by Occaſion of the Treſpaſs aforeſaid to be adjudged to her &c.

Plaintiff demurs.

And the aforeſaid *Cyriack*, for that he has above alledged ſufficient Matter in Law to preclude the aforeſaid *Margaret* from having her Action aforeſaid againſt him, which he is ready to verify, which ſaid Matter the aforeſaid *Margaret* does not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſes to admit, as before prays Judgment, and that the aforeſaid *Margaret* may be precluded from having her Action aforeſaid againſt him, &c. And becauſe the the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the Octave of *St. Michael* to hear their Judgment thereon, becauſe the ſame Juſtices here thereof not yet, &c.

Joinder in Demurrer.

Continuance.

THE CASE.

Husband and Wife being Jointenants of a Term for Years, the Husband becomes *felo de ſe*, and the Wife is in by Survivor, yet upon Office found the King ſhall have the whole Term. S. C. S. P. cited 9 Co. 129. b. W. Jones 21. Hardr. 24. Jenk. 65. pl. 22. 3 Inſt. 55. H. P. C. 30. 1 H. H. P. C. 413. 107. b. 1 Finch 232. 2 Finch 216. Godolph. Orph. Leg. 131, § 2. 4 Bac. Abr. 198. Vin. Abr. tit. Baron and Feme Z. 3. pl. 5. tit. Forfeiture R. pl. 10. in Margine.

It appears by the above Record that Lady *Margaret Hales* has brought a Writ of Treſpaſs againſt *Cyriack Petit* for a Treſpaſs done the 21ſt Day of *November* in the 2d Year of the Reign of the preſent Queen, at *Graveney* in the County of *Kent*, and upon new Aſſignment aſſigns the Treſpaſs certainly, viz. in 200 Acres of Marſh called *Graveney* Marſh. The Defendant pleads in Bar that *Thomas* Archbiſhop of *Canterbury* was ſeized of the ſaid Marſh in his Demeſn as of Fee, in Right of his Archbiſhopric. And being ſo ſeized, he the 8th Day of *March Anno* 26. *H.* 8. leaſed the ſame by Indenture to *John Hales*, and to Sir *James Hales* late Huſband of the

Plaintiff for the Term of 20 Years next enſuing the Feaſt of *St. Michael* the Archangel which ſhould be in the Year of our Lord 1540, which was confirmed by the Prior of *Chriſt's-Church* in *Canterbury*, and by the Chapter of the ſame Church; and they entered after the ſaid Feaſt of *St. Michael*, and *John Hales* died, and Sir *James* had the whole Leaſe by Survivorſhip. And he being ſo poſſeſſed, the ſaid Archbiſhop the 22d Day of *April Anno* 5. *Edw.* 6. by his Indenture reciting the ſaid Leaſe, ratified and confirmed it; and further by the ſame Indenture leaſed the ſame Marſh to the ſaid Sir *James* and to the ſaid *Margaret* then his Wife, to have and to hold to them from the Feaſt of *St. Michael* which ſhould be in the Year of our Lord 1560, unto the End of 12 Years thence next enſuing. And they by virtue thereof being poſſeſſed, and the ſaid Sir *James* being alſo poſſeſſed of the Premiſſes by Force of the firſt Indenture, the ſaid Sir *James Hales* the 4th Day of *Auguſt Anno* 1 & 2 *Philip* and *Mary*, feloniouſly and voluntarily drowned himſelf in a River in the Pariſh of *St. Mildred* in the County of the City of *Canterbury*. And he ſhews alſo that the ſame Day all this Matter was found accordingly before the Coroner upon the View of the Body there lying dead. And afterwards by virtue of a Commiſſion out of the Exchequer directed to Sir *Martin Bowes* Knight and others, to enquire what Goods, Chattles, and Leaſes the ſaid Sir *James* had ſolely or jointly with others in the County of *Kent* at the ſame Time that he killed and murdered himſelf, the 30th Day of *October* in the ſaid 1 & 2 Years of *Philip* and *Mary* an Inqueſt found the ſaid Leaſes and Intereſts, and alſo found that the ſaid Title, Intereſt, and Term of Years which the ſaid Sir *James* had ſolely by the firſt Leaſe, and alſo the Leaſe and Intereſt which the ſaid Sir *James* and *Margaret* had by the ſecond Leaſe, the ſaid 4th Day of *Auguſt* came and ought to come to the ſaid late King and Queen by Reaſon of the Felony aforeſaid; and the ſaid Office was accordingly returned into the Exchequer, by Force whereof both the Leaſes and Intereſts were forfeited to the ſaid King and Queen, and came to their Hands, and they the 21ſt Day of *November* in the ſaid 1 & 2 Years of *Philip* and *Mary* by their Letters-patent granted their Eſtates in them to the Defendant, and to one *John Webb*, who afterwards died; and the ſaid Plaintiff claiming the ſaid Marſh as Survivor to her ſaid Huſband entered upon the Poſſeſſion of the Defendant, and the Defendant at the ſame Time of the Treſpaſs ſuppoſed to be done re-entered into the ſaid Marſh, and did the Treſpaſs, &c. And upon this the Plaintiff has demurred.

Mich. Term 4 & 5. *Eliz.* — For the Plaintiff.

And *Southcote* and *Puttrel* Serjeants argued on the Part of the Plaintiff. And they ſaid that the Bar was not good, and that it does not diſcloſe ſufficient Matter to deveſt the Term out of the Plaintiff, and to put it in the King and Queen. For firſt, the Bar conveys the Term of 12 Years to the Plaintiff and to her Huſband jointly, and it has ſhewn the Death of the Huſband, which gives the Wife Title to have the whole Term as Survivor, and the Cauſe that ſeems to interrupt this Title (if there be any) is, for that the Huſband drowned himſelf, and ſo was a *felo de ſe*. But this Cauſe ſhall not take away her Title of Survivorſhip, for in this Manner of Felony two Things are to be conſidered. Firſt, the Cauſe of the Death; ſecondly, the Death enſuing the Cauſe, and theſe two make the Felony, and without both of them firſt done the Felony is not conſummate. And the Cauſe of the Death is the Act done in the Party's Lifetime, which makes the Death to follow. And the Act which brought on the Death here was the throwing himſelf voluntarily into the Water, for this was the Cauſe of his Death. And if a Man kills himſelf by a Wound which he gives himſelf with a Knife, or if he hangs himſelf, as the Wound or the Hanging, which is the Act done in the Party's Lifetime, is the Cauſe of his Death, ſo is the throwing himſelf into the Water here. And this Act which he has done to himſelf is to be conſidered in the ſame Light as if he had done it to another, and if he had given another a mortal Wound whereof he afterwards died, there altho' the Wound was the Cauſe of the Death, yet it ſhould not have Relation, as to the Forfeiture of his Goods, to the Time of the Wound given, for if he had given his Goods to another after the Wound, and before the Death, the Gift ſhould have been good. [a] And in 11. *H.* 4. one that had given a mortal Wound to another was arreſted by two Conſtables, and afterwards they voluntarily let him eſcape, and after that the Party wounded died, and there by the better Opinion this is not Felony in the Conſtables, for the Death has not Relation to the Cauſe of it, nor was he that gave the Wound a Felon before the Party wounded died. So here the Death has not Relation to the Cauſe of it, but for the Forfeiture it has Relation to the Death itſelf, and when the Death comes, then he ſhall be adjudged a Felon. And foraſmuch as he cannot be attainted of his own Death, becauſe he is dead before there is any Time to attaint him, the finding of his Death by the Coroner, or other Perſon authoriſed, is by Neceſſity of Law equivalent to an Attainder in Fact coming after his Death, as to his Goods. And therefore the King ſhall have all his Goods which ſhould have come to his Executors, or which he might have deviſed to another, if he had been a Perſon able, and had not done ſuch Act, and becauſe the King ſhall have them, the Party cannot [b] make his Executors, nor a Teſtament, where he is a *felo de ſe*. But the King ſhall have no more than the *felo de ſe* has in his own Right, or which ſhould have come to his Executors if he had not been a *felo de ſe*. For his Forfeiture ſhall only have Relation to the Time of the Death, and the Death precedes the Forfeiture, for until the Death is fully conſummate he is not a *felo de ſe*, for if he had killed another, he ſhould not have been a Felon until the other had been dead. And for the ſame Reaſon he cannot be a *felo de ſe* until the Death of himſelf be fully had and conſummate. For the Death precedes the Felony both in the one Caſe and in the other, and the Death precedes the Forfeiture. But nevertheleſs the Forfeiture comes at the ſame Inſtant that he dies, yet in Things of an Inſtant there is a Priority of Time in Conſideration of Law, and the one ſhall be ſaid to precede the other, altho' both ſhall be ſaid to happen at one Inſtant, [c] for every Inſtant contains the End of one Time, and the Commencement of another. And accordingly here the Death and the Forfeiture ſhall come together, and at one ſame Time, and yet there is a Priority, that is, the End of his Life makes the

[a] M. 11. H. 4. 12. pl. 26. Fitz. Corone 84. Bro. 28. Eſcape 8. Relation 7. S. P. C. 23. a. 1 H. H. P. C. 427, 591. H. P. C. 108. 2 Hawk. P. C. 126, 2 Inſt. 591. Ld. Raym. 827. 7 Mod. 158. 11 Mod. 11. 2 Bac. Abr. 636. Vin. Abr. tit. Relation K. pl. 1. Poſt 263 (g) 401.

[b] Godolph. Orph. Leg. 37, § 7. 302, § 3.

[c] Co. Litt. 185. b. Vin. Abr. tit. Inſtant A. pl. 2.

the Commencement of the Forfeiture, tho' at the ſame Time the Forfeiture is ſo near to the Death that there is no mean Time between them, yet notwithſtanding that, in Conſideration of Law the one precedes the other, but by no Means has the Forfeiture Relation to any Time in his Life. Then here, if the Forfeiture has not Relation to any Time in the Life of Sir *James Hales*, but to the Time of his Death, (and to that only it has Relation) from thence it follows that every one who makes Title to his Goods or Chattles, which Title is accrued ſince his Death, whether he be Legatee, Executor, Adminiſtrator, or Ordinary, or other Perſon whatſoever, he comes too late to make it, for the Title of the King and Queen ſhall be adjudged in Law paramount it, which is the Reaſon that he cannot make Executors or a Teſtament of them, nor ſhall the Ordinary have them; and alſo from thence it follows that every one who can make Title to the Goods or Chattles which belonged to him, or were in his Poſſeſſion, which Title is elder than his Death, ſhall avoid the Title of the King and Queen. Then here, when Sir *James Hales* and his Wife were Jointenants of the Leaſe for 12 Years, there was no † Moities between them, but each of them took the whole. So that the Wife took the whole, and her Title to it was before the Death of her Huſband, viz. in his Life time, for ſhe claims by the firſt [a] Leſſor, and not by her Huſband. [b] And if the Huſband charges the Land, after his Death ſhe ſhall avoid it, as it is taken in 7. *H.* 6. for ſhe is remitted to the Term, and is upon Title paramount the Charge. [c] As if a Man aliens Trees growing in his Land which he has in Tail, [d] or in his Land which he has in Right of his Wife, and dies before they are cut down, the Alienee ſhall not cut them down, as *Southcote* ſaid, for the Iſſue in Tail is in upon Title paramount the Alienation, viz. by the Donor, and ſo is the Wife. [e] So, he ſaid, by 14. *H.* 4. the Lord ſhall take the Ward, who is an Apprentice, out of the Poſſeſſion of his Maſter, becauſe his Title to his Body accrues in reſpect of the Seigniory, which is more ancient than the Apprenticeſhip. In like Manner here the Plaintiff's Title to the Leaſe is by the firſt Leſſor, and ſhe claims no more than that which ſhe had in the Life of her Huſband; ſo that her Title is paramount the Death of her Huſband, and the Title of the King and Queen is paravail his Death, and therefore too late. But perhaps it may be objected, that as the whole Term without Moities was in the Wife in the Life of her Huſband, ſo was the whole Term without Moieties in the Huſband during his Life, and until the Death was conſummate, and then when after his Death the Title of the Wife to have the whole by Survivorſhip came, and the Title of the King and Queen to have the whole which the Huſband had, came alſo at the ſame Time, then the Title of the King, which comes all at one Time with the Title of another at an Inſtant, ſhall be preferred; Sir, as to this, it appears in 49. *Ed.* 3. [f] that the King's Tenant in *London*, who held of him in Burgage, deviſed the Land to his Wife for Life, and died without Heir; there it ſeems by the Book that the Deviſe is good, and yet the Deviſe did not take Effect but after the Death of the Deviſor, and then the Title by Eſcheat came to the King, ſo that the Title of the Wife by Demiſe, and of the King by Eſcheat came together at the ſame Inſtant, and yet the Wife was preferred, which is in reſpect that the Deviſe was made in the Life of the Tenant, altho' it took Effect after his Death; wherefore ſeeing that ſome Part of the Title of the Wife commenced in the Life of the Deviſor, it ſhall be adjudged *eigne* to the Title of the King; and this Caſe was put by *Puttrel*. *A fortiore*, he ſaid, is it in our Caſe, for the Title of the Wife now Plaintiff was altogether in the Life of the Huſband, and therefore ſhall be more *eigne* than the Title of the King and Queen. [g] And in 7 & 8. *Ed.* 4. an Obligation was made to two, and one of them became a *felo de ſe*, and by the better Opinion the Survivor ſhall ſue the Obligation, and not the King. The ſame Reaſon is there in our Caſe why the Wife ſhall have the Term, and Survivorſhip holds Place as much in this as in the other Caſe. Wherefore it ſeemed to them that the Term of 12 Years never came to King *Philip* and Queen *Mary*, and that their Grant of it to the Defendant and *Webb* was void. And as to the finding of the Jurors that the Term of 12 Years came and ought to come to the King and Queen by Reaſon of the ſaid Felony, to this *Southcote* ſaid [h] that their ſaying does not bind the Party, if the Law be otherwiſe, *quod Curia conceſſit*, for they are not Judges to adjudge Matter of Law, but Jurors to find the Matter of Fact. Wherefore it ſeemed to the ſaid *Southcote* and *Puttrel* that the Plaintiff ſhould recover.

On the contrary it was argued by *Walſh*, *Cholmley*, *Bendloe*, and *Carus* Serjeants, that the Forfeiture of the Goods and Chattles real and perſonal ſhall have Relation to the [i] Act done in the Party's Lifetime, which was the Cauſe of his Death; and upon this the Parts of the Act are to be conſidered. [k] And *Walſh* ſaid that the Act conſiſts of three Parts. The firſt is the Imagination, which is a Reflection or Meditation of the Mind, whether or no it is convenient for him to deſtroy himſelf, and what Way it can be done. The ſecond is the Reſolution, which is a Determination of the Mind to deſtroy himſelf, and to do it in this or that particular Way. The third is the Perfection, which is the Execution of what the Mind has reſolved to do. And this Perfection conſiſts of two Parts, viz. the Beginning and the End. The Beginning is the doing of the Act which cauſes the Death, and the End is the Death, which is only a Sequel to the Act. And of all the Parts the doing of the Act is the greateſt in the Judgment of our Law, and it is in Effect the whole, and the only Part that the Law looks upon to be material. For the Imagination of the Mind to do Wrong, without an Act done, is not puniſhable in our Law, neither is the Reſolution to do that Wrong, which he does not, puniſhable, but the doing of the Act is the only Point which the Law regards; for until the Act is done, it cannot be an Offence to the World, and when the Act is done it is puniſhable. Then here the Act done by Sir *James Hales*, which is evil and the Cauſe of his Death, is the throwing himſelf into the Water, and the Death is but a Sequel thereof, and this evil Act ought ſome Way to be puniſhed. And if the Forfeiture ſhall not have Relation to the doing of the Act, then the Act ſhall not be puniſhed at all, for inaſmuch as the Perſon who did the Act is dead, his Perſon cannot be puniſhed, and therefore there is no

Way

† T. Raym. 122. See Ante 58(m).

[a] 2 Rol. R. 286.

[b] M. 7. H. 6. 2. a. *per Rolf.* Ibid. 2. b. *per Chaunt.* Fitz. Charge 1. Bro. 41. Litt. § 286.

[c] M. 11. H. 4. 32. pl. 59. *per Hill.* Fitz. Bar 180. Bro. Contract 11. Done 10. Waſt 67. 11 Co. 50. a. 1 Rol. R. 99. 101. 2 Bulſt. 7. Bridgm. 65. Perk. § 58. Cowel's Inſt. 112. Poſt 437.

[d] Sed Contra P. 27. 27. H. 8. 5. pl. 16. *per Fitz. et Shilley.* Bro. Contract 2. Done 2. Tayl 1. So if Tenant in Tail grants the Veſture of his Woods, and dies, the Grantee cannot cut the Wood afterwards, 1 Rol. Abr. 842 pl. 5, againſt the Opinion of *Belknap* M. 38 Ed. 3. 24. a.

[e] 18 Ed. 4. 6. a. 21. b. Bro. Contract 26. Dette 165. 1 Rol. R. 99. 2 Bulſt. 7.

[f] H. 14. H. 4. 32. pl. 45. Fitz. Gard 83. Bro. 79. De ſon tort. demeſne 9. F. N. B. 143. i. Crompt. J. C. 123. a.

[g] H. 49. Ed. 3. 3 b. Fitz. Deviſe 7. 2 Co. 53. a. Hardr. 26.

[h] 8 Ed. 4. 4. a. 24. b. Bro. Corone 151. Jointenants 34. Obligation 50. Office devant Eſch. 43. Prerogative 67. Sed Contra 3 Inſt 55. 1 Hawk. P. C. 68. § 7. T. Raym. 7. 121, 122. Ante 243 (f). Poſt 323 (e).

[i] See like Point Ante 114 (i).

E contra for the Defendant.

[k] 1 H. H. P. C. 413. 1 Finch 232. 2 Finch 216.

[k] See Crompt. J. C. 74. a. b.

Way elſe to puniſh him but by the Forfeiture of thoſe Things which were his own at the Time of the Act done, and the Act was done in his Lifetime, and therefore the Forfeiture ſhall have Relation to his Lifetime, viz. to that Time of his Life in which he did the Act that took away his Life. And *Bendloe* ſaid, if the Forfeiture ſhall only have Relation to the Death, and the Death be taken to precede the Forfeiture, then he ſhall forfeit nothing; for when he is dead the Goods are not his own, for a dead Man can have no Property, and ſuch Forfeiture would be a Prejudice to others who ought to have the Goods then, and not to the Party himſelf; for which Reaſon it is inconſiſtent to ſay that his Act ſhall forfeit the Goods which are not his own, but it is more fit to ſay that his evil Act ſhall forfeit the Things which are his own, and that cannot be unleſs the Forfeiture ſhall have Relation to that Time of his Life when the Offence was committed, and when the Goods were his own. [a] And in every Act, as *Walſh* ſaid, the Law has Reſpect to the Beginning; [b] and therefore, he ſaid, in 22. *Ed.* 3. a Lunatic wounded himſelf mortally with a Knife, and afterwards he became of ſound Mind, and had the Rights of Holy Church, and after died of the ſaid Wound, and his Chattles were not forfeited; for the Law has Reſpect to the Beginning, and when he gave himſelf the Wound he was out of his Senſes, in which Caſe the killing of another ſhould not be adjudged Felony in him, nor ſhould he die for it, and by the ſame Reaſon he ſhall not be a Felon for killing himſelf, and yet when he died he was of ſound Mind, but the Law does not ſo much reſpect the Condition he was in when he died, as the Condition he was in when he did the Act which was the Cauſe of his Death. [c] So he cited the Caſe in 33. *Aſs. pl.* 7. where a Servant, a Year after he was out of his Service, killed his Maſter upon Malice which he had conceived againſt him when he was his Servant, and this Offence was adjudged Treaſon, and he had Judgment accordingly; and yet he was not his Servant when he killed him, but the Law has Regard to the Beginning and the Cauſe of killing him. So here the throwing himſelf into the Water is the Beginning and the Cauſe of the Death, which ought to be puniſhed for an Example to others, and foraſmuch as his Body cannot be puniſhed, the Puniſhment ought to be by his Goods, for the Puniſhment of this Felony varies from the Puniſhment of other Felonies. For Felonies done to others may be puniſhed in the Life of the Offenders by Indictment, Arraignment, Judgment, and Execution, in which Caſe the Offenders ſhall forfeit their Goods, Chattles, and Lands, and ſhall be put to Death beſides; but in this Offence, altho' for Example to others it deſerves as great Puniſhment as any other Felony does, yet the Offender himſelf has prevented a great Part of the Puniſhment, viz. the Death, and the Forfeiture of his Land. [d] For the Law has ſo great Regard to the Inheritance, that it ſhall not eſcheat without an Attainder in Fact, which cannot be here any more than Execution by Death, becauſe the Party has killed himſelf before, ſo that he cannot be brought to Arraignment, by Reaſon of his own Act, and therefore no Judgment can be given againſt him. So that there is no other Means to make him forfeit that which he ought to forfeit, viz. his Goods and Chattles, but by Inquiry and finding of it by the Oath of 12 Men before the Coroner, or other Perſon aſſigned, which Inquiry and Finding ought in all Reaſon to be equivalent, as to the Things that ſhall be forfeited, to a Judgment given upon Arraignment, if the Party had killed another Perſon, in which Caſe the Judgment is given in his Life time, and by the like Reaſon this Inquiry and Finding ſhall be equivalent to a Judgment given in his Lifetime, inaſmuch as his own Act is the Cauſe why Judgment could not be given againſt him in his Life time. And ſo in other Caſes when Judgment by Law cannot be given, the Law ſupplies it by other Means. [e] And hereupon *Bendloe* put the Caſe, that if the Defendant in an Appeal wages Battle, and the Appellor kills him, the Appellee ſhall forfeit his Goods and Chattles, and his Lands ſhall eſcheat, for Judgment cannot be given againſt him becauſe he is killed, and therefore the Law ſays that this killing is equivalent to a Judgment and Execution. [f] And upon this *Walſh* and *Carus* alſo cited the Caſe in 3. *Ed.* 3. *Itinere North.* where it appears that one who had taken Sanctuary in a Church was out in the Night, and the Town purſued him, and the Felon defended himſelf with Clubs and Stones, and would not render himſelf to the King's Peace, and one ſtruck off his Head, and the Goods of the Perſon killed were forfeited, for he could not be arraigned, becauſe he was killed by his own Fault, for which Reaſon upon the Truth of the Matter found his Goods were forfeited, and the King had Year, Day, and Waſt. Wherefore when the Party, againſt whom Judgment ought to be given, is the Cauſe why Judgment cannot be given againſt him, an Inquiry of 12 Men ſhall be equivalent to it. So here this Inquiry before the Coroner *ſuper viſum corporis*, and the Inquiry of the Certainty of the Leaſe before the Commiſſioners, is equivalent, as to the Forfeiture of the Goods, to a Judgment given againſt him in his Lifetime, and to an Inquiry then had. And if the Forfeiture here has Relation to the Act which was the Cauſe of the Death, viz. to the throwing himſelf into the Water, then all the Goods and Chattles as well real as perſonal, which belonged to Sir *James Hales* at that Time, are forfeited. [g] As if my Horſe (as *Carus* ſaid) ſtrikes a Man, and afterwards I ſell my Horſe, and after that the Man dies, the Horſe ſhall be forfeited. [h] So, he ſaid, if a Villain voluntarily gives himſelf a Wound, and afterwards the Lord of the Villain ſeizes his Goods, and after that the Villain dies, and the Coroner finds the Matter as it is, the King ſhall have the Goods out of the Poſſeſſion of the Lord, becauſe the Forfeiture has Relation to the Wound given. And as it is of perſonal Things which were the Party's own, ſo, he ſaid, it ſhall be here with Regard to this Leaſe; for as an actual Gift [i] of this Leaſe made by Sir *James Hales* to another in his Life time ſhould have taken away the Right of the Wife now Plaintiff, ſo a Forfeiture made by Sir *James* in his Life time ſhould have taken it away, as if he had been outlawed or attainted in his Life time, for this is a Gift in Law of the Term. And as an Outlawry or Attainder in his Life time ſhould have taken away the Right of the Wife to the Term, ſo the Title to the Term which is given to the King by the Act done by Sir *James* in his Life time, and by the Inquiry

[a] 3 Bulſt. 8.

[b] Fitz. Corone 241. Abridgment of Aſſizes 73. b. Theol. Dig. lib. 1. cap. 8. § 14. Moor 140. 1 Co. 99. b. 4 Co. 42. a. 3 Inſt. 54. S. P. C. 19. d. 1 H. H. P. C. 412. Ld. Raym. 826.

[c] 33 Aſs. pl. 7. Fitz. Corone 210. Bro. 116. Treaſon 15. 1 Co. 99. b. 3 Bulſt 257. 2 Brownl. 116. Poph. 147. Ld. Raym. 826. 3 Inſt. 20. S. P. C. 10. m. H. P. C. 23. 1 H. H. P. C. 380. 1 Hawk. P. C. 88 § 4. Dalt. Juſt. cap. 142. § 2. 1 Finch 9. 2 Finch. 10. Wentw. Off. of Exec. 246. Wing. Max. reg. 25. pl. 11.

[d] 3 Inſt, 55.

[e] See Contra Poſt 261, 262 *per Weſton, et per Dyer.* But the Opinion of *Brown* Poſt 262 agrees herewith.

[f] 3 Ed. 3. *Itin. North.* Fitz. Corone 290. and ſee L. P. Ibid. 289, 312. 5 Co. 109. b. 3 Inſt. 227. S. P. C. 184. c. 191. b. 1 H. H. P. C. 343. 2 Hawk. P. C. 451. § 16. 2 Bac. Abr. 578. But Stamf. Prerog 46. a. makes a *Quære* whether the Law be not altered in this Point by Statute of 34 *Ed.* 3. *cap.* 12.

[g] 8 Vin. Abr. tit. Deodand A. pl. 8.

[h] 3 Inſt. 55. H. P. C. 29. 1 H. H. P. C. 414.

[i] S. P. Co. Litt. 351. a. 1 Finch 232. 2 Finch 210.

Inquiry afterwards, which has Relation to the Act, ſhall take away the Right of the Wife, and ſhe ſhall not be remitted in the mean time to deſtroy that Title. For if Title is once given to the King, *nullum tempus occurrit Regi*, ſo that if the King has once a Title, it remains for ever. [a] And upon this *Walſh* put the Caſe in 50 *Aſſ.* where Huſband and Wife had a joint Eſtate for thirty Years in certain Land, and the Huſband died, and the Wife held herſelf in, and it was found by Office that the Huſband had received certain Money of Sir *Hugh Spencer* who was attainted, whereby the Money belonged to the King, and the ſaid Leaſe was found *ut ſupra*, out of which Office a *Scire facias* iſſued againſt the ſaid Wife; and it was adjudged that the King ſhould have the Term in Execution, for if this had been found in the Huſband's Liſetime, the King ſhould have had Execution of the Term in the Life of the Huſband, and now this Title found by Office ſhall have Relation to the Life of the Huſband, and as he ſhould have had the Term in Execution in the Huſband's Life, ſo ſhall he have it now, *quia nullum tempus occurrit Regi.* So is it in the Caſe here. For which Reaſons it ſeemed to them that the Forfeiture has Relation to the Act done in the Life of the Huſband, *viz.* the throwing himſelf into the Water, and that this ſhall take away the Term from the Wife now Plaintiff, and conſequently that ſhe ſhall be barred.

[a] 50 Aſſ. pl. 5. Fitz. Execution 113. Bro. 148. Charge 34. Jointenants 30. Prerogative 54. Moor 193. 8 Co. 171. a. Hardr. 24 Crompt. J. C. 107. b. Poſt 263 (l).

And afterwards this ſame Term the Juſtices argued, *viz. Weſton*, *Anthony Brown*, and the Lord *Dyer*. But I only heard the Lord *Dyer*, and therefore what I ſay concerning the other two, I deliver only upon credible Report. And all the Juſtices argued that the Forfeiture of the Goods and Chattles real and perſonal ſhall have Relation to the Act done by Sir *James Hales* in his Lifetime, which was the Cauſe of his Death, *viz.* [b] the throwing himſelf into the Water. And upon this the Lord *Dyer* ſaid that five Things are to be conſidered in this Caſe. Firſt, the Quality of the Offence of Sir *James Hales*; ſecondly, to whom the Offence is committed; thirdly, what he ſhall forfeit; fourthly, from what Time the Forfeiture ſhall commence; and fifthly, if the Term here ſhall be taken from the Wife. And as to the Quality of the Offence which Sir *James* has here committed, he ſaid, it is in a Degree of Murder, and not of Homicide or Manſlaughter, for Homicide is the killing a Man felonioufly without Malice prepenſe, [c] but Murder is the killing a Man with Malice perpenſe. And here the killing of himſelf was prepenſed and reſolved in his Mind before the Act was done. And alſo it agrees in another Point with the ancient Definition of Murder, *viz.* [d] that *murdrum eſt occulta hominum occiſio, nullo præſente, nullo ſciente*; ſo that always he who determines to kill himſelf, determines by the Inſtigation of the Devil to do it ſecretly, *nullo præſente, nullo ſciente*, leſt he ſhould elſe be prevented from doing it. Wherefore the Quality of the Offence is Murder.

Curia.

[b] 1 Finch 232. 2 Finch 216.

1 Point. The Quality of the Offence of a *felo de ſe*.

[c] S. P. C. 18. b.

[d] Bract. 134. b. Britt. cap. 6. S. P. C. 12. e. 17. e.

As to the ſecond Point, it is an Offence againſt Nature, againſt God, and againſt the King. Againſt Nature, becauſe it is contrary to the Rules of Self-preſervation, which is the Principle of Nature, for every thing living does by Inſtinct of Nature defend itſelf from Deſtruction, and and then to deſtroy one's ſelf is contrary to Nature, and a Thing moſt horrible. Againſt God, in that it is a Breach of his Commandment, *thou ſhalt not kill*; and to kill himſelf, by which Act he kills in Preſumption his own Soul, is a greater Offence than to kill another. Againſt the King, in that hereby he has loſt a Subject, and (as *Brown* termed it) he being the Head has loſt one of his myſtical Members. Alſo he has offended the King, in giving ſuch an Example to his Subjects, and it belongs to the King, who has the Government of the People, to take Care that no evil Example be given them, and an evil Example is an Offence againſt him.

2 Point. Againſt whom the Offence is committed.

As to the third Point, what he ſhall forfeit. It was agreed by all the Juſtices, that he ſhall forfeit all his [e] Goods, Debts, and Chattles, real and perſonal, by reaſon of the Offence aforeſaid. For *Brown* ſaid, the Reaſon why the King ſhall have the Goods and Chattles of a *felo de ſe*, and that he cannot make [f] his Executors of them, is not becauſe he is out of [g] holy Church, ſo that for that Reaſon the Biſhop will not meddle with them, and therefore the King ſhall have them as Goods with which no other will meddle, [h] but the King ſhall have them as forfeited to him for the ſaid Offence, *viz.* for the Loſs of his Subject, and for the Breach of his Peace, and for the evil Example given to his People, and not in reſpect that holy Church will not meddle with them, for he is adjudged none of the Members of holy Church. And if this ſhould be the Reaſon, then, (he ſaid) put the Caſe [i] that a Man voluntarily gives himſelf a mortal Wound, and afterwards he repents, and is reconciled to holy Church, and has the Rights of holy Church, and after that dies, now the ſaid Reaſon that he is out of holy Church will not hold Place, but yet notwithſtanding holy Church ſuppoſes him capable of making his Executors, will any one ſay that the King ſhall not have all his Goods? Certainly he ſhall, and the Biſhop ſhall not have them, nor can the Party make his Executors, or have Adminiſtrators, for he cannot have Executors or Adminiſtrators where he has nothing to leave, and all the Goods that he had are the King's, and forfeited to him for the Cauſe aforeſaid. But all the Juſtices agreed [k] that he ſhall not forfeit his Land, [l] nor the Wife her Dower, [m] nor ſhall the Blood be corrupted, for the Eſcheat of the Land, the Loſs of the Wife's Dower, and the Corruption of the Blood cannot be without an Attainder in Deed. And therefore *Weſton* ſaid, that in an Appeal if the Appellee wages Battle, and the Appellor kills him, the Appellee ſhall forfeit all his Goods and Chattles, but his

3 Point. What a *felo de ſe* ſhall forfeit.

[e] Bract. 150. a. Britt. cap. 7. fo. 15. b. 8 Ed. 2. Fitz. Corone 426. 3 Ed. 3. Fitz. Ibid. 301, 562. T. 22 Ed. 3. Fitz. Ibid. 259. M. 8. H. 4. 2. a. *Per Tilleſley*. S. P. C. 19. d. 188. i. H. P. C. 30. 1 H. H. P. C. 413. 1 Hawk P. C. 68, § 7. 3 Inſt. 55. Stamf. Prerog. 46. a. Bac. Law Tracts 110, 139. 1 Finch 231, 232, 2 Finch 216. Cowel's Inſt. 124, § 4. 263, § 16. 2 Bac. Abr. 482.

[f] Godol. Orph. Leg. 37, § 7 302, § 3.

[g] As were the

Opinions in P. 19 H. 6. 63. a. *Per Paſton*. P. 8 Ed. 4. 4. a. *Per Nedham*. P. 27. H. 8. 9. b. *Per Mountague*. [h] Herewith agrees the Opinion of *Littleton*. P. 8. Ed. 4 4 a. [i] Ibid. [k] Bract. 150. a. Britt. cap. 7. fo. 15. b, 16. a. 3 Ed. 3. Fitz. Corone 362. T. 22 Ed. 3. Fitz Ibid. 259 S. P. C. 19. e. H. P. C. 30. 1 H. H. P. C. 413. 1 Hawk. P. C. 68. § 8. 3 Inſt. 55. 1 Finch 231, 232. 2 Finch 216. Bac. Law Tracts 110, 139. Cowel's Inſt. 124, § 4. 2 Bac. Abr. 482. [l] 3 Ed. 3. Fitz. Corone 362. And ſee the Books next before cited. [m] Vin. Abr. tit. Blood corrupted A. pl. 2. and the Books above cited.

Lands ſhall not eſcheat, for the Inheritance is ſo greatly favoured that it ſhall not be forfeited without an expreſs Attainder by Judgment; but if the Appellor overcomes the Appellee, then his Land ſhall be forfeited, for when he is overcome and not killed, * Judgment ſhall afterwards be given againſt him that he ſhall be hanged, and therefore in that Caſe his Land ſhall eſcheat, but not in the other Caſe, becauſe no Judgment is given; but *Brown* denied this Opinion, for he ſaid, † when the Appellee is killed, this is the Trial and End of the Matter in this Point, and foraſmuch as the Matter is ended by a Trial conſonant to Law, this is ſufficient to convict him of the Fact imputed to him, and to attaint him, in which Caſe his Land ſhall eſcheat. [a] For in 8. *Ed.* 3. a Woman brought a Writ of Dower, and the Tenant ſaid that her Huſband went into *Scotland*, and there adhered to the King's Enemies, and came into this Realm with the King's Enemies, and afterwards died in *Scotland*, and it ſeems a good Bar by [b] Averment, for other Law could not be had againſt him. [c] For if a Man is ſlain in the Field in War againſt the King, this is an Attainder in Law without any thing further, by the ancient Law of the Land, for he himſelf is the Cauſe why the Courſe of Law could not proceed againſt him. But *Dyer* denied the Law to be with *Brown* in the Caſe of an Appeal, for he ſaid there are but three [d] Writs of Eſcheat concerning Attainders for Felony, one is, *pro qua ſuſpenſus eſt*, another, *pro qua abjuravit regnum*, the third, *pro qua utlagatus eſt*, and this Caſe is none of them. [e] And if there be no Writ in the *Regiſter* in ſuch Caſe, it is a good Cauſe to ſay that the Land ſhall not eſcheat therein. But in our principal Caſe they agreed *ut ſupra*, that his Goods, Debts, and Chattles real and perſonal ſhall be forfeited for killing himſelf, but that the Land ſhall not eſcheat, nor is Wife forfeit her Dower, nor the Blood be corrupted between him and his Heirs.

* 8 Ed. 3. Bro. Appeal 117,145. Eſcheat 24. But Fitz. Judgment 225 is that he was ſlain in the Field, and ſuch Judgment was given, and ſo is it cited Co. Litt. 390. b. 2 Hawk. P. C. 447, § 25.

† Herewith agrees Ante 260 (e). *Per Bendloe.*

[a] P. 8. Ed. 3. 20. pl. 6. Fitz. Dower 106. N. Bendl. 57.

[b] But *Note*, the Rule of the Book is againſt this, and ſo it is cited in 1 H. H. P. C. 343, that the Judges would not allow an Averment that the Party died in Rebellion, or adhering, &c without a Record of his Conviction, for he might be there againſt his Will. but if at this Day, ſee the Books cited Poſt 263 (b).

[c] Poſt 263 (a). And 1 H. H. P. C. 342 agrees that the Law was ſo anciently,

[d] Regiſt. 164. b. Co. Litt. 13. a.

* 2 Leon. 3.

4 Point. To what Time the Forfeiture ſhall have Relation.

As to the fourth Point, *viz.* to what Time the Forfeiture ſhall have Relation; they ſaid that the Forfeiture here ſhall have Relation to the Time of the original Offence committed which was the Cauſe of the Death, and that was the [f] throwing himſelf into the Water, which was done in his Lifetime, and this Act was Felony. And the Indictment ſays, and may ſay, that he feloniouſly threw himſelf into the Water; for that which cauſed the Death may be ſaid to be feloniouſly done. And therefore if one ſtrikes another, ſo that afterwards he dies of it, the Indictment ought to ſay that he ſtruck him feloniouſly. So that the Felony is attributed to the Act, which Act is always done by a living Man, and in his Lifetime, as *Brown* ſaid; for, he ſaid, Sir *James Hales* was dead, and how came he to his Death? It may be anſwered, by drowning; and who drowned him? Sir *James Hales*; and when did he drown him? In his Lifetime. So that Sir *James Hales* being alive cauſed Sir *James Hales* to die; and the Act of the living Man was the Death of the dead Man. And then for this Offence it is reaſonable to puniſh the living Man who committed the Offence, and not the dead Man. But how can he be ſaid to be puniſhed alive when the Puniſhment comes after his Death? Sir, this can be done no other Way but by deveſting out of him, from the Time of the Act done in his Life which was the Cauſe of his Death, the Title and Property of thoſe Things which he had in his Lifetime. As if a Man gives himſelf a mortal Wound, the Property of his Goods, Debts, and Chattles continues in him ſtill, but that is only conditionally, for if he dies within the Year, the whole is veſted in the King by the very Act done in his Lifetime; ſo that the Act reſtrains him from meddling with them afterwards, which is as great a Puniſhment to him for the Offence whilſt he is alive, as it reaſonably can be before the Death is conſummate. Wherefore in that the Law ordains that after his Death the Goods and Chattles, which were his own at the Time of the Act done which cauſed the Death, ſhall not be his own, but ſhall belong to the King, therein it puniſhes him whilſt he lives, by depriving him of the Power of diſpoſing of the Property of his Goods as long as he lives after the Act done, if the Death enſues within a Year after. So that by this Relation of the Forfeiture which has a Retroſpect to the Act done, the Law inflicts a Puniſhment upon the living Man for the Act done in his Lifetime, which was the Cauſe of his Death afterwards. And this is more reaſonable than it is for the Forfeiture to have relation only to the Time of his Death, for to give the Property of the Goods to the King, and to take them from thoſe who ought to have them at his Death, is no Puniſhment to the Party, for he is dead before. But it is moſt reaſonable to refer the Forfeiture to his Lifetime, that is, to ſuch Time of his Life wherein the Act, which cauſed the Death, was done, and to adjudge him a Felon from thenceforth, eſpecially when it is conſidered that by the Act he has prevented and eſcaped the actual Judgment which the Law would have given againſt him. For by the Act, *viz.* by the throwing himſelf into the Water, he has done two Things, firſt, he has killed one of the King's Subjects; ſecondly, he has thereby avoided the Arraignment and the Judgment of the Law which ſhould have been given againſt him, and ſo he has fled from the Law, and has eſcaped its Judgment. [g] And if a Man commits Felony, and afterwards flies for it, by the Act of flying he ſhall forfeit his Goods, becauſe by that Act he does all he can to eſcape the Sentence of the Law, as *Weſton* ſaid. [h] So, he ſaid, if a Man arraigned for Felony had challenged peremptorily above the Number of 35. by the common Law he ſhould forfeit his Goods and Chattles, becauſe thereby he refuſed the Trial of the Law. [i] So, he ſaid, if he that is found guilty of Felony takes his Clergy, he ſhall forfeit his Goods, for when he betakes himſelf to his Clergy, therein he refuſes the Judgment of the Law. [k] So, he ſaid, if one arraigned for Felony ſtands mute of Malice, and will not anſwer, he ſhall forfeit

[f] 1 Finch 232. 2 Finch 216.

[g] 3 Ed. 3. Fitz. Corone 296, 344. H. 13. H. 4. 13. b. Fitz. Forfeiture 32. M. 4. H. 7. 18. pl. 14. Fitz. Ibid. 10. Bro. Corone 199. Forfeiture de terres 52. S. P. C. 183. C.

[h] Stamf. Prerog. 46. a. 3 Inſt. 227. 2 H. H. P. C. 268. Bac. Law Tracts 173.

[i] Vide M. 40 Ed. 3. 42. pl. 23. Fitz Corone 91. Bro. Forfeiture. de terres 5. T. 20 Ed. 4. 5. pl. 3. Bro. Corone 166. Forfeiture 65.

[k] 5 Ed. 6. Bro. Ibid. 113. S. P. C. 185. b. See Co. Litt. 391. a. 2 H. H. P. C. 384. 2 Hawk. P. C. 358, § 110. T. 14 Ed. 4. 7. a. Bro. Forfeiture de terres 64. Dr. & Stud. lib. 2. cap. 1. fo. 248. Stamf. Prerog. 46. a. 3 Inſt. 227. Bac. Law Tracts 173.

forfeit his Goods, and the Reaſon is, becauſe he refuſes to be tried by the Law. Then if in theſe Caſes, he ſaid, thoſe that fly from the Law, or that by their Acts refuſe to be tried by the Law, ſhall forfeit their Goods and Chattles, for the ſame Reaſon in our Caſe he ſhall forfeit his Goods and Chattles, for here he has committed a Felony in killing himſelf, whereby he has exempted himſelf from the Trial of the Law, for by his Death he has prevented his being arraigned and tried by Law, and ſo he has fled from the Law, and by Cunning has eſcaped the Sentence and Judgment of the Law, which is more odious in the Eye of the Law than if he had fled indeed, or had challenged above the Number of 35. or had betaken himſelf to his Clergy before Judgment, or had kept himſelf mute and ſilent. And therefore if they ſhall forfeit their Goods by ſuch Evaſions or Refuſals of the Law, by the ſame Reaſon, and *a fortiore* he ſhall forfeit his Goods and Chattles here by this his Evaſion and Refuſal of the Law. But from what Time ſhall they forfeit their Goods? Sir, from the Time when the Act of ſuch Evaſion in the ſaid Caſes appears of Record, *viz.* * from the Time of the Flight found, as *Brown* ſaid, and not before, and from the Time of the Challenge of above 35. or of taking his Clergy, or of ſtanding mute, for theſe are the Acts of Refuſal of the Law, and the Time of them appears of Record. So here, the throwing himſelf into the Water was the Act that made the Felony, and by which he exempted himſelf from and evaded the actual Trial and Sentence of the Law, and from that Time the Goods and Chattles ſhall be forfeited, and to that Time, being in his Life, the Forfeiture ſhall have relation. And although the Act, by which he has avoided the Trial and Judgment of the Law, does not appear of Record in his Lifetime, as it does in the other Caſes above, the Reaſon thereof is, becauſe there is no Poſſibility of its being found in his Lifetime, for until the Death there is no Cauſe of Forfeiture. And he himſelf is the Cauſe why he cannot be arraigned for the Offence, and why the Offence cannot be otherwiſe inquired in his Lifetime. And in ſuch Caſes where Puniſhment for Offences cannot be had in the Life of him that deſerves it, an Inquiry of the Forfeiture, if it be found afterwards, ſhall ſerve, and ſhall be of the ſame Force as if done in his Lifetime. [a] And hereupon *Brown* ſaid, if a Subject joins the King's Enemies in Battle againſt the King within the Realm, and is killed in the Field, by the ancient Law of the Realm he ſhall forfeit his Goods, Chattles, [b] and Lands, and his Blood ſhall be corrupted without other Judgment, for he himſelf is the Cauſe why he could not be tried by the Law in his Lifetime. But whether this ſhall be found by Inquiſition, or ſhall be tried *per pais*, is Matter of Conſideration. [c] And, as *Brown* ſaid, it ſhall be tried *per pais* upon Iſſue joined; and ſo, he ſaid, it is taken in 3. *Ed.* 3. and in 9. *Ed.* 3. And *Dyer* ſaid that there is ſuch a Caſe in [d] 8. *Ed.* 3. in a Writ of Dower, but it is not there adjudged. And ſo in the Caſe before put where the Appellee is killed. And ſo here the finding of this after his Death is all that can be done, and ſhall ſerve ſufficiently. Wherefore all the Juſtices agreed, that the Forfeiture of the Goods and Chattles real and perſonal of Sir *James Hales* ſhall have relation to the Act done in his Lifetime which was the Cauſe of his Death, *viz.* [e] the throwing himſelf into the Water.

And alſo they all agreed in the Argument of this Caſe, [f] that if one gives another a mortal Wound, and he dies of this Wound, and he that killed him is attainted by Verdict, the Eſcheat of his Land ſhall have relation to the Time of the Wound given; [g] but if meſne between the Wound given and the Death he is ſuffered voluntarily to eſcape, ſuch Permiſſion to eſcape ſhall not be Felony. For although as to the Forfeiture it has relation to the Time of the Wound given, againſt the Party himſelf, yet it ſhall not be ſo againſt a Stranger, for if the Eſcape ſhould be Felony, he that eſcaped muſt of Neceſſity be a Felon at the Time of the Eſcape.

As to the fifth Point, the Juſtices held that if the Forfeiture has relation to the felonious Act done in the Party's Lifetime, then although the Wife now Plaintiff ſhould, before the Office found, be adjudged in the Term by Right of Survivorſhip, and ſhould be remitted to the Term as to others, yet after the Office found the Term ſhall be adjudged in the King and Queen, becauſe the Office has relation prior to her Title of Survivorſhip, *viz.* to his Lifetime, and to the doing of the Act by which a Title in Law to the Term is given to the King, which is equivalent to a Grant in Deed made by the ſame Perſon in his Lifetime to the King. For a Title may be as firmly attached in the King by the Act of Law as by the expreſs Grant of the Party. [h] And hereupon *Brown* ſaid, if there are two Jointenants of a Leaſe for Years, and one of them grants to *J. S.* that if he pays him 10 *l.* before *Michaelmas*, then he ſhall have his Term, and the Jointenant who ſo grants dies before *Michaelmas*, and afterwards *J S.* pays the Money to his Executors, yet he ſhall not have the Term, for there the Condition precedes the Grant, as [i] 14. *H.* 8. is, and until the Money is paid the Jointure continues, and it is only a bare Communication, and then the Survivor ſhall have the whole, and ſhall avoid the Condition or Communication: [k] But if he had granted or leaſed it from *Michaelmas* next following during the Term, and had died before the ſaid Feaſt, there he to whom it was demiſed ſhould have had it againſt the Survivor, for in this Caſe the Title in the Eſtate is granted in Deed in his Lifetime. So here by this Act Sir *James* has granted to the King and Queen a Title to the Eſtate, and the Office found has relation to the Time of the Act, and executes the Title, and ſo ſurmounts the Title of Survivorſhip. And inaſmuch as a Title is once given to the King and Queen by this Act, the Survivorſhip ſhall never diſplace it. [l] As in the ſaid Caſe of 50. *Aſſ.* where the Leaſe which the Wife had as Survivor was liable to the Debt of the Huſband, as the Lord *Dyer* ſaid. So, he ſaid, if the King's Villain and his Wife take jointly a Leaſe for 40 Years, and the Villain dies, and the Wife has the Leaſe as Survivor, the King upon Office finding this Matter ſhall have the

* 3 Ed. 3. Fitz. Corone 295. Bro. Expoſition 26. Forfeiture de terres 179. Relation 31. S. P. C. 192. a.

[a] Ante 262 (c).

[b] T. 7. H. 4. 46. b. *Per Markham.* 4 Co. 57. b. Crompt. J. C. 84. a. Dalt. Iuſt. cap. 140, § 4. But the contrary Opinion ſeems to be held in Co. Litt. 13. a S.P.C. 179. H.P.C. 17. 1 H. H.P.C. 342. 343. 2 Hawk. P. C. 447, § 2.

[c] See M. 5 R. 2. Fitz. Trial 54. where *Belknap* ſays, if an Engliſhman be adherent in *Scotland* to the Enemies of the King of *England*, he ſhall forfeit his Land, and his Adherency ſhall be tried in *England* where the Land is. Cromp. J.C. 84. a.

[d] P. 8 Ed. 3. 20. pl. 6.

[e] 1 H.H.P.C. 413 1 Finch 232. 2 Finch 216.

[f] S. P. 1 H. H. P. C. 426. 1 Vent. 371.

[g] See Ante 258 (a). and the Books there cited.

5 Point.

If the Term ſhall be deveſted out of the Plaintiff by the Relation of the Office to the felonious Act done in the Huſband's Lifetime.

[h] S. P. Co. Litt. 184. b. 185. a. Bridgm. 43. 1 Show. 382. 1 Finch 87. 2 Finch 97.

[i] 1 H. 14 H. 8. 22. b. *Per Brudnel.*

[k] See the Books above cited at (h). And S.P. reſolved, Cro. J. 91, 92. 2 Rol. Abr. 89. pl. 4. for though it is to commence at a future Day, yet the Leſſee has a preſent Intereſt in it.

[l] Ante 261 (a).

the Leaſe, and ſhall ouſt the Wife; for, he ſaid, if the King had entered in the Life of the Villain, this had taken away the Intereſt of the Wife, and his delaying to enter ſhall not deſtroy his Title once veſted, *quia nullum tempus occurrit Regi.* Wherefore all the Juſtices agreed that the Intereſt of the Wife now Plaintiff is taken away by the Relation of the Forfeiture. And *Weſton* ſaid that although the Forfeiture ſhould only have relation to the Death, at which Time the Title of the Wife accrued, yet in this [m] Concourſe of Titles the King's Title by Prerogative ſhall be preferred. [n] As if one is a Villain by Birth, and Land deſcends to him, and his Lord enters, and afterwards he is found an Ideot, and the Deſcent is alſo found, the King ſhall have the Land; for the Title of the Lord to the Body of the Villain commenced by the Birth of the Villain, and at that Time, by relation of the Office, the King's Title to his Body commenced in reſpect of Ideocy, in which Caſe the King ſhall have the Land, notwithſtandiug his Latches to ſuffer the Lord of the Villain to enter firſt, for Latches of Entry ſhall never hurt the King. [o] So, he ſaid, if a Woman takes Huſband, and has Iſſue, and Land deſcends to the Wife, and the Huſband enters, ſo that he is intitled to be Tenant by the Curteſy, and afterwards the Wife is found an Ideot, and her Eſtate in the Land is alſo found, the King ſhall have the Land, and if the Wife dies the Huſband ſhall never have the Land by Curteſy; for by the firſt Poſſeſſion of the Wife the Huſband was intitled to be Tenant by the Curteſy, and when the Office is found, the Title of the King ſhall have relation to the firſt Poſſeſſion of the Wife alſo. So that both the Titles commence at one ſame Time, but the King's ſhall have the Pre-eminence; and foraſmuch as the Title of the King in this Caſe is to the Freehold of the Land, in that he ſhall have the Cuſtody of it during the Life of the Wife, this ſhall utterly take away the Title of the Huſband, which was veſted in him before the Office found, and therefore after the Death of the Wife he ſhall not be Tenant by the Curteſy, but the Iſſue ſhall have the Land out of the King's Hands, if it be not held of the King, and if it be, the King ſhall have it by the Wardſhip of him during his Nonage. So that in Things of an Inſtant the King ſhall be preferred. But he and the reſt of the Juſtices agreed that the Forfeiture ſhall have relation to the Lifetime of the ſaid Sir *James Hales*, and ſo this laſt Point is out of Doubt. Wherefore upon the Matter in Law all the Juſtices agreed that the Title of the Wife to the Leaſe is taken away.

m P. 8. Ed. 4. 4. a *Per Choke.* Dy. 344. a. pl. 56. in marg. Dal. 8. pl. 6. Co. Litt. 30. b. 4 Co. 55. a. 9 Co. 129. b. 3 Leon. 251. W. Jones 21. Palm. 352. Hardr. 24, 26. 2 Vent, 268. 4 Bac. Abr. 158.

n 9 Co. 129. b. Hardr. 24.

o Co Litt. 30. b. 2 Rol. R. 322. 1 Vern. 10. 3 Danv. Abr. 241. pl. 5. 1 Bac. Abr. 665. 4 Bac. Abr. 198. Vin. Abr. tit. Curteſy H. pl. 3. But *Quære* of this Caſe, for the King's Title to the Cuſtody of the Inheritance cannot continue longer than for the Life of the Ideot, and therefore there does not ſeem to be any Colour of Reaſon why the Huſband ſhould not be Tenant by the Curteſy, ſeeing that his Title, though initiate by the Seizin of the Wife, is not conſummate nor begins to any Effect until her Death, at which time the King's Title is at an End. So that upon the Matter the Huſband has no perfect Title at the Time when the King's Title commences, and therefore it cannot be ſtrictly ſaid that there is a Concourſe of Titles in this Caſe, and the Huſband's Title ſtands in no more Oppoſition to the King's Prerogative than the Title of the Iſſue does, neither of which look for the Land as long as the King can have any Intereſt in it.

Exceptions to the Bar.

But *note*, *Brown* at the End of his Argument ſaid, that the Bar was inſufficient for three Cauſes. Firſt, for that it is not found that the Archbiſhop is alive. For the Leaſe for 12 Years is not pleaded to be confirmed, and therefore it is not good longer than for his Life, for which reaſon his Life ought to be averred. Secondly, for that although the Office finds both the Leaſes, yet it does not find preciſely that the ſaid Sir *James* was poſſeſſed of them at the Time of drowning himſelf, for which reaſon the Office is not ſufficient therein to entitle the King and Queen. Thirdly, that the Day of the Treſpaſs is aſſigned the 21ſt Day of *November* in the *ſecond* Year of the Reign of the preſent Queen, which Day is *in anno Domini* 1559. and the new Leaſe made to the Plaintiff and her Huſband did not commence until *Michaelmas* 1560. which is the *Michaelmas* after the Treſpaſs aſſigned, ſo that the Plaintiff has aſſigned the Treſpaſs before the Commencement of the new Leaſe, and yet the Defendant has not given her any Colour, for the new Leaſe which was not then commenced is no Colour to her, and therefore they had no Cauſe to argue the Matter in Law which they had argued. For which three Cauſes the Plaintiff ought to recover for the Inſufficiency of the Bar.

p Co. Litt. 45. b. Watſ. Compl. Incumb. 489. 3 Bac. Abr. 392.

To which it was anſwered by the Lord *Dyer*, that for any thing ſhewn in the Record it might be that the Biſhop was alive. And if he was not, a Leaſe made by him who has the [p] Fee ſimple is not determined by his Death, as a Leaſe of Tenant [q] for Life is, but it is only voidable, and until it be avoided it is good, for which reaſon it ſhall be intended to continue until the Avoidance be ſhewn. As to the ſecond Point, it is pleaded in Fact that Sir *James* was poſſeſſed of both the Eſtates at the Time of drowning himſelf. And if the Plea and the Office, which finds both the Leaſes, be put together, it will appear manifeſtly to the Court that he was poſſeſſed of them at the Time of drowning himſelf. As to the third Point, he ſaid that if the Plaintiff's Leaſe was not commenced at the Time of the Treſpaſs ſuppoſed, from thence it follows that ſhe had no Title, and was not able to puniſh this or any other Treſpaſs. And tho' Colour is not given by the Defendant, yet if it appears to the Court [r] that the Plaintiff has no Title, it would be hard that ſhe ſhould have Judgment. And at laſt, notwithſtanding the ſaid three Exceptions, Judgment was given the ſame Term, as follows.

q See Ante 30 (l) and the Books there cited.

r See like Matter Ante 66 (k). (l) (m). and (n).

The reſt of the Record.

At which Day here came as well the aforeſaid *Margaret* as the aforeſaid *Cyriack* by their Attornies aforeſaid. And thereupon the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it ſeems to the ſame Juſtices here that the aforeſaid Plea of the aforeſaid *Cyriack* above in Bar pleaded is ſufficient in Law to preclude the aforeſaid *Margaret* from having her Action aforeſaid againſt the aforeſaid *Cyriack*, as the aforeſaid *Cyriack* has above alledged. Therefore it is conſidered, that the aforeſaid *Margaret* take nothing by her Writ aforeſaid, but be in Mercy for her falſe Claim. And the aforeſaid *Cyriack* may go thereof without Day, *&c.*

Judgment.

A brief

A brief Report of a Judgment upon Demurrer, and of the Arguments therein, given by the Juſtices of the King's Bench, *in* Michaelmas *Term in the* fourth *and* fifth *Years of the Reign of Queen* Elizabeth, *upon a Writ of* Error *brought by* George Fiſh *Brother and Heir of* Edward Fiſh *againſt* Edward Broket. *And the Record appears among the Rolls in* Eaſter *Term* 4 & 5 Philip *and* Mary. Rot. 168.

IT appears by the ſaid Record, that *George Fiſh* Brother and Heir of *Edward Fiſh* brought a Writ of Error in the King's Bench returnable in *Eaſter* Term 4 & 5 *Philip* and *Mary*, upon a Fine levied on the Octave of *St. Michael* 2 & 3 *Philip* and *Mary* between the ſaid *Edward Broket* Complainant, and the ſaid *Edward Fiſh* Deforceant, of the Tenements in *Welwin Codicote* and *Parva Ayot* in the County of *Hertford* upon an Acknowledgment of Right, as that which the ſaid *Edward Broket* had of the Gift of the ſaid *Edward Fiſh:* Upon which Fine Proclamations were made, *viz.* four in the ſame Term, and four in every other of the three Terms then next following, and the 13th Proclamation was contained to be made on the *ſeventh* Day of *June* in the Term of the Holy *Trinity* 2 & 3 *Philip* and *Mary*. And after the Removal of the Record, and the Proclamations certified, the Writ was diſcontinued, and the Plaintiff ſued another Writ of Error of the ſame Record, *quod coram vobis reſidet*, in *Eaſter* Term 3 *Elizabeth*, and upon this the Plaintiff aſſigned ſome Errors, which were not of any Effect, nor doubtful, but the moſt effectual Error which he aſſigned was as follows. *Alſo in the Record and Proceſs aforeſaid, it is further erred, in this, to wit, that the aforeſaid Term of the Holy Trinity in the aboveſaid ſecond and third Years of the Reign of the aforeſaid late King and Queen Philip and Mary, (in which Term the aforeſaid thirteenth Proclamation was made) begun on Friday the fifth Day of June in the ſame ſecond and third Years, and that the ſeventh Day of the ſame Month of June (on which Day the thirteenth Proclamation in the Record aforeſaid ſpecified was made) was the Lord's Day, and that the Lord's Day by the common Law of this Realm of England was not then, nor ever was, a Law Day, nor a Day lawful for Fines to be proclaimed, or Pleas in the Bench aforeſaid to be levied, proclaimed, done, or holden, and this he is ready to verify; wherefore for the ſaid Error, and others which be in the Record aforeſaid, the ſame George prays that the Fine aforeſaid, with the Proclamations aforeſaid not made according to the Form of the Statute in ſuch Caſe lately made and provided, may be reverſed, and holden for none.* And upon this he prayed a *Scire facias* againſt the ſaid *Edward Broket*, and had it, and thereupon the ſaid *Edward Broket* came and ſaid *in nullo eſt erratum.*

Eaſter Term 4 & 5 *P. & M.* If any of the Proclamations upon a Fine according to the Statute of 4 *H.* 7. be made on a Sunday, it makes all the Proclamations erroneous, but it does not make the Fine void, which remains a Diſcontinuance, as a Fine at Common Law. S. C. Dy. 181. b. Like Caſe Ibid. 216. pl. 54. S. P. Palm. 259. 1 Finch 6. 2 Finch 7. Wing. Max. reg. 5. pl. 3. 3 Danv. Abr. 63. pl. 7.

And this Matter was argued in the ſaid Term of *St. Michael* by *Loveleſs* on the Behalf of *Fiſh*, and by *Jefferies* on the Behalf of *Broket*. And the Point argued was, whether the whole Fine ſhould be reverſed for the Error in the 13th Proclamation. For it was granted by all, [a] that all the Proclamations were thereby erroneous and reverſible, becauſe the Juſtices do not nor ought to ſit on a *Sunday*, but that Day is, for the Solemnity of it, exempt from ſuch Buſineſs by the common Law, to the Intent that all Men may apply themſelves to Prayer, and to honour God on that Day. And foraſmuch as it appears to the Court that this 13th Proclamation, contained in the Record to be made on a *Sunday*, could not be made, nor was made on that Day, becauſe the Court did not ſit, or if it was then made it was void; from thence it follows, that the Proclamations were not made according to the Effect of the Statute of 4 *H.* 7. *cap.* 24. which ordains that the Fine ſhall be ſolemnly proclaimed in the ſame Court the ſame Term in which it is engroſſed, and three Terms next following the ſame Engroſſment, at four ſeveral Days in each Term, and that the Proclamations being ſo had and made, the Fine ſhall be final, and ſhall conclude as well Privies as Strangers to it. And then if four Proclamations are not made in each of the four Terms, the Fine ſhall not conclude Privies or Strangers by the Act, but it reſts as it was at the common Law; and becauſe the 13th Proclamation is here wanting, or was ill made, whichever it be, there are only three Proclamations made that Term according to the Statute, and in all but 15. which are of no more Effect than if none at all had been made; and ſo it was held and admitted by all. But as to the Point in Queſtion, *Loveleſs* argued that this Defect in the 13th Proclamation made the whole Fine erroneous. For before this Statute a Man might levy a Fine without theſe Proclamations; and ſo he may ſince this Statute, for in the End of it it ſays, *every Perſon ſhall be at Liberty to levy a Fine according to the Form ordained by this Act, or according to the Manner and Form aforetime uſed.* And then when the Party has Election to levy a Fine according to the common Law, or according to the Act, if he intends to levy it according to the Act, and he meddles with the Act, and does not purſue it in all Points, but meddles with Part of it, and omits other Part requiſite, thereby the whole ſhall be erroneous. And therefore here, when there is an Order and Form of a Fine at common Law, and the Act has added Proclamations to it, now theſe Proclamations are become Part of the Fine, and they and the Fine are one entire Thing, and one ſame Record, and not ſeveral, and then if Part of that which is entire is faulty, the whole is faulty. And he put ſeveral Caſes to enforce this. And ſo it ſeemed to him that by the Conjunction of the Proclamations to the Fine, they and the Fine together are by the Operation of the Act, one entire Thing, and that by reaſon of the Defect in the 13th Proclamation, not only the Proclamations, but alſo the whole Fine is erroneous.

Mich. Term. 4 & 5 *Eliz.* For the Plaintiff. [a] Weſt's Symb. pt. 2. fo. 55. a. See the Books above cited.

The Statute of 4 *H.* 7. *cap.* 24. gives Election to levy a Fine either at the Common Law without Proclamation, or according to that Statute with Proclamation, S. P. Palm. 255, 256. Weſt's Symb. pt. 2. fo. 5. b.

On the contrary *Jefferies* and all the Juſtices argued, that the Act does not ordain a new Form of the Fine, but the ancient Form of Fines continues, ſo that the Fine remains as it was before the Act in Form and Subſtance. And when the Statute gives to the Party, if he pleaſes, Proclamations upon the Fine, this is another Thing ordained for another Purpoſe, *viz.* to give notice to Strangers; ſo that it is quite a different Matter, and the Fine and Proclamations are not become one entire Thing, or one ſame Record. For the Fine is by itſelf one Matter of Record perfect

E contra for the Defendant. The Statute of 4 *H.* 7. *cap.* 24. does not alter the Form of the Fine, but the ancient Form continues, S. P. Vin. Abr. tit. Fine Z. 3. pl. 5.

The Fine and the Proclamations upon it are not one entire Matter of Record, but ſeveral, S.P. Palm. 255. Vin. Abr. tit. Fine F. b. pl. 3. Weſt's Symb. pt. 2. fo. 71. b. Therefore Error in the Proclamations is not Error in the Fine.

perfect and full before the Proclamations made, and it binds the Parties and the Right of the Land between them before the Proclamations, and the Proclamations which are made afterwards are another Matter of Record, which have another Entry in the Record after the Fine. Wherefore although the Proclamations are grounded upon the Fine, and are purſuant to it, yet they are ſeveral from the Fine, and they and the Fine are ſeveral Matters of Record, for which reaſon Error in them is not Error in the Fine. As in Treſpaſs, if the Plaintiff has Judgment to recover, and afterwards has a *Capias ad ſatisfaciendum*, and outlaws the Defendant upon it, if there is Error in the Outlawry, and a Writ of Error is brought upon it, this ſhall not reverſe the firſt Judgment; for although the *Capias ad ſatisfaciendum* is founded upon the firſt Judgment, yet the Judgment of Outlawry thereupon, and the firſt Judgment to recover the Damages, are ſeveral and ſeveral Matters of Record. [a] But Error in the firſt Judgment ſhall reverſe both, though not *e contra*, *cauſa qua ſupra*. So in an Action of Account, if a Man be adjudged to account, and afterwards Proceſs goes out againſt him to account, if there be Error therein, this ſhall not reverſe the firſt Judgment, for they are ſeveral Matters of Record, and the one comes after the other. [b] So here the Fine was good before the Proclamations, and the Proclamations which are another Thing, being ill and erroneouſly made, ſhall not deſtroy the Force of the Fine which was good before the Proclamations. And many other good Caſes were put upon this Head. And afterwards the Juſtices gave Judgment that the Proclamations ſhould be reverſed, and that the Fine ſhould ſtand in Force. Which Judgment here follows, *viz.*

But Error in the Fine makes the Proclamations void. S.P. Weſt's Symb. pt. 2. fo. 71. b.

[a] H. 6. Ed. 4. 9, 10. Bro. Error 193. 8 Co. 143. a. 2 Bulſt. 175. Cro. J. 646.

[b] Vin. Abr. tit. Error E. b. pl. 14.

The Judgment.

Whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Queen here more fully underſtood, and mature deliberation being thereupon had, for that it evidently enough appears to the Court of the Lady the Queen here, upon diligent Search therein by the ſame Court made, that the aforeſaid *ſeventh* Day of *June*, on which the aforeſaid 13th Proclamation is ſuppoſed in Form aforeſaid to be made, was the Lord's Day, and not a Law Day, by Reaſon whereof all the Proclamations aforeſaid upon the Fine aforeſaid in Form aforeſaid proclaimed and made are erroneous, void, and of no Effect in Law, it is conſidered by the ſame Court that all the Proclamations of the Fine aforeſaid in Form aforeſaid made for the Error aforeſaid be reverſed, annulled, and wholly for none had, and that the aforeſaid *George Fiſh* be reſtored to all that he has loſt by reaſon of the Proclamations aforeſaid, *&c.* And further by the ſame Court of the Lady the Queen here it is conſidered, that the Fine aforeſaid be adjudged and affirmed ſufficiently good and valid in Law, according to the Form of the ſaid Fine, as a Fine levied without Proclamations, the ſaid Cauſes or Matters above aſſigned for Errors in any wiſe notwithſtanding.

Nota bene by the Reporter.

If any of the Proclamations upon a Fine be entered to be made upon a Sunday, they may be avoided by Plea as well as by Writ of Error. S. P. 3 Danv. Abr. 2. pl. 6. Vin. Abr. tit. Error A. pl. 9. Weſt. Symb. pt. 2. fo. 71. b.

In this Caſe it ſeemed to many that the ſaid George Fiſh *did not need to have brought a Writ of Error to reverſe the Proclamations, for that any one might avoid them by Plea well enough, without any Reverſal by Error. For the Statute makes the Fine to be final, and to conclude as well Privies as Strangers to it, if it be proclaimed at four ſeveral Days in the four ſeveral Terms. And if this be not done, there is no Proviſion or Order in the Statute, but the Proviſion of the Statute is only where all this is done, wherefore it follows from hence that every one againſt whom it is objected ſhall ſay that the Proclamations were not made according to the Statute. And ſo it was adjudged accordingly, as it is hereafter ſhewn, in the like Caſe* [c] *between the ſame Parties: For theſe ſame Tenements were entailed by* Thomas Fiſh *to the ſaid* Edward Fiſh *and to* George Fiſh, *and after the Death of the ſaid* Edward Fiſh, *who died without Iſſue*, viz. *the 12th Day of* May *in the* 4 & 5 Philip *and* Mary, *the ſaid* George Fiſh, *as Heir to the ſaid Tail, purchaſed a* Formedon *in Deſcender againſt the ſaid* Edward Broket *for the ſaid Tenements, which Writ was returnable and returned on the Morrow of the Holy* Trinity *then next enſuing, and afterwards the ſaid* Edward Broket *appeared, and pleaded in Bar another Fine with Proclamations levied by the ſaid* Edward Fiſh *to the ſaid* Edward Broket *of the ſame Tenements on the Morrow of the Holy* Trinity *in the* 2 & 3. Philip *and* Mary; *and the Proclamations in the firſt three Terms*, viz. *in the Terms of the Holy* Trinity, *(in which it was levied) and of* St. Michael, *and of* St. Hillary, *were well and duly made, but he pleaded the laſt four Proclamations to be made, as follows, viz.* the thirteenth Proclamation was made the 22d Day of *June* in the Term of *Eaſter* in the third and fourth Years of the aforeſaid late King and Queen, the fourteenth Proclamation was made the 25th Day of *June* in the ſame Term, the fifteenth Proclamation the 28th Day of *June* in the ſame Term, the ſixteenth Proclamation the 31ſt Day of *June* in the ſame Term. *Againſt which* George Fiſh *replied and ſaid*, that the Term of *Eaſter* in the third and fourth Years aboveſaid, in which the aforeſaid thirteenth, fourteenth, fifteenth, and ſixteenth Proclamations of the Fine aforeſaid are ſuppoſed to be made, begun the fifth Day of *May*, and ended the laſt Day of the ſame Month of *May*, and this he is ready to verify, *&c. Whereupon* Edward Broket *demurred in Judgment. And upon this Demurrer it was adjudged that* George *ſhould recover. And the Record thereof is among the Records of*

Roll *So that* George Fiſh *by Plea, without Writ of Error, avoided the Proclamations unduly made, and ſo it ſeemed to many that he might have done here, and that he was not driven to his Writ of Error. And it ſeems that as the Avoidance there was, becauſe the Proclamations were not made, ſo is it in the firſt Caſe here; for although the Record ſays that the 13th Proclamation was made on the ſeventh Day of* June, *which was* Sunday, *yet the Point of the Error therein ſeems to be in the non Feaſance, rather than in the miſ-Feaſance of the Proclamation, for that which is ſaid by the Record to be made upon a* Sunday *cannot be ſaid to be made then, inaſmuch as the Court did not ſit, and it cannot be done but in Court. And ſo the Juſtices took it. So*

[c] See the Caſe Dy. 181. b. 2 Formul Placit. 155.

that

that that which is reported to be made the ſeventh Day of June *ſhall be taken for a Falſity, and that it was not really made, and ſo like to the other Caſe. But although* Fiſh *might have avoided it by Plea, nevertheleſs it was taken that a Writ of Error would lie well enough. But* Fiſh's *Deſign in bringing the Writ of Error was to reverſe and annul the whole Fine, and to avoid the Diſcontinuance, and to be reſtored to the Land, and not only to avoid the Proclamations; but that he could not do, as it is ſhewn before.*

A Report of the Reſolution of the Court of Wards *touching the Wardſhip of the Body of Sir* John Ratcliff *Knight, and of the Decree made thereupon with the Aſſent of the Counſel and Aſſiſtants of the ſaid Court, in* Eaſter *Term in the* ſixth *Year of the Reign of Queen* Elizabeth.

Eaſter Term 6 Eliz.

Where the Heir apparent of a Tenant by Knight's Service is made a Knight within Age in the Life of the Anceſtor, and the Anceſtor dies, the Heir being within Age, he ſhall not be in Ward, nor pay Value for his Marriage, S. P. reſolved 6Co.74. a.b. 8 Co. 173.a. 2 Inſt. 12. Moor 153. Ley's Treat of Wards, &c. 10. Sed Contra Bro. Gard 42, 72. Livery 22. B.N.C § 379. fo. 82. b. Crompt. J. C. 117. b.

IT was found by Office in the County of *Somerſet* the laſt Day of *April* 4 & 5. *Philip* and *Mary*, after the Death of *Mary* Counteſs of *Arundel* late Wife of *Robert* Earl of *Suſſex*, by Force of a Writ of *diem clauſit extremum*, after the Death of the ſaid Counteſs, directed to the Eſcheator of the ſaid County of *Somerſet*, that King *Henry* 8. by his Letters-patent dated in the 33d Year of his Reign, gave to the ſaid *Robert* Earl of *Suſſex*, and to the ſaid *Mary* then his Wife, the Reverſion of the Site of the Abbey of *Cleve*, which was leaſed for Years, and alſo the Manor of *Cleve*, and divers Tenements, to have to them and to the Heirs Males of the Body of the ſaid *Robert* on the Body of the ſaid Counteſs begotten, the Remainder over to the Heirs Males of the Body of the ſaid *Robert* begotten, by force of which they entered, and were ſeized accordingly; and that the ſaid *Robert* died, and afterwards the ſaid Counteſs the 20th Day of *October* laſt paſt before the taking of the Office died, after whoſe Death the ſaid Reverſion, and the ſaid Manor and other the Premiſſes deſcended to the ſaid Sir *John Ratcliff* Knight, as Son and Heir Male of the Body of the ſaid *Robert* Earl of *Suſſex* begotten on the Body of the ſaid *Mary*, which Sir *John Ratcliff* Knight was of the Age of 18 Years the 30th Day of *December* laſt paſt before the finding of the ſaid Office; and that the Premiſſes were held of the ſaid King and Queen *in capite* by the ſixth Part of a Knight's-Fee, and this Office was returned into the Chancery, and certified into the Court of Wards. And when the ſaid Sir *John Ratcliff* came of full Age, he prayed his Livery. And the Court of Wards required of him, for the Queen, the Value of his Marriage, and demanded of him what he could ſay in diſcharge of it. And he, by his Counſel, ſaid that before the Title of Wardſhip accrued, *viz.* in the Time of King *Edward* 6. he was made a Knight, and is found a Knight by the ſaid Office, by which Degree he was enabled to do Knight's-Service. And Wardſhip is due to the Lord in reſpect of the Imbecillity of the Perſon to do Knight's-Service; [a] for when the Lord gives Land to his Tenant to do Knight's-Service as often as there is Occaſion, and the Tenant dies, his Iſſue being within Age, and ſo unable to perform Knight's-Service, it is reaſonable that the Lord ſhould have the Wardſhip of the Land, that with the Profits thereof he may find one to do the Service, [b] and the Wardſhip of the Body, that he may train him up, and inſtruct him how to do ſuch Service when he is able. But when he is made a Knight by the King, who is the chief Cap-

[a] Spelm. Gloſſ. ad V. *Werda.* Craig de Jure Feud. 284. Wright's Ten. 90. Smith's Commonw. 120. 228.

[b] Forteſc. de laud. leg. Angl. cap. 44, and Selden's Notes thereon. Smith's Commonw. 120. 229. Bac. Hiſt. Eng. Gov. 148, 149. Cowel's Inſt. 37. § 2. Co. Litt. 75. b. Wright's Ten. 92.

tain of all Chivalry, or by ſome other great Captain aſſigned by the King for that Purpoſe, he is thereby allowed and admitted [a] able to perform Knight's-Service, and then his Body ought not to be in Ward, becauſe his Imbecillity ceaſes, *et ceſſante cauſa, ceſſabit effectus.* And to enforce this Argument they cited the Statute of *Magna Charta cap.* 3. which ſpeaking of Knight's-Service has theſe Words in it, *viz. and after ſuch an Heir has been in Ward, when he comes to full Age, that is, to the Age of one and twenty Years, he ſhall have his Inheritance without Relief, and without Fine; ſo that if ſuch an Heir being within Age be made a Knight, yet nevertheleſs his Land ſhall remain in the Cuſtody of his Lord unto the Term aforeſaid.* From which Act it appears, that by the [b] common Law if the Ward was made a Knight, during his Nonage, he ſhould thereby be out of Ward both for Body and Land, and for the detaining of the Land to the Lord's Advantage the Act was made. And if the Degree of a Knight ſhould make him who was in Ward to be out of Ward, by the like Reaſon [c] if he is made a Knight in the Life of his Anceſtor, his Perſon ſhall never be in Ward, and if it ſhall never be in Ward, then no Marriage nor Value for the ſame ſhall be due to the Guardian. For which Reaſons he prayed to be diſcharged of the Value of his Marriage, and to have his Livery. And hereupon Deliberation was taken, for the Caſe had come in Queſtion many Times before, as in the Caſe of the Viſcount *Mountague* and others, but they had all [d] compounded with the King or Queen for the Time being, as it was ſaid. But Sir *John Ratcliff* would not compound, but required Law and Juſtice. For which Reaſon the Court took great Deliberation, and the rather, becauſe the Rule of it would be a Precedent to others who were in like Caſe; and it depended three Years before they came to a full Reſolution, and at laſt this *Eaſter* Term in the *ſixth* Year of the Reign of Queen *Elizabeth*, they adjudged that he ought not to be in Ward for his Body, and that the Value of the Marriage was not due to the Queen. And upon this they made their Decree as follows, *viz. Eaſter* Term in the *ſixth* Year of the Lady Queen *Elizabeth*, in the Book of Decrees of the Court of Wards and Liveries.

[a] 6 Co. 74. a. 2 Inſt. 12. Hob. 46. Cowel's Inſt. 37, § 1.

[b] 6 Co. 74. a. Cro. J. 156.

[c] See the Books cited Ante 267 at the Head of the Caſe.

[d] So it was done in Sir *Anthony Brown*'s Caſe Bro. Gard. 42, 72. B. N. C. 379. fo. 82. b.

The Decree. Where the Maſter and Counſel of the Queen's Majeſty's Court of Wards and Liveries have heretofore ſtaied Sir *John Ratcliff* Knight and Heir of the Body of the Right Honourable *Robert* late Earl of *Suſſex*, and of the Lady *Mary* his Wife deceaſed, to proſecute his Livery forth of the Queen's Majeſty's Hands, although he were of full Age the 29th Day of *December* in the *third* Year of the Reign of our ſovereign Lady the Queen's Majeſty that now is, until her Highneſs were anſwered of the Value of Marriage which ſhe claimed to have of the ſaid Sir *John Ratcliff*, of which Value of Marriage the ſaid Sir *John Ratcliff* and his Counſel learned have pretended to be acquitted and diſcharged, for that the ſaid Sir *John Ratcliff* was made a Knight by the late King *Edward* the *Sixth*, before his Lands and Tenements deſcended unto him; and thereupon the ſaid Maſter and Counſel, after long Deliberation thereupon had, and full Reſolution thereupon made by the Opinions of Sir *James Dyer* Knight Chief Juſtice of the Common Bench, and of Sir *Edward Saunders* Knight Chief Baron of the Exchequer, Aſſiſtants unto the ſaid Court, have determined, decreed, and ordered, that the ſaid Sir *John Ratcliff* is and ought to be clearly acquitted againſt our ſaid ſovereign Lady the Queen for and concerning the Value of his Marriage, by Reaſon he was made a Knight, as is aforeſaid, and thereby out of Ward touching his Body, and that the ſaid Sir *John Ratcliff* ſhall proceed with his ſaid Livery, without yielding, making, or paying at any Time any Fine or Sum of Money for his ſaid Marriage, or for the Wardſhip of his Body. Provided always that this Decree ſhall not in any wiſe extend to the mean Rates of this Land.

A brief

A brief Report of a Caſe argued and adjudged by the Juſtices of the Common Bench *in* Eaſter *Term in the* ſixth *Year of the Reign of Queen* Elizabeth, *upon a Demurrer in* Replevin *brought by* William Say *Plaintiff againſt* John Smith *and* Thomas Fuller *Defendants. And the Record is entered among the Records of* Michaelmas *Term* 3 & 4 Elizabeth. Rot. 1530. *and is as follows,*

Mich. Term 3 & 4 *Eliz. Rot* 1530. *Midd.* Declaration. Same Precedent Raſt. Entr. 561. b. pl. 1.

John Smith Gentleman and *Thomas Fuller* were ſummoned to anſwer *William Say* Gentleman of a Plea, wherefore they took the Cattle of the ſaid *William*, and them unjuſtly detained againſt Gages and Pledges, &c. And whereupon the ſame *William* by *Thomas Carpenter* his Attorney ſays that the aforeſaid *John* and *Thomas* the 19th Day of *November* in the *third* Year of the Reign of the Lady the Queen now, at *Ikenham* in a certain † Place called *Marl-Crofts*, took the Cattle, viz. nine Cows of the ſaid *William*, and them unjuſtly detained againſt Gages and Pledges until, &c. Wherefore he ſays that he is damnified and has Damage to the Value of 20 *l.* and therefore he brings the Suit, &c.

† *Note*, H. 22. Ed. 4. 51. a. *per Brian et Starkey*, in Replevin the particular Place where the taking was muſt of Neceſſity be aſſigned in the Count as well as the Town, and ſo was it adjudged on Demurrer Hob. 16 *Read v. Hawk.* And note the Caſes there cited in the Margin. And ſee the Reaſon hereof at large Gilb. Law of Replev. 165, 166.

And the aforeſaid *John Smith* and *Thomas Fuller* by *Robert Chatterton* their Attorney come and defend the Force and Injury * when, &c. and as Bailiffs of *Edmund Smith* well acknowledge the taking of the Cattle aforeſaid in the aforeſaid Place where, &c. and juſtly, &c. becauſe they ſay that the ſame Place called *Marl-Crofts*, in which the taking of the Cattle aforeſaid is ſuppoſed to be done, is, and at the aforeſaid Time of the taking of the Cattle aforeſaid ſuppoſed to be done was, 20 Acres of Land with the Appurtenances in *Ikenham* aforeſaid, which are, and at the aforeſaid Time when, &c. were, the § Freehold of the aforeſaid *Edmund:* And becauſe the Cattle aforeſaid were at the aforeſaid Time when, &c. in the aforeſaid Place where, &c. the Graſs in the ſame then growing eating up, and doing Damage there, the ſame *John* and *Thomas*, as Bailiffs of the aforeſaid *Edmund Smith* well acknowledge the taking of the Cattle aforeſaid in the aforeſaid Place where, &c. and juſtly, &c. Damage there ſo doing, &c.

* Note here full Defence made in Replevin, and ſo is the Rule by Bro. Defence 28.

§ Note here Avowry for Damage-feaſant in the Place which is alledged to be his Freehold, and this good, as well as if he had ſaid that he was ſeized in Fee of the Place where, S. P. 4 Ed. 6. Bro. Avowry 122. B. N. C. § 399.

And the aforeſaid *William Say* ſays, that the aforeſaid *John Smith* and *Thomas Fuller*, as Bailiffs of the aforeſaid *Edmund Smith*, for the Reaſon before alledged ought not to acknowledge as juſt the taking of the Cattle aforeſaid in the aforeſaid Place where, &c. becauſe he ſays that long before the aforeſaid Time of the taking the Cattle aforeſaid, one *William Norton* Gentleman was ſeized in his Demeſn as of Fee of and in the aforeſaid 20 Acres of Land in which, &c. and them held of *Robert Shoreditch* Gentleman, as of his Manor of *Ikenham* in the County aforeſaid, by Fealty only for all Services and Dues to be claimed in the ſame. And being ſo ſeized thereof, before the aforeſaid Time of the taking the Cattle aforeſaid, viz. the 20th Day of *January* in the *fourth* Year of the Reign of Lord *Henry* the *eighth* late King of *England* the Father of the Lady the Queen now, at *Riſlip* in the aforeſaid County of *Middleſex*, the aforeſaid *William Norton* by a certain Indenture made between the ſaid *William Norton* of the one Part, and one *John Kirton* of the ſame Town and County Tilemaker of the other Part, (one Part whereof, ſealed with the Seal of the ſame *William Norton*, the ſame *William Say* here produces in Court, the Date whereof is the ſame 20th Day of *January* in the Year aboveſaid) granted, demiſed, and to Farm let the aforeſaid 20 Acres of Land in which, &c. amongſt other Things to the aforeſaid *John Kirton*, by the Name of one Cottage, and one Croft called the *Tyle-Houſe-Croft* to the ſame adjoining, with a ſmall Meadow to the ſame appertaining, and one Meadow called *Aldermead*, four Crofts called *Marl-Crofts*, one Grove called *Prowdes Grove*, certain Parcels of Meadow containing by Eſtimation eleven Acres, twenty and five Acres lying in *Wittingrowfield*, *Middlefield*, and *Roxburnfield*, and with the *Hedgerows* of the Woods, Timber, and Under-woods growing or being upon the aforeſaid Lands, or within any Parcel thereof in the Pariſhes of *Riſlip* and *Ikenham* aforeſaid, to have and to hold the aforeſaid Cottage and other the Premiſſes aforeſaid with their Appurtenances whereof, &c. to the aforeſaid *John Kirton* his Heirs and Aſſigns from the Feaſt of *St. Michael* the Archangel then laſt paſt next before the Date of the Indenture aforeſaid, unto the End and Term of ten Years from thence next and immediately following, fully to be compleat. And the aforeſaid *John* granted by the ſame Indenture to pay at the End of the ſaid Term of ten Years, to the aforeſaid *William Norton* and one *Joan* then his Wife, their Heirs and Aſſigns, ten thouſand Tiles, or the Value thereof in Money, by the Name of a Groſſome. And further then and there it was agreed and granted between the aforeſaid *William Norton* and *John Kirton* by the aforeſaid Indenture, that if the aforeſaid *John Kirton*, his Heirs or Aſſigns, ſhould pay or cauſe to be paid to the aforeſaid *William* or *Joan*, their Heirs or Aſſigns, the ſaid ten thouſand Tiles, or the Value thereof in Money, at the End and Term of every ten Years from thence next following, that then the aforeſaid *William Norton* granted and promiſed for himſelf, his Heirs and Aſſigns, by the aforeſaid Indenture, that the aforeſaid *John Kirton*, his Heirs or Aſſigns, ſhould have a perpetual Demiſe, Farm, and Grant of the Premiſſes, and of every Parcel thereof with the Appurtenances, from ten Years to ten Years continually and enſuing out of the Memory of Man, paying therefore yearly the Rent of 4 *l.* 16 *s.* 8 *d.* and the aforeſaid Tiles in Manner and Form above ſpecified, as in the ſame Indenture amongſt other Things more fully appears. By virtue of which Demiſe the aforeſaid *John Kirton* was of the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things poſſeſſed, during all the aforeſaid Term of ten Years to him before granted. And the ſame *William Say* in Fact ſays, that the aforeſaid Term of ten Years ended and expired long before the aforeſaid Time when, viz. on the Feaſt of *St. Michael* the Archangel in the 14th Year of the Reign of the aforeſaid late King

Henry the *eighth*, and that the aforeſaid *John Kirton*, at the End of the ſame Term, viz. on the Morrow of *St. Michael* the Archangel at *Riſlip* aforeſaid, paid to the aforeſaid *William Norton* and *Joan* ten thouſand Tiles by the Name of a Groſſome; whereby the aforeſaid *John Kirton*, by virtue of the Demiſe aforeſaid, was of the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things poſſeſſed for another Term of other ten Years from thence next and immediately following. And the ſame *William Say* in Fact ſays, that the aforeſaid other Term of ten Years ended and expired before the aforeſaid Time when, &c. viz. on the Feaſt of *St. Michael* the Archangel in the 24th Year of the Reign of the aforeſaid late King *Henry* the *eighth*, and that the aforeſaid *John Kirton*, at the End of the ſame Term, viz. on the Morrow of the ſame Feaſt of *St. Michael* the Archangel at *Riſlip* aforeſaid, paid to the aforeſaid *William Norton* and *Joan* ten thouſand Tiles by the Name of a Groſſome; whereby the aforeſaid *John Kirton*, by virtue of the Demiſe aforeſaid, was of the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things poſſeſſed for another Term of ten Years from thence next and immediately following. And the ſame *William Say* in Fact ſays, that the aforeſaid other Term of other ten Years ended and expired on the Feaſt of *St. Michael* the Archangel in the 34th Year of the Reign of the aforeſaid late King the *Henry* the *eighth*, before which ſaid Feaſt, and before the aforeſaid Time of the taking the Cattle aforeſaid, viz. the 12th Day of *Auguſt*, in the 33d Year of the Reign of the aforeſaid late King, the aforeſaid *William Norton*, being in Form aforeſaid ſeized of the Reverſion of the aforeſaid 20 Acres of Land with the Appurtenances, at *Riſlip* aforeſaid, made his laſt Will and Teſtament in Writing, and by the ſame among other Things willed and deviſed the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things to the aforeſaid *Edmund Smith*, to have to him and to his Heirs for ever. And afterwards the aforeſaid *William Norton* there died, and the aforeſaid *Joan* ſurvived him. After the Death of which ſaid *William Norton*, the aforeſaid *Edmund Smith* was of the Reverſion of the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. ſeized in his Demeſn as of Fee and Right, by virtue of the Deviſe aforeſaid; and the ſaid *Edmund Smith* being ſo ſeized thereof, the aforeſaid *John Kirton* at the End of the ſaid Term, viz. on the Morrow of the ſame Feaſt of *St. Michael* the Archangel in the 34th Year aboveſaid, at *Riſlip* aforeſaid, paid to the aforeſaid *Joan Norton* then Widow ten thouſand Tiles by the Name of a Groſſome; whereby the aforeſaid *John Kirton*, by virtue of the Demiſe aforeſaid, was of the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things poſſeſſed for another Term of ten Years from thence next and immediately following. And the ſame *William Say* in Fact ſays, that the aforeſaid other Term of other ten Years ended and expired before the aforeſaid Time when, &c. viz. on the Feaſt of *St. Michael* the Archangel in the *ſixth* Year of the Reign of Lord *Edward* late King of *England* the *ſixth* from the Conqueſt, and that the aforeſaid *John Kirton*, at the End of the ſaid Term, viz. on the Morrow of the ſame Feaſt of *St. Michael* in the *ſixth* Year aboveſaid, at *Riſlip* aforeſaid, paid to the aforeſaid *Joan Norton* Widow ten thouſand Tiles by the Name of a Groſſome, whereby the aforeſaid *John Kirton*, by virtue of the Demiſe aforeſaid, was of the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things poſſeſſed for another Term of other ten Years from thence next and immediately following. And the ſame *John Kirton* being ſo poſſeſſed thereof, before the aforeſaid Time of the taking the Cattle aforeſaid, viz. the 12th Day of *Auguſt* in the Year of our Lord 1558. at *Riſlip* aforeſaid, made his laſt Will and Teſtament in Writing, and by the ſame among other Things willed and deviſed his whole Eſtate, Term, and Intereſt, which he then had to come of and in the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things to one *John Kirton* his Son, and appointed and ordained the ſame *John Kirton* Executor of his ſame Teſtament. And afterwards the aforeſaid *John Kirton* the Father there died; after whoſe Death the aforeſaid *John Kirton* the Son, as Executor of the Teſtament aforeſaid, before the aforeſaid Time of the taking the Cattle aforeſaid, into the aforeſaid 20 Acres of Land with the Appurtenances entered, and was thereof poſſeſſed by virtue of the Demiſe and Deviſe aforeſaid. And the ſaid *John Kirton* the Son being ſo poſſeſſed thereof, the aforeſaid *Joan Norton* died, and afterwards and before the aforeſaid Time of the taking the Cattle aforeſaid, viz. the 29th Day of *Auguſt* in the *ſecond* Year of the Reign of the Lady the Queen now, the aforeſaid *John Kirton* the Son being ſo poſſeſſed thereof, at *Riſlip* aforeſaid, granted all his Eſtate, Intereſt, and Term of Years, which he the ſame *John Kirton* the Son, &c. then had to come of and in the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. among other Things to the aforeſaid *William Say*; by virtue of which ſaid Grant the ſame *William Say*, before the aforeſaid Time of the taking the Cattle aforeſaid, into the aforeſaid 20 Acres of Land with the Appurtenances in which, &c. entered, and was thereof poſſeſſed for the reſt of the ſame other Term of ten Years then to come, by virtue of the Demiſe and Grant aforeſaid. And the ſame *William* being ſo poſſeſſed thereof, put his Cattle aforeſaid into the aforeſaid Place where, &c. to eat up the Graſs then growing: Which ſaid Cattle were in the aforeſaid Place where, &c. the Graſs there then growing eating up, until the aforeſaid *John Smith* and *Thomas Fuller* the aforeſaid 19th Day of *November* in the aforeſaid *third* Year of the Reign of the Lady the Queen now, at *Ikenham* aforeſaid in the aforeſaid Place called *Marl-Croſts*, took the aforeſaid Cattle of the ſaid *William Say*, and them unjuſtly detained againſt Gages and Pledges until, &c. as he above complains againſt them. And this he is ready to verify, wherefore for that the aforeſaid *John Smith* and *Thomas Fuller* above acknowledge the taking of the Cattle aforeſaid in the aforeſaid Place called *Marl-Croſts* where,

&c. the ſame *William Say* prays Judgment and his Damages by Occaſion of the taking and unjuſt Detention of the Cattle aforeſaid to be adjudged to him, &c.

And the aforeſaid *John Smith* and *Thomas Fuller* not acknowledging any Thing by the aforeſaid *William Say* above pleaded to be true, for Plea ſay that the aforeſaid Plea of the aforeſaid *William Say* above pleaded in Bar of the Cognizance aforeſaid is inſufficient in Law to preclude the ſaid *John Smith* and *Thomas Fuller* from having their Cognizance aforeſaid; and that they have no Neceſſity, nor are by the Law of the Land bound to anſwer the ſaid Plea in Manner and Form aforeſaid pleaded. And this they are ready to verify, wherefore for Want of a ſufficient Plea in this Behalf the ſame *John Smith* and *Thomas Fuller* as before pray Judgment, and a Return of the Cattle aforeſaid together with Damages, &c. to be adjudged to them, &c. Defendants demur.

And the aforeſaid *William Say*, for that he has above alledged ſufficient Matter in Law to preclude the aforeſaid *John Smith* and *Thomas Fuller* from having their Cognizance aforeſaid, which he is ready to verify, which ſaid Matter the aforeſaid *John Smith* and *Thomas Fuller* do not deny, nor thereunto in anywiſe anſwer, but the ſaid Averment wholly refuſe to admit, as before prays Judgment and his Damages by Occaſion of the taking and unjuſt Detention of the ſaid Cattle to be adjudged to him, &c. And becauſe the Juſtices here, &c. will adviſe themſelves of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the Octave of *St. Hillary* to hear their Judgment thereon, becauſe the ſame Juſtices here thereof not yet, &c. Joinder in Demurrer.

It appears by the Record that *William Say* has ſued a Replevin againſt *John Smith* and *Thomas Fuller*, and declares that the Defendants the 19th Day of *November* in the 3d Year of the Reign of the preſent Queen at *Ikenham*, in a Place called *Marl-Crofts*, took his Cattle, viz. nine Cows. The Defendants ſay that the Place contains 20 Acres of Land, which are the Freehold of *Edmund Smith*, and they as Bailiffs to him acknowledge the taking for Damage-feaſant. The Plaintiff ſays, that before the taking *William Norton* was ſeized of the ſaid 20 Acres in his Demeſn as of Fee, and held them of one *Robert Shoreditch* as of his Manor of *Ikenham* by Fealty only. And he being ſo ſeized, the 20th Day of *January* in the 4th Year of King *Henry* 8. by an Indenture ſhewn forth leaſed the ſaid 20 Acres among other Things to one *John Kirton* for ten Years from the Feaſt of *St. Michael* then laſt paſt, fully to be compleat. And the ſaid *John Kirton* granted by the ſame Indenture to pay at the End of the ſaid Term of ten Years to the ſaid *William Norton* and to *Joan* his Wife their Heirs and Aſſigns ten thouſand Tiles, or the Value thereof in Money, in the Name of a Groſſome. And further it was agreed and granted between the ſaid *William Norton* and the ſaid *John Kirton* by the ſaid Indenture, that if the ſaid *John Kirton*, his Heirs or Aſſigns, ſhould pay to the ſaid *William* and *Joan*, or their Aſſigns, the ſaid ten thouſand Tiles, or the Value of them in Money, at the End and Term of every ten Years from thence next following, then the ſaid *William Norton* granted and promiſed for himſelf, his Heirs and Aſſigns, by the ſaid Indenture, that the ſaid *John Kirton*, his Heirs or Aſſigns ſhould have a perpetual Demiſe, Farm, and Grant of the Premiſſes from ten Years to ten Years continually and enſuing out of the Memory of Man, paying therefore yearly the Rent of 4 *l.* 16 *s.* 8 *d.* and the aforeſaid Tiles in Manner and Form above ſpecified; by Force of which the ſaid *John Kirton* was poſſeſſed of the ſaid 20 Acres. And he ſhews further, that at the End of the ſaid ten Years, viz. on the Morrow of *St Michael* in the 14th Year of King *Henry* 8. the ſame *John Kirton* paid to the ſaid *William Norton* and his Wife ten thouſand Tiles in the Name of a Groſſome, whereby the ſame *John Kirton* by virtue of the ſaid Leaſe was poſſeſſed of the ſaid 20 Acres for other ten Years thence enſuing, and he pleads alſo the like Payment at the End of thoſe ten Years, viz. on the Morrow of *St. Michael* in the 24th Year of King *Henry* 8. and he pleads the like Payment at the End of ten Years next following, viz. in the 34th Year of King *Henry* 8. made to the ſaid Wife, and he ſhews that the Huſband deviſed the Reverſion to the ſaid *Edmund Smith* in Fee, and died in the 33d Year of King *Henry* 8. and he pleads the like Payment made by the ſaid *John Kirton* to the ſaid Wife at the End of ten Years then next following, viz. on the Morrow of *St. Mithael* in the 6th Year of King *Edward* 6. whereby he was poſſeſſed for another Term of other ten Years then next enſuing. And he being ſo poſſeſſed, deviſed his Term to one *John Kirton* his Son and Executor, and died, which *John Kirton* the Son the 29th Day of *Auguſt* in the 2d Year of the preſent Queen granted his Term to the Plaintiff; by Virtue whereof the ſaid Plaintiff entered, and was poſſeſſed, and put in the ſaid Cattle, which were there until the Defendants took them. And upon this the Defendants have demurred in Judgment.

The CASE. *Eaſter Term* 6 *Eliz.* Leaſe for 10 Years by Indenture, wherein the Leſſor grants that if the Leſſee pay *at the End and Term of every* 10 *Years* 10,000 Tiles, that then he ſhall have a perpetual Demiſe of the Land *from ten Years to ten Years continually following, and out of the Memory of Man*, this is a good Leaſe for no more than 10 Years, for beyond that no other Term has any certain Commencement, continuance, or End. S. C. 3 Bac. Abr. 430, 431.

And it was argued by the Juſtices the 10th Day of *May* in *Eaſter* Term 6 *Elizabeth*. And I heard the Arguments of all the Juſtices except *Walſh*, the latter End of whoſe Argument I only heard. But they all argued to one Effect, and agreed that the Title of the Plaintiff was not good, and that the Defendants ſhould have a Return. And one Point was touched by *Anthony Brown* Juſtice beſides the Matter in Law, and that was, at what Time the ten thouſand Tiles ſhould be paid: For the Agreement was that they ſhould be paid *at the End of every ten Years*, and the Payment is alledged to be made on the Morrow after the Term ended, viz. on the Morrow of *St. Michael*. And it ſeemed to him to be well pleaded; for, he ſaid, the Payment ought to be at the End of every ten Years, and the firſt Leaſe was made for ten Years from the Feaſt of *St. Michael* the Archangel then laſt paſt, ſo that the Day of *St. Michael* was not parcel of the Leaſe, but the Leaſe commenced after the Day of *St. Michael*, viz. on the Morrow after it, from whence it follows, that the laſt Day of the ten Years was the Day of *St. Michael*. And when the Payment

ought

ought to be at the End of the ten Years, it cannot be upon the Day of *St. Michael*, for whilst the Day of *St. Michael* continues, the End of the Term is not come. So that on that Day it cannot be paid by the expreſs Words, then on the Morrow of *St. Michael* the Term of ten Years is ended, and not before, and inaſmuch as the End of it then firſt came, that was the Time to pay the Tiles. And therefore if he pay them that Day in convenient Time it is ſufficient, for the Law allows convenient Time for the doing of every Act; and here there muſt be Carriage of them, which requires Time to load and unload them. And if a Man gage Deliverance here, he ſhall be allowed Time to bring them in, if the Things require it. [a] So if a Man has a Leaſe in this County of Lands for the Life of *J. S.* who dies in the County of *York*, the Leſſee ſhall have convenient Time to avoid, having Regard to the Diſtance of the Place for his Notice, for there he cannot ſo haſtily avoid, as he might have done if *J. S.* had died in this County, for he could not have ſuch early Notice of his Death. So that reaſonable Time ought to be allowed in all Acts. And therefore here he might pay the Tiles on the Morrow of *St. Michael*, as it is pleaded, *quod Dyer* Chief Juſtice *conceſſit*.

[a] Ante 30 (k). *per Hales* J.

Then as to the principal Matter, [b] every Contract ſufficient to make a Leaſe for Years ought to have Certainty in three Limitations, viz. in the Commencement of the Term, in the Continuance of it, and in the End of it: So that all theſe ought to be known at the Commencement of the Leaſe, and Words in a Leaſe, which don't make this appear, are but babble, as *Brown* ſaid. And theſe three are in Effect but one Matter, ſhewing the Certainty of the Time for which the Leſſee ſhall have the Land, and if any of theſe fail, it is not a good Leaſe, for then there wants Certainty. And here in the principal Caſe there is none of theſe three Certainties for any Term beyond the firſt ten Years, for when the firſt ten Years are paſſed, there is a Condition here appointed, which ſhall be performed before any new Term ſhall commence, and before the Condition is performed there ſhall be no Leaſe, for ſuch is the Limitation of the Leſſor. And *Brown* ſaid, Words make the Plea, as *Littleton* ſays; and as the Leſſor hath limited them, ſo they ought to be performed. And he ſaid, there is a Diverſity between a Leaſe conditional, and a Condition to have a Leaſe, for a Leaſe conditional is good until the Condition is broken, and there the Leaſe goes before, and the Condition comes after; but in a Condition to have a Leaſe the Condition goes before, and the Leaſe comes after, and the Leaſe ſhall never be adjudged to be a Leaſe until the Condition is firſt performed. [c] As if I grant to you that if you will do ſuch a Thing, you ſhall have a Leaſe in ſuch particular Land of mine, there, he ſaid, the Condition precedes the Leaſe, as the Needle precedes the Thread, and as the Needle draws the Thread after it, ſo does the Condition the Leaſe. So if I ſay, if you will marry my Daughter before *Chriſtmas*, you ſhall have 100 *l.* there if you will claim this, you ought to ſurmiſe that you have married my Daughter before *Chriſtmas*. [d] So, he ſaid, in 7. *Ed.* 3. a Man made a Leaſe for 8 Years, rendering Rent 100 s. yearly, and if the Leſſee would hold the Land over the Term to him and to his Heirs for ever, that then he ſhould pay yearly 20 l. and the Leſſor brought an Action of Debt within the 8 Years for the 100 s. and it was adjudged maintainable, becauſe the Leſſee had but a Term in the Land, for there was a Condition preceding the Fee-ſimple, viz. if he would hold the Land over. So that the Act ſignifying his Election ought firſt to be ſhewn, before the Fee ſhall be ſhewn to be in him. And ſo the Lord *Dyer* ſaid that in the Caſe put by [e] *Littleton*, if a Man makes a Leaſe for five Years, upon Condition that if the Leſſee does ſuch an Act within the two firſt Years, he ſhall have the Fee, there he ſhall not have the Fee until the Act is done; and he ſaid that the Opinion of *Littleton* to the contrary was not Law. So here the firſt Term of ten Years is good without Queſtion, but the Term afterwards for other ten Years is limited to commence after the Performance of a Condition, ſo that until the Condition is performed the Term cannot commence. And then if the Condition ought firſt to be performed, it is firſt to be conſidered whether or no it is poſſible to be performed, and if it is now performed. And *Brown* ſaid that it is not poſſible to be performed, becauſe the Words of it are, that he ſhall have the Leaſe if he pay the Tiles or the Value of them in Money *at the End of every ten Years from thence next following*. So that *every* ten Years which ſhall next follow ought to precede the Payment, and the Payment the Leaſe. And if the next ten Years be paſſed, he cannot pay the Tiles or the Value of them, for the Payment ought to be *at the End of every ten Years*. And other ten Years follow the firſt ten Years, and other ten Years follow the ſecond ten Years, and other ten Years follow the third ten Years, and ſo ten Years follow ten Years until all ten Years are paſſed, which is not until the End of the World is come, and by the Words all ten Years ought to precede the Payment, for the Words are, *at the End of every ten Years*. So that until all ten Years are paſſed, *the End of every ten Years next following* the Date of the ſaid Indenture is not paſſed; and all ten Years are not paſſed until the End of the World. Wherefore the End of the World ought to come before the Payment, and the Payment ought to come before the Leaſe, and ſo the Leaſe ſhall never commence. And *Dyer* ſaid, it appears by the Words of the Indenture recited, that the ſaid *John Kirton* granted to pay ten thouſand Tiles at the End of the firſt ten Years. And the new Agreement is, that if the ſaid *John Kirton*, his Heirs or Aſſigns, ſhould pay to the ſaid *William* and *Joan*, and to their Aſſigns, the *ſaid* ten thouſand Tiles, or the Value of them in Money at the End, &c. that then, &c. So that it ſhall be taken, that at the End of every ten Years *the ſame* Tiles which were firſt paid ought always to be paid. [f] And upon this he put the Caſe of an Annuity in 15. *H.* 7. where *W.* Prior of *F.* granted to the Plaintiff an annual Rent of 10 *l.* until he was advanced to a Benefice of

[b] S. P. Co. Litt. 45. b. 6 Co. 35. a. Carter 148. 1 Vent. 83. Bridgm. 21. 1 Finch 144.

[c] H. 14. H. 8. 22. b. *per Brudnel.*

[d] H. 7. Ed. 3. 10. pl. 22. Fitz. Debt 147. See Ante 26(q). and the other Books there cited.

[e] Littlet. § 350. Ante 27 (a).

[f] H. 15. H. 7. 1. Bro. Annuity 22. in fine. Condition 69, 214. Tender 15.

of holy Church by the aforeſaid *W.* and *W.* died; and there it ſeems that the Succeſſor of *W.* could not tender a Benefice to the Grantee, becauſe the Words of the Grant were, *until he was advanced by the aforeſaid* W. ſo that the Word *(aforeſaid)* is material. So here, the Word *(ſaid)* in the Clauſe of the ſaid ten thouſand Tiles is material. But he ſaid, if the Clauſe *(the ſaid ten thouſand Tiles)* ſhould be taken for *the like* ten thouſand Tiles, (as in *Quintin*'s Caſe in 26 *Aſſ.* [a] the ſame Rent is taken for the like Rent, where a Rent reſerved upon a Leaſe for Life was granted to another, and afterwards the Heir of the Grantor confirmed the Eſtate of the Grantee, and that if the ſaid Rent was in Arrear, he and his Heirs might diſtrain for it in the Land out of which it iſſued, and after the Death of the Tenant for Life it was adjudged that he might diſtrain, for the Grant that he might diſtrain for the ſame Rent ſhall be taken for ſuch or the like Rent in Quantity;) yet he ſaid, he was of Opinion with *Brown*, that the Condition precedes the Leaſe, and that the Leaſe ſhall never commence, becauſe *every* ten Years ought to precede the Payment, and the Payment the Leaſe, and that cannot be here for the Reaſon ſhewn by him: For which Cauſe it ſeemed to them that the Leaſe could never commence.

[a] 26 Aſſ. pl. 38. Fitz. Aſſize 241. Bro. Confirmation 15. Grants 73 Rents 14. 1 Rol. R. 377. See like Matter Plowd. Quer. § 174. Ante 141 (h).

Then as to the Certainty of the Time of the Continuance of the Leaſe, although it ſhould be here admitted that there is a Certainty of the Commencement of it, yet there is no certain Space of Time expreſſed by which the Length of the Term may be known, for it is appointed that upon the Payment the Leſſee ſhall have a perpetual Demiſe from ten Years to ten Years, which is as much as a Demiſe for 20 Years, and which Words would have made a good Leaſe for 20 Years, if he had ſtopped there, but he has coupled them with other Words which make the whole incertain, *viz.* that the Demiſe ſhall be perpetual, and from ten Years to ten Years continually and out of the Memory of Man, which Words, *perpetual, continually, and out of Memory*, don't contain any certain Term, but Time without a Term; for *terminus*, if it be referred to Time, is the End of it, as *Weſton* ſaid, and it may be referred to Place (as the Lord *Dyer* ſaid), as *terminus loci*, and then it is taken as a Precinct or Limit of a Place, as a Boundary is between Lands of divers men, ſo that it has the ſame Meaning with *(Certainly)*, whether it be referred to Time or Place, and *terminus loci* may be called Certainty in Place, and *terminus temporis* Certainty in Time. Wherefore ſuch a Limitation of Years as hath Certainty in it may well be called a *Term*, and a Leaſe containing ſuch Time ſhall be good. [b] As a Leaſe for ten Years, and ſo from ten Years to ten Years during 100 Years, ſhall be a good Leaſe for 100 Years, and ſuch Limitation is as good as an expreſs Leaſe for 100 Years is. [c] So *Weſton* ſaid, a Leaſe during the Nonage of *J. S.* who is of the Age of 15 Years, is a good Leaſe for 6 Years, if *J. S.* ſhall live ſo long, for the Reference to a certain Time is equivalent to an expreſs Nomination of the Time contained in the Reference. [d] So he ſaid, if I make a Leaſe for ſo long as *J. S.* who is impriſoned for hunting, ſhall be in Priſon for the ſame by the Order of Law, this is as much as if I had made a Leaſe for two Years, for ſo long he ſhall be impriſoned by the Statute. [e] So, he ſaid, if I make a Leaſe for Years rendering 5 *l.* yearly, and afterwards I grant the Rent and Reverſion to another until he has received of the Rent 20 *l.* this is all one as if I had granted the Reverſion for four Years, for he ſhall receive 20 *l.* in four Years; ſo that the Reference contains a Certainty of the Time of its Continuance. So if a Leaſe has a certain Appointment of the Number of Years, although the Commencement or the End of it is certainly appointed upon an incertain Time, yet ſuch Leaſe ſhall be good. [f] As a Leaſe for Years after the Leſſee ſhall have done ſuch an Act is good: [g] So a Leaſe for 20 Years, if the Coverture between *J. S.* and his Wife ſhall continue ſo long, is good, and yet in the one Caſe it is incertain when the Leſſee will do the Act to make the Leaſe commence, and in the other Caſe it is incertain when the Coverture will be diſſolved; [h] but a Leaſe certainly limited may commence or determine upon an Incertainty well enough. [i] So *Weſton* ſaid, if I make a Leaſe to one for ſo many Years as *J. S.* ſhall name, and afterwards *J. S.* in my [k] Lifetime names a certain Number of Years, it ſhall be a good Leaſe for ſo many Years as he names, for it is my Demiſe, and I am content that he ſhould name the Years, which by my own Reference to his Nomination is as much as if I myſelf had named them: [l] But if the Leaſe be for ſo many Years as my Executors ſhall name, and afterwards I die, and my Executors name the Years, there (he ſaid) the Leaſe is not good for the Years named, becauſe they cannot name the Years during my Life, ſo that in my Life it is no Leaſe, and after my Death it cannot be my Leaſe, becauſe the Years were not named in my Lifetime. But if a Leaſe is made until *J. S.* who has Execution of a Statute-merchant is ſatisfied the Duty for which he has ſued Execution, there (he ſaid) this is not a good Leaſe, nor ſhall he be ſaid Termor for Years, for it is not certain how long the Years ſhall endure, *viz.* for 6 Years, or for 12 or 20 Years; ſo that the Time of the End of the Leaſe is utterly incertain, and therefore it cannot be called a Term of Years, for *terminus* contains Certainty. [m] So *Brown* ſaid, if one makes a Leaſe for three Years, and ſo from three Years to three Years during the Life of *J. S.* this ſhall be a good Leaſe for no more than ſix Years, for during ſix Years there is Certainty, for it was certain for the firſt three Years, and when he ſays, and ſo from three Years to three Years, this is as much as if he had ſaid, from theſe firſt three Years during other three Years, which contains Certainty, but when he goes further and ſays, during the Life of *J. S.* this does not contain any Certainty, for it is incertain how many more Years *J. S.* may live. So that at the Commencement of the Leaſe the End of the Number of Years intended is not known, which is contrary to the Nature of a Leaſe for Years, and therefore it ſhall only be good for ſix Years in all, *quod Dyer conceſſit.* And

[b] M. 29 H. 8. Bro. Leaſes 49. B. N. C. § 112. 6 Mod. 215. Kitch 327. 3 Bac. Abr. 433. Watſ. Compl. Incumb. 450. Poſt 522.

[c] 6 Co. 35. b. 2 Bac. Abr 664. 3 Bac. Abr. 431.

[d] 1 Finch 145.

[e] Co. Litt. 42. a. 6 Co. 35. b. 3 Bac. Abr. 431.

[f] Co. Litt. 45. b. 1 Rol. Abr. 849. pl. 10. 3 Bac. Abr. 431.

[g] L. P. Co. Litt. 42. b. where the Leaſe is for 20 Years if J. S. lives ſo long. 3 Bac. Abr. 429, 431.

[h] See Poſt 523.

[i] See Ante 6 (k). and the Books there cited.

[k] See Lane 62, 102. Godb. 25. Vin. Abr. tit. Grants H. 4. pl. 3.

[l] 1 Co. 155. b. 2 Bulſt. 274. Owen 97. 2 Bac. Abr. 624. 3 Bac. Abr. 429.

[m] 1 Finch 145.

[n] 1 Finch 144.

Brown ſaid that ſo it has been adjudged. [a] And *Dyer* ſaid that in his Knowledge it has been adjudged here in this Court, that where a Parſon makes a Leaſe of his Parſonage for five Years, and ſo from five Years to five Years during his Life, (as it is their common Cuſtom to make Leaſes) it is only a Leaſe for ten Years in all, and no longer, although the Leſſor continues Parſon longer, and the Reaſon is becauſe there is no Certainty of Years beyond the ten Years. So here in the principal Caſe, when he has made a Leaſe for ten Years, which is good without Doubt, and has further agreed and granted that if the Leſſee does ſuch an Act, then he ſhall have a perpetual Demiſe, Farm, and Grant of the Premiſſes from ten Years to ten Years continually following out of the Memory of Man, although the Commencement of it ſhould be granted to be good (as it is not), yet he cannot have more than ten Years beyond the firſt ten Years; for the Words *perpetual*, *continually*, and *out of Memory of Man* have no certain End or Determination. [b] And every Leaſe for Years ought to have a certain End or Determination. And *Brown* ſaid that where the Demiſe and Grant is to hold from ten Years to ten Years *out of Memory*, if the Words, *out of Memory*, be referred to the Time to come, it does not ſignify any Certainty of Continuance, for he ſaid that a thouſand Years to come are not more out of Memory than a Day to come, for that which is not come is not within Memory, but Memory is referred to the Time paſſed. So that if it be referred to the Time to come, it cannot be known whether ten, or an hundred, or a thouſand Years be intended thereby, for the one of theſe is not more out of Memory than another. And *Dyer* ſaid, if the Words, *out of Memory*, ſhould be thus taken, *viz.* that he ſhall occupy for ſo many ten Years as ſhall be out of Memory of the firſt Demiſe or the firſt Commencement, and ſo *out of Memory* be taken backwards, then this is merely contrary to the Affirmation that he has a Leaſe; for none can affirm that he has a Leaſe, unleſs he affirms that there was one who made the Leaſe, and that the Leaſe had ſuch a Commencement, and if he affirms that ſuch an one made the Leaſe, and that the Leaſe had ſuch a Commencement, thereby he affirms that the making of the Leaſe and the Commencement of it is not out of Memory, inaſmuch as he has knowledge of it. For out of Memory and out of Knowledge is all one, and both the Phraſes purport an Ignorance of the Time; and when the Party takes Knowledge of the Time, it does not ſtand in his Mouth to ſay that he is ignorant of the ſame Time, for Ignorance and Knowledge are contrary, and to affirm Contrarieties is not ſufferable in our Law. Wherefore inaſmuch as he affirms him to be Tenant for Years, and therein affirms that he has Knowledge of the Time of making the Leaſe, from thence it follows conſequentially that he cannot ſay that he has had and occupied the Land by the Leaſe out of Memory or out of Knowledge from the Time of making the Leaſe, for to affirm that he has Knowledge of the Time of making the Leaſe, and to affirm that he has occupied the Land by Force of the Leaſe for ſo long Time ſince the making of the Leaſe that there is no Knowledge of the making of it, contains in itſelf an expreſs Contrariety, which the Law will not admit. And he ſaid, if the Leſſee ſhould by force of the Leaſe occupy the Land out of Time of Memory, then the Leſſor could never have the Writ of *Ad terminum qui præteriit*, for he cannot have that Writ unleſs he expreſſes the making of the Leaſe, and the End of it, and if the Leſſee ſhould hold out of Memory, then the making of the Leaſe muſt be out of Memory, and ſo cannot be affirmed, nor can the Leſſor have Remedy by the Writ. And he ſaid that in ſome Books Deeds have been pleaded which bore Date 200 Years before, and this has not been taken out of Memory, becauſe the Certainty of the Time is known, but out of Memory contains no Knowledge of the Beginning. Wherefore it ſeemed to the Juſtices, that after the firſt ten Years paſſed no other Term had any Commencement or End, becauſe it had no Certainty of Commencement, Continuance, or End, and therefore that the Plaintiff's Title was not good. And afterwards Judgment was given the ſame *Eaſter* Term 6 *Elizabeth*, as follows.

[a] Co. Litt. 45. b. Watſ. Compl. Incumb. 450. See Dy. 24 pl. 151. 3 Bac. Abr. 432, 433.

[b] M. 14. H. 8. 11. a. *Per Brown.* 14. a. *Per Brudnel.*

The reſt of the Record. At which Day here came as well the aforeſaid *William* as the aforeſaid *John* and *Thomas* by their Attornies aforeſaid. And thereupon the Plea aforeſaid being ſeen and underſtood by the Juſtices here, it ſeems to the ſame Juſtices here that the aforeſaid Plea of the aforeſaid *William Say* above in Bar of the Cognizance aforeſaid pleaded is inſufficient in Law to preclude the aforeſaid *John* and *Thomas* from having their Cognizance aforeſaid, as the aforeſaid *John* and *Thomas* have above alledged. Therefore it is conſidered that the aforeſaid *William Say* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim, and that the aforeſaid *John* and *Thomas* go thereof without Day, and have a Return of the Cattle aforeſaid, to be detained irrepleviſable for ever, *&c.*

Judgment.

A brief

A brief Report of the Arguments of the Judges of the Common-Bench, *and of the Judgment given in* Eaſter *Term in the* ſeventh *Year of the Reign of Queen* Elizabeth, *upon a Demurrer in Law in a Writ of* Detinue *brought before them by* Alvared Grayſbrook *Executor of the Teſtament of* Thomas Kene, *againſt* Robert Fox. *And the Record appears among the Records of* Michaelmas *Term* 3 & 4 Elizabeth. Rot. 1338. *and was read as follows*

Robert Fox late of *Middleton* in the County aforeſaid Huſbandman was ſummoned to anſwer *Alvared Grayſbrook* Gentleman, Executor of the Teſtament of *Thomas Kene* Gentleman otherwiſe called *Thomas Kene* of *Sutton* in *Coldfield* in the County of *Warwick* Gentleman, otherwiſe called *Alvared Grayſbrook my Son-in Law, which Alvared I conſtitute and make my true and lawful Executor of this my laſt Will and Teſtament*, of a Plea that he render to him Goods and Chattles to the Value of 100 *s.* which he unjuſtly detains from him, *&c.* And whereupon the ſame *Alvared* by *Thomas Newman* his Attorney ſays, that whereas the aforeſaid *Thomas Kene* in his Lifetime the 27th Day of *December* in the *ſecond* Year of the Reign of the Lady the Queen now, at *Sutton* in *Coldfield*, was poſſeſſed of Goods and Chattles, *viz.* of one Cart bound with Iron, ſeven Yokes harniſhed with Iron, two Yokes with iron Rings, called *Copyokes with Rings*, ſix iron Tews, three Cock-cleaves with Pins, two Culters, two Plow-ſhares, three Nagers, two Muck-forks, two Muck-hooks, one double-grained Fork, called a *Pike-fork*, one Wainrope, one Mattock, one Brierſithe, two Carts called *Tumbrels*, two Spades, one Hopper, four Rings called *Ox-bows*, two iron Rings called Sithe-rings, four Carts, one great Harrow called an *Ox-harrow*, and two Harrows, called *Small-harrows*, to the Value, *&c.* as of his own proper Goods and Chattles. And being ſo thereof poſſeſſed, the ſame Day and Year at *Sutton* in *Coldfield* aforeſaid died, after whoſe Death, *viz.* the *firſt* Day of *February* in the *ſecond* Year aboveſaid, the ſaid Goods and Chattles to the Hands and Poſſeſſion of the aforeſaid *Robert Fox* at *Middleton* came, and in the Cuſtody and Poſſeſſion of the ſaid *Robert* yet are; whereby an Action has accrued to the ſame *Alvared* to demand and have of the aforeſaid *Robert* the Goods and Chattles aforeſaid, nevertheleſs the ſame *Robert*, although often requeſted, the Goods and Chattles aforeſaid to the ſame *Alvared* has not yet delivered, but the ſame to deliver to him has hitherto refuſed, and yet refuſes, and unjuſtly detains, wherefore he ſays that he is damnified and has Damage to the Value of 10 *l.* and therefore he produces the Suit, *&c.* And he produces * here in Court the Letters teſtamentary of the aforeſaid *Thomas Kene*, whereby it ſufficiently appears to the Court here that the ſaid *Alvared* is Executor of the Teſtament aforeſaid, and thereof hath the Adminiſtration, *&c.*

Mich. Term 3 & 4 *Eliz. Rot.* 1338. *Warwick.* Declaration.

* See 2 Saund. 402 *Slow v. Wilmot*, ruled by *Hale* C. J. that the ſhewing of Letters-teſtamentary or of Adminiſtration is but Matter of Form, and not of Subſtance, and no Advantage can be taken of the Want thereof on a general Demurrer. 1 Vent. 222. Nelſ. Lex Teſtam. 33. See the Statutes of 16 & 17 *Car.* 2. *cap.* 8. and 4 *Ann. cap.* 16.

And the aforeſaid *Robert Fox* by *Edward Colbarn* his Attorney comes and defends the Force and Injury when, *&c.* by proteſting that the aforeſaid *Thomas Kene* did not make any Teſtament, by proteſting alſo that he did not conſtitute the aforeſaid *Alvared* Executor of his Teſtament, as in his Declaration aforeſaid is above ſuppoſed, for Plea ſays, that the aforeſaid *Alvared* his Action aforeſaid againſt him ought not to have, becauſe he ſays that well and true it is that the aforeſaid *Thomas Kene* in his Lifetime the aforeſaid 27th Day of *December* in the *ſecond* Year aboveſaid at *Sutton* in *Coldfield* aforeſaid was poſſeſſed of the Goods and Chattles aforeſaid, as of his own proper Goods and Chattles, and being ſo poſſeſſed thereof, the ſame Day and Year at *Sutton* in *Coldfield* aforeſaid died. And the ſame *Robert Fox* ſays, that after the Death of the aforeſaid *Thomas Kene*, the Adminiſtration of all the Goods and Chattles which were the ſame *Thomas Kene*'s at the Time of his Death was by *John Diot* Commiſſary of the reverend Father in Chriſt *Thomas Bentham* Biſhop of *Coventry* and *Litchfield*, at *Litchfield* in the County of the City of *Litchfield*, the 15th Day of *January* in the *ſecond* Year aboveſaid, committed to one *Thomas Kene* Son of the aforeſaid *Thomas Kene* the Teſtator, *&c.* By virtue of which ſaid Adminiſtration the ſame *Thomas Kene* the Son was poſſeſſed of the Goods and Chattles aforeſaid; and being ſo thereof poſſeſſed, afterwards and before the Day of proving the Teſtament of the aforeſaid *Thomas Kene* the Teſtator by the aforeſaid *Alvared*, *viz.* the 27th Day of *January* in the *ſecond* Year aboveſaid, the aforeſaid *Thomas Kene* the Son, at *Sutton* in *Coldfield* aforeſaid, ſold the Goods and Chattles aforeſaid in the Declaration aforeſaid ſpecified to the ſame *Robert Fox* for a certain Sum of Money between them then agreed on, and to the aforeſaid *Thomas Kene* the Son by the ſaid *Robert Fox* in Hand then paid; by reaſon of which ſaid Sale the ſame *Robert Fox* the ſame Goods and Chattles into his Hands took, and was and yet is of the ſame Goods and Chattles poſſeſſed. And this he is ready to verify, wherefore he prays Judgment if the aforeſaid *Alvared* his Action aforeſaid againſt him ought to have, *&c.*

Bar.

And the aforeſaid *Alvared* ſays, that the Plea aforeſaid by the aforeſaid *Robert Fox* above in Bar pleaded is inſufficient in Law to preclude him the ſaid *Alvared* from having his Action aforeſaid againſt the ſame *Robert*, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer the ſaid Plea in Manner and Form aforeſaid pleaded. And this he is ready to verify, wherefore for Want of a ſufficient Anſwer in this Behalf, the ſame *Alvared* prays Judgment, and Delivery of the Goods and Chattles aforeſaid together with his Damages by Occaſion of the detaining the ſaid Goods and Chattles to be adjudged to him, *&c.*

Plaintiff demurs.

And the aforeſaid *Robert Fox*, for that he has above alledged ſufficient Matter in Law to preclude the aforeſaid *Alvared* from having his Action aforeſaid againſt him, which he is ready to verify, which ſaid Matter the ſame *Alvared* does not deny nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſes to admit, prays Judgment, and that the aforeſaid *Alvared* may

Joinder in Demurrer.

Continuance.

be precluded from having his Action aforesaid against him, &c. And because the Justices here will advise themselves of and upon the Premisses before they give Judgment thereon, Day is given to the Parties aforesaid here until in eight Days of *St. Hillary* to hear their Judgment thereon, because the Justices here not yet, &c.

The CASE. *Easter Term 7 Eliz.*

A. makes his Will and appoints an Executor, and dies, the Ordinary without taking notice of the Will commits Administration to *J. S.* before the Executor has proved the Will, the Administrator sells the Goods of the deceased, and the Executor afterwards proves the Will, and brings Detinue for the Goods against the Vendee, and adjudged that he should recover, for the Probate supersedes the Administration *ab initio*, and the Sale made under it; but otherwise if it be averred that the Sale was made to discharge the funeral Expences or Debts, which the Administrator or Executor was compellible to pay, for there such Sale shall be indefeasible for ever. S. P. Theol. Dig. lib. 1. cap. 18. § 31. 1 Rol. Abr. 919. pl. 2. in fine. 2 Lev. 182. 183. admitted *Per Saunders, arguendo.* 1 Freem. 445. 1 Show. 410. 2 Bac. Abr. 411. Godolph. Orph. Leg. 141, § 1. Wentw. Off. of Exec. 49. Law of Testam. &c. 377.

The Case was recited in this Manner. It appears by the Record that *Alvared Grayfbrook* Executor of the Testament of *Thomas Kene* has sued an Action of Detinue against *Robert Fox* of *Middleton* in the County of *Warwick*, for one Cart bound with Iron, and seven Yokes, and divers other Goods and Chattles; and has counted that the Testator, the 27th Day of *December* in the 2d Year of the Reign of the present Queen, was possessed at *Sutton* in *Coldfield* of the said Goods, as of his own proper Goods; and being so possessed, the same Day and Year died at *Sutton* in *Coldfield* aforesaid in the County of *Warwick*, after whose Death, *viz.* the first Day of *February* in the said 2d Year, the Goods and Chattles came to the Hands of the said *Robert Fox* at *Middleton* aforesaid, and in his Hands now are, whereby an Action has accrued to the Plaintiff. The Defendant makes Defence, and by protesting that the said *Thomas Kene* did not make any Testament, and also by protesting that he did not constitute the Plaintiff his Executor, for Plea says that the said *Alvared* ought not to have his Action against him, because he says that true it is that the said *Thomas Kene* the said 27th Day of *December* in the said 2d Year was possessed of the said Goods, and thereof died possessed the same Day and Year, as the Plaintiff hath declared. But he says that after the Death of the said *Thomas Kene* the Administration of all his Goods and Chattles was by *John Dive* Commissary to *Thomas Bentham* Bishop of *Coventry* and *Litchfield*, at *Litchfield* in the County of the City of *Litchfield*, the 15th Day of *January* in the said 2d Year of the Reign of the present Queen, committed to one *Thomas Kene* Son to the said *Thomas Kene* the Testator. By force of which Administration the said *Thomas Kene* the Son was possessed of the said Goods and Chattles; and being so possessed, afterwards and before the Day of the Probate of the said Testament of the said *Thomas Kene* the Testator by the said *Alvared*, *viz.* the 27th Day of *January* in the 2d Year aforesaid, the said *Thomas Kene* the Son at *Sutton* in *Coldfield* aforesaid sold the Goods and Chattles specified in the Count to him the said *Robert Fox*, for a certain Sum of Money between them agreed on, and by him paid to the said *Thomas Kene* the Son, by force of which Sale the said *Robert Fox* took the same Goods and Chattles into his Hands, and was and yet is possessed of them. And this he is ready to verify, and demands Judgment *si Actio.* And upon this Plea the Plaintiff has demurred in Law.

Exceptions taken to the Bar. 1.

Protestation ought to be taken after the Defence and Plea to the Action. S. P. Heath's Max. 26.

And this Matter was debated by the Serjeants, and now this said *Easter* Term it was argued by *Walsh*, *Weston*, and the Lord *Dyer* Justices, but *Anthony Brown* was sick, for which reason he did not argue. And the Justices who argued spoke first to the Exceptions taken by the Serjeants. And as to the first of them, they all held that the Protestations taken by the Defendant were not taken nor placed in Order, for first he ought to say *that the Plaintiff his Action aforesaid against him ought not to have*, &c. and then take his Protestations afterwards, but to take the Protestations before the Action is not the usual Form of Pleading, but contrary to the common Practice.

Protestation must not be superfluous. S. P. Heath's Max. 26.

Also they held that the second Protestation was superfluous, it being included in the first; for the first Protestation is, that the said *Thomas Kene* did not make any Testament, and the second is, that he did not constitute the Plaintiff his Executor, and if he made no Testament (as he says in the first Protestation) *ergo* he did not make him his Executor; * for without a Testament a Man cannot be an Executor. Wherefore the second Protestation being included in the first is superfluous.

* Went. Off. of Exec. 2. Law of Testaments, &c. 347.

That which is the Ground of the Party's Suit cannot be taken by Protestation, for it may be denied by Answer, and Issue may be joined upon it; as in Detinue by the Executor of *A.* the Defendant cannot take by Protestation that *A.* did not make the Plaintiff his Executor. S. P. Moor 356. pl. 481 Cro. C. 365, 366. Cart. 39. Doc. Pla. 296. Heath's Max. 26. 1 Finch 176. 2 Finch 359.

Also the Protestations here are repugnant to the Matter pursuant. † For a Protestation (as *Walsh* defined it) is a saving to the Party who takes it from being concluded by any Matter alledged or objected against him, upon which he cannot join Issue, and it is no more than an Exclusion of a Conclusion, for he that takes it excludes the other from concluding him; and it ought to be consistent with the Sequel of the Plea. But here the Matter taken by the Protestation, *viz.* the making of the Plaintiff Executor, may be denied by Answer, and Issue may be joined upon it, for it is the Ground of the Suit, and it utterly destroys the Action of the Plaintiff; and such Matter as is the Effect of the Party's Suit cannot be taken by Protestation. Also the Lord *Dyer* said, that he has confessed in the Plea afterwards a Thing which is meerly contrary to the Protestation, for after that he has alledged in his Plea that the Administration was committed to the Son, and that the Son by force thereof was possessed of the Goods, he says, *and being so thereof possessed, afterwards and before the Day of the proving the Testament of the aforesaid* Thomas Kene *the Testator by the aforesaid* Alvared, *&c.* by which Words *(before the Day of the proving the Testament of the aforesaid* Thomas Kene *the Testator)* he agrees that there was a Testator, and a Testament, which is contrary to his Protestation, whereby he denies it. Wherefore his Protestations being repugnant to the Plea afterwards are not well taken.

† Co. Litt. 124. b. Litt. R. 203, 228. Doc. Pla. 295. Heath's Max. 26. 1 Finch 176. 2 Finch 360. Vin. Abr. tit. Protestation A.

Exception 2.

In Detinue by an Executor against the Vendee of Goods sold by an Administrator before the Will proved, the Defendant needs not shew the Letters of Administration. S. P. 1 Show. 408.

And as to another Exception taken to the Bar, in that the Defendant does not shew forth to the Court the Letters of Administration, *Walsh* and *Weston* said that this is not ne-

ceſſary for two Cauſes, firſt, for that he pleads them by way of Bar, in which Caſe they ſhall not be ſhewn, [a] as they ought to be if a Thing was demanded by the Adminiſtrator; and ſecondly, for that the Defendant here is not privy to them, but they remain with the Adminiſtrator. So that the Plea is good notwithſtanding this Exception.

[a] Same Diverſity P. 10, Ed. 4. 1. a. *per Cboke.* Fitz. Monſtrans de faits 107. P. 16. Ed. 4. 2. a. 1 Show. 408.

Another Exception was taken to the Plea in Bar, for that the Defendant has alledged that the Adminiſtration was committed to *Thomas Kene* the Son by the Commiſſary of the Biſhop of *Coventry* and *Litchfield*, and has not alledged that the Biſhop of *Coventry* and *Litchfield* was the Ordinary of the Place where the Teſtator died; and if the Place was not within his Dioceſe, the Biſhop of *Coventry* and *Litchfield* had no Authority to commit Adminiſtration, but it is void, and therefore to make it good he ought to ſhew that the Biſhop was Ordinary of the Place. But *Weſton* ſaid that it is not neceſſary, becauſe it appears by the Letters of Adminiſtration, that the Teſtator died within the Dioceſe of the Biſhop who committed the Adminiſtration, which ought to be credited by Us, and to be intended accordingly. But the Lord *Dyer* held the contrary, for inaſmuch as the Adminiſtrator derives his Authority from the Biſhop of *Coventry* and *Litchfield*, who has no Power to commit Adminiſtration to him unleſs the Teſtator dies or has Goods within his Dioceſe, therefore it ought to be preciſely averred that the Place where, &c. is within his Dioceſe. And altho' the Letters of Adminiſtration ſhew it, yet they don't bind any in our Law, for they may be [b] denied, and the Seal of the Ordinary ſhall not be concluſive, but it is [c] iſſuable, and ſhall be tried by [d] an Inqueſt in our Law, if Iſſue be joined upon it. And he ſaid that in a Writ of Annuity againſt a Parſon, if he ſays that he found his Church diſcharged, and prays in Aid of the Patron and Ordinary, the uſual Courſe is to pray in Aid of ſuch Biſhop *loci illius Ordinarii*. And ſo he ought to pray here, and foraſmuch as he has not done ſo, the Plea is not good.

Exception 3. Whether it ought to be averred that the Ordinary who committed the Adminiſtration is Ordinary of the Place where the Teſtator died. See H. 31 H. 6. 13. pl. 5. Fitz. Judgment 35. Bro. Pleading 153. Nels. Lex. Teſtam. 31, 32, 437.

[b] 9 Co. 31. a. 41. a. Doc. Pla. 353.

[c] Theol. Dig. lib. 4. cap. 10. §2.

[d] Dy. 294. pl. 7. 9 Co. 31. a. 40. b. 41. a. Poſt 282 (d).

As to the Matter in Law, *Walſh* puiſne Juſtice and *Dyer* Chief Juſtice held the Law for the Plaintiff, and *Weſton* held it for the Defendant. [e] For, he ſaid, by the Common Law before the Statute of *Weſtminſter* 2. *cap.* 19. if a Man had died inteſtate, the Ordinary ſhould have had his Goods to diſpoſe of *in pios uſus*, for when he died inteſtate, and had not committed his Goods to any Perſon to be diſpoſed of, the Law adjudged the Ordinary the moſt proper Perſon to have the Diſpoſition of them. For it was to be preſumed that the Ordinary, who had the Care of his Soul in his Lifetime, would be the fitteſt to have the Care and Diſpoſal of his Goods *in pios uſus* after his Death, for which Reaſon when the Inteſtate had not left the Charge of his Goods to any one, the Law committed them to the Ordinary. And therefore the Ordinary might ſeize them, and keep them without Waſt, and he might have [f] given or alien'd them, or have otherwiſe diſpoſed of them at his Pleaſure, and the Money ariſing from them he was to diſpoſe of *in pios uſus*, and if he did not, he broke the Confidence and Truſt repoſed in him, for which he ſtood charged in Conſcience to God: But nevertheleſs the Gift or Alienation of the Goods by the Ordinary was good by the Law of the Realm. And altho' the Law committed the Goods to the Ordinary, [g] yet it did not make the Ordinary chargeable to Actions of Creditors for Debts due to them by the Inteſtate, but the Charge of the Ordinary was only to employ them *in pios uſus*, and in Acts of Charity, and the Common Law did not make him, being a ſpiritual Governor, ſubject to temporal Suits for ſuch Things. And this was a great Defect in the Common Law, there being no Remedy to come at the Debts of the Inteſtate, for which Reaſon the Statute of *Weſtminſter* 2. *cap.* 19. was made, which provides *that where after the Death of a Perſon dying inteſtate, who is bounden to ſome other for Debt, the Goods come to the Ordinary to be diſpoſed, the Ordinary from henceforth ſhall be bound to anſwer the Debts, as far forth as the Goods of the dead will extend, in ſuch Sort as the Executors of the ſame Party ſhould have been bound, if he had made a Teſtament.* Which Act has remedied the great Miſchief which was ſuffered at the Common Law, and has provided that the Debts of the Inteſtate ſhall be paid, and that the Ordinary ſhall be chargeable for them, and ſhall be anſwerable to the Creditors, as far as the Goods of the Inteſtate, which come to his Hands, will extend. And the Words of the Act *(bounden to ſome other for Debt)* are not only to be intended of ſuch Inteſtates who were bound in an Obligation, but they comprehend every Debtee for whatever Cauſe who dies inteſtate, whoſe Executors (if he had made any) ſhould have been chargeable with his Debt. And therefore they comprehend the Debt of an Inteſtate who owes to his Leſſor Arrears of Rent reſerved upon a Leaſe for Years, and every other Debt which an Executor is bound to pay. [h] So that this Statute has made the Ordinary, who before diſpoſed of the Goods of the Inteſtate as a ſpiritual Governor, ſubject to temporal Suits for them, and ſueable by Action of Debt, or other perſonal Suit, which lay againſt the Inteſtate, and has made him chargeable in the temporal Law as far as the Value of the Goods will reach. [i] And accordingly there is a Writ formed in the *Regiſter*, viz. *Command A. Biſhop of E. to whoſe Hands the Goods and Chattles which were B's, who died inteſtate, as it is ſaid, came, that juſtly, &c. he render, &c.* ſo that the Poſſeſſion of the Goods and the Act make him chargeable, but further than the Goods extend he ſhall not be charged. And, Sir, altho' the Ordinary might by the Common Law ſeize and take the Goods which the Inteſtate had at the Time of his Death, yet for the Debts due to the Inteſtate, or for Things in Action, the Ordinary had no Remedy either [k] before or [l] ſince the Statute, for he could not bring an Action of Debt or other Action for a Debt due to the Inteſtate, and by the ſame Reaſon he could not [m] releaſe the Debts due to the Inteſtate; but his Intereſt was only to ſeize the Things which the Inteſtate had in Poſſeſſion, and with them he might do as he pleaſed, but he could not ſue the Debtors of the Inteſtate. And this was taken to be a great Miſchief, for by this Means the Debtors would keep in their own Hands the Money which they owed the Inteſtate, and thereby the Perſons to whom the Inteſtate was indebted could not have Remedy for the Debts due to them by the Inteſtate, but only according to the Rate of the Value of the Goods in Poſſeſſion, ſo that if the Debt which the Inteſtate owed

The Matter in Law.

Weſton Juſtice for the Defendant.

[e] 9 Co. 38. b. 39. a. 2 Inſt. 397. 2 Bulſt 3. Cart. 127. 3 Mod. 59. 2 Show 409. 1 Finch 410. 2 Finch 173. Bac. Law. Tracts 160. Poſt 280 (b). So now in Caſe of an Inteſtate dying without Kindred, the Ordinary may diſpoſe *in pios uſus*, Salk. 37. *Manning v Napp.*

[f] 1 Finch 410. 2 Finch 174. But ſee the contrary 8 Co. 135. b. 9 Co. 39. a. Dy. 255, 256. pl. 8. 1 Rol. Abr. 918. C. pl. 1. 2 Inſt. 398. Wentw. Off. of Exec. 173, 174.

[g] Herewith agree M. 18. H. 6. 23. b. *per Forteſcue.* Dy. 247. pl. 73. 1 Rol. Abr. 906. pl. 3. 3 Mod. 60. 1 Show. 409. *obiter.* 1 Finch 410. 2 Finch 174. Nelſ. Lex Teſtam. 11. Poſt 280 (d). Yet ſee the contrary H. 11 H. 7. 12. b *per Fineux.* Bro. Adminiſtrators 50. M. 9. Ed. 4. 33. b. *per Danby.* Fitz. Executors 35. 5 Co. 83. a. 9 Co. 39. b. 2 Inſt. 397.

[h] 1 Rol. Abr. 906 pl. 4

[i] Regiſt. 141. a. F. N. B. 122. d. Nelſ. Lex. Teſt. 11.

[k] M. 18. H. 6 23. b. *per Forteſcue.* 9 Co. 39. a. 1 Rol. Abr. 906. pl. 1. 1 Finch 410. 2 Finch 174. 3 Mod. 25.

[l] M. 19. Ed 3. Fitz. Covenant

[k] M. 18. H. 6. 23. b. *per Forteſcue.* 1 Rol. Abr. 906. pl. 5. W. Jones 175.

[m] M. 18. H. 6. 23. b *per Forteſcue.* 9 Co. 39. a. 1 Rol. Abr. 906 pl. 6. W. Jones 175.

was 40 l. and he died having Goods to the Value of 20 l. and a good Debt of 20 l. was due to him by Obligation, now he to whom he owed the 40 l. could only have Remedy for 20 l. of his Debt, that is to say, for no more than the Value of the Goods in Possession, for none could sue for the 20 l. due to the Intestate. And thus he to whom the Intestate was indebted was defrauded of his Debt, and he that was indebted to the Intestate retained the Debt in his Hands, which by good Reason ought to go to satisfy the Creditor of the Intestate; and this was taken to be a Thing against Conscience, and a great Mischief. And therefore to redress it the Statute of 31. *Ed.* 3. *cap.* 11. was made, which enacts, *that in Case where a Man dieth intestate, the Ordinaries shall depute the next and most lawful Friends of the dead Person intestate to administer his Goods, which Deputies shall have an Action to demand and recover as Executors the Debts due to the said Person intestate in the King's Court, for to administer and dispend for the Soul of the dead, and shall answer also in the King's Court to others to whom the said dead Person was holden and bound, in the same Manner as Executors shall answer: And they shall be accountable to the Ordinaries, as Executors are in the Case of a Testament, as well of the Time past as the Time to come.* So that this Act provides that where a Man dies intestate, the Ordinary shall commit the Administration to others who are the next aud most faithful Friends of the dead, and it gives them an Action of Debt, and does not give it to the Ordinary himself. And the Reason thereof seems to be, because the Ordinary is a spiritual Governor, wholly conversant in spiritual Causes, to whom it is inconvenient to toil in the temporal Concerns of others, and therefore the Statute has given him Liberty to appoint others to take the Trouble of the Administration of the Intestate's Goods, and they shall have Power as Executors, and may recover the Debts of the Intestate,; and so it has remedied the said Mischief. And, Sir, altho' this Act gives Power to the Ordinary to commit the Administration to others, yet it seems to me that he might [a] do it by the Common Law before this Act. For if the Common Law gave the Possession of the Goods to him, from thence it follows that he might commit them to another, for when he had the Goods he might do with them at his Pleasure; and as he might [b] give them or sell them, by the same Reason he might commit them to another, if he pleased, and the Committee might do the same with them that the Ordinary might. For the chief Charge of the Ordinary is about divine and spiritual Things, and altho' our Law gives him Authority over the Goods of Intestates in his Diocese, yet the Care and Disposition of them is not his principal Charge, for that is conversant about spiritual Matters, as it is said before, and if he could not commit the Goods and the Dispofal of them to another, great Inconvenience would follow from it. For as one might die intestate within his Diocese, so might 20, or 100, or 1000; and if he could not commit the Administration and Care of them to others, then he must take it upon himself, and the Business would be so great that it would withdraw him from his principal Charge and Vocation, which is about divine and spiritual Things, and after all he could not be able to perform all the Business concerning the Goods of Intestates, which would be attended with great Inconvenience. For which Reason the Law *ex necessitate* gave him Authority to commit the Administration of the Goods of Intestates to others, before the Statute of 31. *Ed.* 3. And such Committees might [c] give or sell the Goods which came to their Hands, and do with them at their Pleasure; and such Committees or Administrators might be [d] sued in an Action of Debt before the Statute of 31. *Ed.* 3. as well as the Ordinary might, and this by Equity of the Statute of *Westminster* 2. *cap.* 19. So that before the Statute of 31. *Ed.* 3. the Administrators might be sued by the Creditors, and the Administrators had full Power to alien or give, or otherwise dispose of the Goods of the Intestate which came to their Hands. [e] But such Administrator could not get in any Debt, nor sue any Action, for his Authority was confined only to the Things in Possession, and he could not meddle with Things in Action, for he could not release a Debt due to the Intestate, any more than an Executor now can before Probate of the Will. For before the Executor has proved the Will of the Testator, he cannot have [f] any Action of Debt, and by the same Reason he cannot [g] release the Debt, for he cannot be said to have a Right to that which he has no Means to obtain, and the Debt which he cannot demand he cannot discharge. And thus the Law was touching the Administrator before the Statute of 31. *Ed.* 3. for he had no Power to get in any Debt or Duty due to the Intestate, and by Reason thereof the Debtors of the Intestates would keep the Debts in their own Hands, and the Creditors of the Intestates, who ought to have them, were disappointed of them, as it is said before, which was a Thing against Conscience, and a great Mischief; for the Redress of which the Act enables the Administrators to have an Action, and to recover the Debts, as Executors may, which Point is the only Purview of the Act. But as to our Case, viz. as to the [h] giving or aliening the Goods in his Hands, the Administrator had Power to do this at the Common Law. And altho' the Act provides that the Ordinary shall commit the Administration in case where a Man dies intestate, and in our Case here he did not die intestate, but made a Testament and Executors, and before the Probate Administration was committed, and the Administrator aliened the Goods, and afterwards the Testament was proved, yet it seems to me that the Sale of the Administrator shall be good, because it is declared in the Pleading that the Ordinary had Notice of the Testament. [i] And if he that is Executor keeps the Testament secretly, and neither he nor any other gives Notice of it to the Ordinary, there is no Defect in the Commission of Administration by the Ordinary, for he did not know but he had the Care of the Goods; and there is Reason to think that the Goods might have been wasted, if he had not appointed the Administrator to have the Care of them, and therefore he is not bound to take Notice of the Testa-

[a] 2 Keb. 210. Nelf. Lex. Testam. 12. Hale on F. N. B. 120. d. Post 280 (h).

[b] See Ante 277 (f).

[c] *Note*, when the Common Law invested the Ordinary with Power to commit Administration before the Statute of 31. *Ed.* 3. yet such Committee was in every Respect in the same Plight with the Ordinary himself from whom his Estate was derived, and therefore if the Ordinary could not give or alien the Intestate's Goods (as the greater Opinions seem to be Ante 277 (f). and there is no Authority here vouched to support the contrary Assertion) *ex consequente sequitur* that such Committee could not do it, *nam derivativa potestas non potest esse major primitivâ.*

[d] Post 280 (i). *Note*, they were chargeable by the Name of Executors, 5 Co. 82. b. 9 Co. 40. a. b. 2 Inst. 398. Hale on F. N. B. 120. d. Nelf. Lex Testam. 13.

[e] 2 Inst. 398, 404. 5 Mod. 93. 1 Show. 407. Nelf. Lex Testam. 12. Post 290. (d).

[f] T. 7. H. 4. 18. pl. 19. Fitz. Executors 107. Bro. 49. Perk. § 482. 5 Co. 28. a. 9 Co. 38. a. 39. a. 10 Co. 52. a. Co. Litt. 292. b. 1 Rol. R. 21. Hutt. 31. Wentw. Off. of Exec. 35. Godolph. Orph. Leg. 144, 145, § 4. 154. Cowel's Inst. 116. § 4. Post 280 (o). *Note*, this is to be understood, that he cannot sue effectually, for the Executor may commence an Action before Probate, but he cannot declare upon it. 1 Rol. Abr. 917. A. pl. 2. T. Raym. 481. Salk. 302, 303. *per Powel J.* 11 Mod. 9, 10. Law of Testaments, &c. 360, 361, 363.

[g] All the Books seem to be clearly against this Opinion in this Point. See Co. Litt. 292. b. 5 Co. 28. a. bis. 9 Co. 39. a. 10 Co. 52. a. 2 Brownl. 174. T. Jones 73. 1 Freem. 436. Salk. 301. 3 Salk. 163. 10 Mod. 171. 11 Mod. 39. 4 Bac. Abr. 280. Godolph. Orph. Leg. 145, § 4. Law of Testaments &c. 360, 363. Wentw. Off. of Execut. 296. Post 281 (e). [h] See supra (c). [i] Law of Testaments, &c. 451.

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ment, for that is a ſecret [a] Thing, which the Ordinary ſhall not be bound to enquire after; and *teſtamentum eſt teſtimonium mentis*, and how can it be ſaid the Teſtimony of his Mind, when it is not known? Wherefore it is reaſonable that it ſhould be made known to the Ordinary. [b] As if there be Lord and Tenant, and the Tenant makes a Feoffment, the Lord may avow upon his ancient Tenant, for he is not bound to take Notice of the Feoffment, but the Feoffee ought to give the Lord Notice of his Purchaſe. [c] And if an Action of Debt is ſued againſt an Executor who has Aſſets in his Hands, and he not having Notice of the Writ pays the Aſſets to others, and afterwards has Notice of the Writ, he ſhall be allowed to pay the Aſſets to the others, and ſhall not be chargeable to the Plaintiff for it, altho' he had not Notice before the *Capias pluries*, as it is held in 2. *H.* 4. for there the Executor who came in at the *Capias pluries* ſaid that he had fully adminiſtred before he had Notice of the Writ, which was ſued in [d] another County than where he dwelt, and the Opinion of the Court was, that the Plea was good, and that he ſhould not be charged to the Plaintiff for the Goods which he had employed in Payment of other Debts pending the Writ, where he had not Notice of the Writ; wherefore the Plaintiff ſaid that he warned him at ſuch a Day, at which Time he had Aſſets, *priſt*, *et alii e contra*. [e] So that we ſee Notice ought to be given to the Ignorant by him that has Knowledge of the Matter, or elſe he that has Knowledge ſhall not take Benefit of the Things which the ignorant Perſon does by Reaſon of his Ignorance of the Matter. So here the Executor who had Knowledge of the Will, and did not give Notice of it to the Ordinary, but ſuffered the Ordinary who was ignorant of the Will, to commit Adminiſtration to another, who has adminiſtred and ſold the Goods to the Defendant, ſhall not take Advantage of his own Silence, nor avoid the Sale made by the Adminiſtrator, who is not averred to have Notice of the Will at the Time of the Sale made; neither ſhall his Probate of the Will afterwards avoid the Acts done by the Adminiſtrator meſne between the Time of the Adminiſtration committed, and the Probate of the Will. And altho' the Act of 31. *Ed.* 3. provides that the Ordinary ſhall commit Adminiſtration in Caſe where a Man dies inteſtate, and in our Caſe here he did not die inteſtate, yet both ſince the Act and at the Common Law before the Act Adminiſtration may be committed where he that is dead makes a Teſtament and Executors. [f] As if the deceaſed makes Executors, and they refuſe before the Ordinary, [g] or if the Executors prove the Teſtament, and afterwards die inteſtate, there Adminiſtration may be committed, and yet it is not within the Words of the Act; but it is within the [h] Intent of the Act, for the Intent of the Act was, that Adminiſtration ſhould be committed where there was no Executor that would intermeddle. So ſhall it be here. [i] And if a Man makes his Will, and appoints that the Executors of *J. S.* ſhall be his Executors, and he dies living *J. S.* there the Ordinary may commit Adminiſtration of the Goods of him that is dead; and if the Adminiſtrator gives or ſells the Goods, and afterwards *J. S.* makes his Executors, and dies, and his Executors prove the other Will, yet they ſhall not avoid the Sale, or other Acts of the Adminiſtrator, altho' he did not there die inteſtate, but made his Will. And, Sir, the Intent of the Act is, that if a Man makes his Teſtament and Executors, and there is a meſne Time in which the Executors cannot or will not execute the Teſtament, the Ordinary may in the mean time commit Adminiſtration, and the Acts of the Adminiſtrator made for the Time ſhall bind, and this ſtands with the Intent of the Act, and with common Reaſon. [k] And if a Man makes his Executors, and enters into Religion, and is afterwards deraigned, he ſhall not avoid the Acts of the Executors done in the mean time. [l] Same Law if a Man makes his Teſtament, and ordains that a [m] Year after his Death ſuch Perſons ſhall be his Executors, and dies, the Ordinary within the Year may commit Adminiſtration, and the Sale or Gift of the Goods by the Adminiſtrator within the Year, or other Acts done by him within the Year, ſhall never be avoided by the Executors after the Year; for the Ordinary during the Year has Authority to meddle with the Goods, and may during that Time commit the Adminiſtration of them to others, from whence it follows that during that Time the Acts done by the Adminiſtrator ſhall be good for ever. So here the Ordinary not knowing that a Will was made had good Authority to commit Adminiſtration by the Intent of the Act, and the Adminiſtrator to adminiſter. And therefore the Probate of the Will afterwards ſhall not diſprove or avoid that which was well done before, but the Sale to the Defendant by the Adminiſtrator is good and indefeaſible; for which Cauſes it ſeemed to him that the Plaintiff ſhould be barred.

On the other Hand *Walſh* and the Lord *Dyer* argued for the Plaintiff. And they ſaid that the Plaintiff has declared as Executor, and has brought his Writ accordingly, in which it is contained that the ſaid *Thomas Kene* made his Teſtament, and thereby made the Plaintiff his Executor, and the Teſtament is proved, and he has produced it to the Court. And the Defendant in the Bar has ſhewn his Death, and the Commiſſion of Adminiſtration to the Son, and his Sale before the Probate; but he has not ſaid that he died inteſtate, and therefore inaſmuch as he has not alledged it, but has confeſſed by the *nient dedire* that he made a Will, and that it is proved, we ought to conſider how the Matter and the Authorities of Executor and of Adminiſtrator to one ſame Perſon ſtand together. And as to this, [n] there are three Perſons (as *Walſh* ſaid) who have to do with the Goods of the dead, that is, the Executor, the Ordinary, and the Adminiſtrator. [o] The Exeeutor is the Officer appointed for that Purpoſe by the Party himſelf, in whom the Party has repoſed the Property of the Goods, and a Confidence to diſpoſe of them, and to execute his Will. And if the Party does not appoint any one, then the Law appoints one to preſerve his Goods without Waſt, and to diſpoſe of them, and that is the Ordinary, [p] who in Reſpect of his Function, Piety, and Integrity is eſteemed in the Law the moſt worthy and fit Perſon to perform ſuch an Office. [q] And Adminiſtrators are appointed by the Ordinary for his Eaſe, and to diſcharge himſelf of the Burden of the Office, and they take their Commencement by a

[a] See Hob. 51 *Holmes v. Twiſt*, Notice muſt be given of a Thing ſecret.

[b] H. 8. H. 7. 10. b. *per Read et Jay.* M. 22. H. 6. 34. b. *per Fulthorp.* H. 7. Ed. 4. 28. a. *per Choke.* M. 8. Ed. 4. 12. b. *per Markham.* Bro. Avowry 97. H. 29. H. 8. Bro. Ibid. 111, 146.

[c] T. 2. H. 4. 21. pl. 2. Fitz. Executors 51. Bro. 43. Adminiſtrators 52. Aſſets inter maines 4 Notice 16. 1 Rol. Abr. 927. T. pl. 2. Cro. E. 793. 2 Leon 60. 3 Keb. 172. 1 Finch 336. 2 Finch 79. Godolph. Orph. Leg. 220. Wentw. Off. of Exec. 141. Nelſ. Lex. Teſtam. 432. Law of Teſtaments, &c. 433.

[d] The Law ſeems to be the ſame, tho' the Writ be ſued in the ſame County wherein the Executors are commorant, as it is ſaid by *Vaughan* C. J. upon Conference with the Judges of K. B. and upon Conſideration had of this Book, and of the Book of 2 *H.* 4. here cited. 1 Freem. 57, 112. with which agrees Wentw. Off. of Exec. 145.

[e] O. Bendl. 134. *Hogan's* Caſe.

[f] 1 Rol. Abr. 907. pl. 6. 2 Bac. Abr. 405. Law of Teſtaments, &c. 454.

[g] Poſt 281 (q).

[h] That the Act extends to both theſe Inteſtates, 9 Co 40. a. Law of Teſtaments, &c. 454.

E contra for the Plaintiff, *Walſh* and *Dyer* C. J.

[i] Poſt 281 (n).

[k] T. 4. H. 7. 14. a. *per Brown.*

[l] 1 Vin. Abr. tit. Executors C. pl. 13. Godolph. Orph. Leg. 77. § 2. 231, § 5. Poſt 281 (p).

[m] Hereby note that the Power of an Executor may be ſpecially limited and qualified, See Swinb. 240, 310. Wentw. Off. of Exec. 10. [n] Cart 125. [o] Salk. 303. 3 Salk. 163. [p] Wentw. Off. of Exec. 43. [q] Salk. 303. 3 Salk. 163.

[a] 9 Co. 38. a. 11 Mod. 39. Swinb. 381.

[b] See Ante 277 (e). and the Books there cited.

[c] T. 9. H. 7. 2. b. *per Fisher*. Bro. Extinguishment 53.

[d] Ante 277 (g). and See the Books there cited.

[e] 1 Show. 409 *obiter, arguendo*. Nelf. Lex Testam. 11.

[f] F.N.B. 120. d. Nelf. Lex Testam. 12.

[g] T. 11. Ed. 3. Fitz. Executors 77. Bro. 161.

[h] Ante 278 (a).

[i] Ante 278 (d).

[k] F.N.B. 120. d.

[l] 9 Co. 38. a. 11 Mod. 39. Swinb. 49.

[m] M. 9 Ed. 4. 47. a. *per Litt.* Bro. Executors 90.

[n] Salk. 301. *per Gould.* J. Treat. of Wills 236.

[o] See Ante 278 (f) and the Books there cited.

[p] 1 Freem. 446 *per Levinz, arguendo*. Salk. 301 *per Gould.* J. Godolph. Orph. Leg. 145, § 3.

[q] 36. H. 6. 7. b. Fitz. Administrators 6. 1 Vent. 304. Swinb. 27. Wentw. Off. of Exec. 38. Law of Testaments, &c. 365.

[r] For the Command of the Executor amounted to an Administration, Went. Off. of Exec. 39, 40. Law of Testaments &c. 367. Vin. Abr. tit. Executors B. a. pl. 44.

[s] 9 Co. 37. b. 1 Freem. 151. 2 Bac. Abr. 405. Swinb. 384, 443. Godolph. Orph. Leg. 63, § 6. Wentw. Off. of Exec. 38. 40. Law of Testaments &c. 365. 367, 450. But it seems, if the Ordinary does admit one to refuse, notwithstanding he has administred, it stands good, *nam factum valet, quod fieri non debuit.*

[t] Godolph. Orph. Leg. 145, § 2. Wentw. Off. of Exec. 92.

spiritual Act, viz. by the Letters of Administration, and have Authority over a Thing temporal. [a] But the Executor takes his Commencement by a temporal Act, viz. by the making of the Will of the Testator, which is a temporal Act, but takes it's Perfection by a spiritual Act, viz. by Probate in the Spiritual Court, and the Executor's Authority is over a Thing temporal. But the Ordinary or Administrator have no Authority or Interest, unless the deceased die intestate. For the Lord *Dyer* said, [b] if a Man had died intestate, the Property of his Goods came by the Common Law to the Ordinary, because the deceased had not appointed any one to take Care of them. For as by the Course of the Common Law a [c] Freehold shall be in some one, and shall not be in Suspence, so by the Common Law the Property of Goods shall be in some one, and shall not be in Suspence. And when a Man has a Property in Goods, the Property cannot be in him longer than he lives, and after his Death the Goods belong to another, as the ancient Verse is, *Da tua dum tua sunt, quia post mortem tua non sunt.* Then forasmuch as they cannot be his own after his Death, and he has not appointed them to any other, but has left them to the World, the Law gives the Property of them to the Ordinary, and because he had the Care of his Soul whilst he was alive, the Law gives him the Goods to dispose of for his Soul after his Death, and to such and no other Purpose he had the Goods, [d] for by the Common Law he should not be charged in an Action of Debt for a Debt due by the Intestate. [e] And the Letter of the Statute of *Westminster* 2. *cap.* 19. seems to purport this, for it says, *the Ordinary from henceforth shall be bound to answer the Debts, as far as the Goods of the dead will extend, in such Sort as Executors should have been bound, if he had made a Testament*; which Words *(from henceforth)* imply that before he was not chargeable, and therefore (he said) *from henceforth* was put in to make him chargeable afterwards; and by this Statute he was made so chargeable that if he had died his [f] Executors should have been chargeable in an Action of Debt, as far as the Goods which came to the Hands of the Ordinary would extend. And therefore, he said, in 16. *Ed.* 2. an Action of Debt in such Case was maintenable against the Executors of the Ordinary: And in [g] 11. *Ed.* 3. an Action of Debt was brought in such Case against the Executors of the Ordinary, but it is not there adjudged one Way or other, and the said Case in 16. *Ed.* 2. is there cited. And notwithstanding that the Statute of *Westminster* 2. *cap.* 19. made the Ordinary chargeable in an Action of Debt, [h] yet after that Statute and before the Statute of 31. *Ed.* 3. the Ordinary might commit the Administration to another, [i] and such Administrator should be charged in an Action of Debt: For in 19. *Ed.* 3. in an Action of Debt brought against the Ordinary, he pleaded that before the Action brought he had committed Administration to another, and there it is held a good Plea. And he also said that [k] *Fitzherbert* in his *Natura Brevium* takes the Law to be that the Ordinary might before the Statute of 31. *Ed.* 3. have committed the Administration to another, for he there says that before the Statute of 31. *Ed.* 3. Administrators could not have an Action of Debt against the Debtors, in which Saying it is implied that there were and might be Administrators before the said Statute. But the Power or Interest which the Ordinary himself had, and the Power and Authority which the Common Law or the Statute of 31. *Ed.* 3. gave him to commit Administration to another, is but where a Man dies intestate, so that if he makes a Will, such Power and Interest is not given. For when a Man makes a Will, thereby he commits all his Goods to his Executor, and in him he repose the greatest Confidence, and the Law favours his Will; for Wills have been ever since Property has been amongst Men, and they have always been, and by Necessity of Reason ought to be, favoured. So that it shall be called a Will, and his Executors who are named shall be called Executors, before the Probate of the Will. For *St. Paul* says, *a Testament is confirmed by Death*, so that by his Definition, and by our Law also, it is a Testament when the Testator is dead, and the Executors named are Executors [l] presently and before the Probate of the Testament, for the Probate is but a Confirmation and Allowance of that which the Testator has done. For the Spiritual Court Men have divers Terms, as *Insinuation*, which is a Surmise that there is such a Testament, and *Approbation*, which implies that the Surmise is tried to be true, and allowed, and in Witness thereof the Ordinary puts his Seal. But before this is done it is a Testament, and the Executors named are Executors, for the Death preceding makes it a Testament, and by the Death the Property of the Goods which was in the Testator is cast upon and vested in the Executors. And they are not called Executors in Respect only that they actually execute, but in respect that they may execute. [m] And they may execute before Probate, [n] and may be sued, [o] altho' they shall not sue for any Duty due to the Testator until they have proved the Testament, [p] and they may alien or give away the Goods, or otherwise dispose of them before Probate. And upon this he cited the Case in 36. *H.* 6. where an Executor commanded *A.* to take certain Goods of the Testator out of the Possession of *B.* who accordingly did so, and afterwards the Executor refused to administer, and the Ordinary committed the Administration to *B.* who brought an Action of Trespass against *A.* for the said taking of the Goods; and there it is the Opinion of three Justices, that the Justification by the Command of him who was named Executor was good, notwithstanding his Refusal afterwards, for the Refusal shall not make the Command void, nor prejudice him who was not Party, and who did well at the Time of the Act done. Which Case argues that before the Probate of the Testament the Executor has an Interest and Authority in the Things which belonged to the Testator. And he said that it seemed to him in this Case, that the Ordinary might there have well [r] refused the Refusal of the Executor, [s] for when he had once intermeddled with the Goods, the Ordinary ought not to have permitted him to refuse afterwards. And he said that there are some Things which must of Necessity be done before there is any Time to prove the Will, [t] as to remove the Goods and Chattles out of the House and Lands of the Testator, which after his Death are descended to the Heir, for if the Executors

do not this in as ſhort a Time as they conveniently can, the Heir may diſtrain them Damage feaſant. So that before Probate the Law allows the Executors who are named to be Executors, and compels them to do ſome Things as Executors, and adjudges the Property of the Goods of the Teſtator to be in them before any Seizure; and if any one takes them before the Executors ſeize them, [a] they ſhall have an Action of Treſpaſs or Replevin againſt him before Probate, for the Property and Poſſeſſion was caſt upon them before Seizure. [b] As if the tenth Part of Corn is ſevered for Tithes, the Parſon ſhall have an Action of Treſpaſs, before any Seizure, againſt him that takes it away, for the Property and Poſſeſſion was in him before Seizure, becauſe the Thing is certain by the Severance of the tenth Part. [c] But, he ſaid, if the Parſon ought to have the beſt Beaſt for a Mortuary, the Property ſhall not be in him before Seizure, as 10. *H.* 4. is, for a Diſpute may ariſe whether it be the beſt Beaſt or not, and therefore he ſhall determine his Election by Seizure, and before that is done he ſhall not have an Action of Treſpaſs or Replevin. Then if the Law immediately after the Death of the Teſtator veſts the Property and the Poſſeſſion of his Goods in the Executor, from thence it follows that the Law never veſts the Property in the Ordinary, and from thence it follows that the Law never veſts the Property in the Adminiſtrator. For if he ſhould have the Property, then there would be two Properties of one Thing, or at leaſt the Law muſt take the Property out of the Executor, and veſt it in the Adminiſtrator; but the Law will not do him ſuch Wrong, nor will it deveſt that which it has once veſted. And the Adminiſtrator cannot have a greater Property of the Things in Poſſeſſion than the Ordinary had before, and here the Ordinary before Adminiſtration had no Property at all, nor any Thing to do with the Goods, but the Executor had the Property and the full Poſſeſſion of them. And if there ſhould be any Doubt in this Point, it is removed by the Probate, for thereby the Will is fully perfected and conſummate, and is of the ſame Effect as if it had been proved immediately after the Death of the Teſtator, by reaſon of the [d] Relation of the Probate in this Point. [e] For if before the Probate he had releaſed a Debt, and afterwards had proved the Will, this makes the Releaſe good and perfect, as *Walſh* ſaid, and yet at the Time of the Releaſe made he could not have an Action of Debt for the Duty, becauſe he could not ſhew the Will proved under Seal; but the Relation of the Probate removes all Imperfection which might have been alledged before, and it over-reaches the Adminiſtration, and the Authority of the Adminiſtrator, as the Lord *Dyer* termed it, and diſproves his Acts by annihilating his Power. [f] As if one takes Letters of Adminiſtration of the Ordinary of the Goods of one who dies inteſtate, and afterwards the Metropolitan commits Adminiſtration to another, becauſe the inteſtate had Goods to the Value of [g] 10 *l.* in divers Dioceſes, there this diſproves the Authority of the firſt Adminiſtrator, and makes the ſecond Adminiſtrator to avoid the Acts of the firſt. [h] And he ſaid that in 10. *H.* 7. *Keble* ſaid in this Caſe, that the ſecond Adminiſtrator ſhall have an Action of Treſpaſs againſt the firſt Adminiſtrator for taking the firſt Goods, for the firſt Ordinary who committed the Adminiſtration had no [i] Authority to do it where the inteſtate had Goods to the Value of 10 *l.* in divers Dioceſes, but that Adminiſtration and all the Dependances upon it are utterly diſproved by the Commiſſion of the ſecond Adminiſtration. [k] And he alſo cited the Caſe in 7. *Ed.* 4. where one as Adminiſtrator to *J. S.* brought a Writ of Debt againſt another, and the Defendant pleaded that the ſaid *J. S.* made him his Executor in another County than where the Action was brought and the Adminiſtration committed, and that pending this Suit he had proved the Will; and there *Littleton* ſays, "if a Man makes an Executor, it is reaſonable that (if he will) he ſhould have the Diſpoſition of the Goods to diſpend for the Soul of the deceaſed, for that was his laſt Will, which "Will is reaſonable to be performed; and a Man may make me his Executor without my Knowledge, and afterwards when I have Notice of it, I may take upon me the Power of Executor; "and the Ordinary may well commit Adminiſtration in the mean time (as he has done here), but "preſently by the Probate of the Teſtament the Power of the Adminiſtrator is determined, unleſs the Executor has once [l] refuſed before the Ordinary, and then perhaps the Law would be "otherwiſe." And to this ſaying of *Littleton* agreed *Newton* and *Danby* there; and they ſpoke further there whether he ſhould traverſe that he did not die inteſtate, but the clear Opinion there upon the Matter was, that by the Probate the Power of the Adminiſtrator ſhould be diſproved, and that the Plaintiff there ſhould be barred. [m] And further, he ſaid, it ſeems by the Book in 3. *H.* 7. that before the Ordinary commits Adminiſtration where there is an Executor made, he ought to award Proceſs againſt the Executor to come in and prove the Teſtament, and if he will not prove it, then the Ordinary may commit Adminiſtration to others, and this ſtands with Reaſon. But here there is no ſuch Thing done, for which Reaſon the Probate here diſproves the Adminiſtration not only from the Time of the Probate, but for the whole Time. For, he ſaid, the Probate proves the Executor here to be a full and perfect Executor not only for a Time, but for the whole Time fully and entirely ſince the Death of the Teſtator. And it is not like to the Caſe put, *viz.* [n] where a Man appoints by his Teſtament that the Executors of *J. S.* who is alive ſhall be his Executors, and dies, for there until the Death of *J. S.* he dies [o] inteſtate, for in the mean time he has no Executor. Nor is it like to the Caſe put, [p] where he makes one his Executor a Year after his Death, for within the Year he is inteſtate, and therefore for that Time the Ordinary has Power to commit Adminiſtration, and that ſhall never be diſproved. Neither is it like to the Caſe put, [q] where one makes his Executor, who proves the Teſtament, and dies inteſtate, for there the Ordinary may commit Adminiſtration of the Goods of the firſt Teſtator, [r] becauſe from the Time of the Death of the Executor, who died inteſtate, the firſt Teſtator died inteſtate, for which reaſon from that Time forwards the Ordinary may commit Adminiſtration. Neither is it like to the Caſe put, [s] where a Man makes his Executors, who refuſe, for there

[a] Theol. Dig. lib. 1. cap. 18. § 30. 8 Co. 135. b. Godolph. Orph. Leg. 145, § 4. 154. Went. Off. of Exec. 35. Nelſ. Lex Teſtam. 466. Law of Teſtaments, &c. 361.

[b] See Perk. § 63.

[c] M. 10. H. 4. 1. pl. 2. Fitz. Premunire 13.

[d] The Probate has Relation to the Death of the Teſtator, Went. Off. of Exec. 48. Law of Teſtaments, &c. 377.

[e] See Ante 278 (g). and the Books there cited.

[f] Godolph. Orph. Leg. 251, § 5.

[g] As to what ſhall be deemed *bona notabilia* to entitle the Metropolitan, ſee Swinb. 438.

[h] P. 10 H. 7. 18. pl. 1. Theol. Dig. lib. 1. cap. 19 § 12. 2 Leon *Dunn*'s Caſe *dubitatur*.

[i] S. P. 5 Co. 30. a. 8 Co. 135. b. Swinb. 443.

[k] T. 7. Ed. 4. 12. b. Fitz. Adminiſtrators 8. Bro. Executors 111. T. Jones 72.

[l] See *Abraham v. Cuningham* 1 Freem. 446. 1 Vent. 303.

[m] H. 3. H. 7. 14. pl. 21. Fitz. Adminiſtrat. 11. T. 4. H. 7. 13. pl. 10. Bro. Adminiſtrators 32.

[n] Ante 279 (l).

[o] Godolph. Orph. Leg. 78. Wentw. Off. of Exec. 10. Law of Teſtam. &c. 351. Vin. Abr. tit. Executors G. 3. pl. 1.

[p] Ante 279 (l).

[q] Ante 279 (s).

[r] 1 Keb. 247. Swinb. 90.

[s] Ante 279 (f).

there the Ordinary may afterwards commit Administration to others, because upon the Matter he died [a] intestate. But here in our Case *Grayſbrook* the Plaintiff was made Executor immediately without the Intervention of any mean time, and by the Probate he has made himself a full and continual Executor, occupying the Place and Authority of Executor for the whole Time incurred since the Death of the Testator, leaving no Time for the Ordinary or for the Administrator to intermeddle, but disproving their Authority and Interest. And he said that the Seal of the Ordinary put to the Administration is but a Matter [b] of Fact, which is not any Estoppel for the Time, nor shall it force the Executor to sue in the spiritual Court to repeal it, but he shall avoid it by Plea, or by taking the Goods from the Administrator, or by some other Matter of Fact as Occasion shall offer. [c] And to prove this he cited the first Case in *Trin.* 44. *Ed.* 3. where one brought a Writ of Debt against another as Administrator, and declared that the Debtor died intestate, and that the Ordinary deputed the Defendant to be Administrator, and he shewed the same in Certainty, and the Opinion of the Court there was, that he ought to do so; and the Defendant said that the deceased made his Testament, and constituted the Defendant and another his Executors, and he demanded Judgment of the Writ, and shewed forth the Testament proving his Plea, and the Plaintiff offered to aver that the Party died intestate, and the Defendant said that he should not be received to this Averment against the Testament which is proved before the Ordinary, and is under the Seal of the Ordinary, *sed non allocatur*; wherefore the Plaintiff had the Averment, and it was tried [d] *per Pais*. So that the Seal of the Ordinary to the Probate of the Testament could not deprive the Plaintiff of his Averment, but that he should have it, and try it *per Pais*. [e] Also he cited the Case in 21. *H.* 6. where one brought an Action of Debt against a Man as Executor, who had administered as Executor of his own Wrong, and afterwards and before the Writ purchased had taken out Letters of Administration; [f] as also the like Case in 2. *R.* 3. in a *Scire facias* brought against certain Persons as Executors, where they had administred as Executors, and afterwards had taken out Letters of Administration; in which Cases it seems by the better Opinion that the Plaintiff shall not be concluded by the Letters of Administration; but neither of the Cases is there adjudged. [g] Also he cited the Case in 34. *H.* 6. where *Thomas Lombard* as Administrator brought an Action of Debt, and the Defendant was received to avoid the Letters of Administration by saying that the deceased made Executors, and that the one had proved the Testament in the *Arches*, and that one was alive, *absque hoc* that he died intestate, *&c.* and the Plaintiff maintained that he died intestate, and thereupon Issue was joined. [h] And also, he said, in the Case of 7. *Ed.* 4. before cited, the Executor who proved the Testament was not forced to avoid the Letters of Administration granted before the Probate by Suit in the spiritual Court, but he proved the Testament, and upon this he was received by Plea to avoid the Letters of Administration. So shall the Defendant here, and thereby he shall avoid the Sale of the Administrator. But *Walsh* said, if the Defendant here had averred that the Administrator had aliened the Goods to him for a certain Sum, and had employed the Money in Discharge [i] of the Funeral, or of the Debts of the deceased, or about other Things which an Executor should be forced to do, there the Sale for such Purposes should not be avoided, but should remain indefeasible; and the Reason is, because by the Commission of the Administration to him by the Ordinary, who was ignorant of the Testament, he has a Colour of Authority, though it is not a rightful one, and he that has the Right suffers no Disadvantage although he be bound by the Act of the Administrator, for it is no more than he himself was compellible to do, and the Administrator having done that which the Executor himself was obliged to do, his Act shall be allowed good, because the Executor himself is thereby freed and excused from the Trouble of doing it. And so inasmuch as the Administrator was compellible to do it, (for if he was sued for a Thing which ought to be done, he could not disable or discharge himself for the Time) it is reasonable, and no Detriment to any one that the Thing done should remain stable and firm without Impeachment. [k] And hereupon he cited the Case of *Sands* and *Peckham* in 4. *H.* 7. where *Peckham* claiming to be Executor to one who was dead by a false Testament supposed to be made by the Testator, had got this false Testament to be allowed, upon Default of *Sands* who claimed to be Executor by a latter Will, before a certain Person appointed by a Delegacy, and the Will exhibited by *Peckham* was proved, and afterwards *Sands* sued out another Delegacy to another, who awarded that the Testament exhibited by *Sands* was true, and that he was Executor, and that the said Testament whereby *Peckham* claimed should be void, and upon this *Sands* sued an Action of Debt against *Peckham* for 40 Marks, which he was bound to the Testator to pay, and *Peckham* shewed the Allowance of his Testament *ut supra*, and that during the Time that his Testament was in force he paid the 40 Marks to one of whom the Testator had received so much for Usury; and it was adjudged no Plea, because he was not bound by Law to repay the Usury, for it is but a Thing of Conscience, which the Law will not compel him to pay. But there it is held, that although he was not Executor of Right but of Wrong, [l] yet if he had paid any Debt due by Specialty, or other Thing which the Law will force the Executor to pay, the true Executor should have been bound by it, and should have been obliged to allow it, because the other was compellible to pay it, and the true Executor had no Prejudice by it, forasmuch as he himself should have been bound to pay it. And it is there put, [m] that if the Bailiff of a Manor pays the Debts of his Master due by Specialty or Contract, he shall not be allowed for it in his Account, because he was not compellible to pay them; [n] but if he pays Quit-rents issuing out of the Manor, he shall be allowed for it in his Account, because it belongs to his Office to pay them. And so here if the Administrator had aliened the Goods specified in the Count to pay the Funeral or Debts, the Sale had been good and indefeasible; *quod alii duo Justiciarii concesserunt*. And upon

[a] M. 20. H. 6. 1. pl. 4. *Per Newton.* 36. H. 6. 8. a. *Per Nedham.* Dy. 236. pl. 27. 1 Rol. Abr. 907. pl. 1. 9 Co. 37. a. 1 Finch 148, 151. 409. 2 Finch 168, 171.

[b] Wentw. Off. of Exec. 48. Law of Testaments, &c. 376.

[c] T. 44. Ed. 3. 26. Fitz. Administrators 15. Estoppel 9. Bro. Administrators 11. Estoppel 36. Record 12. 9 Co. 31 a. 41. a. Doc. Pla. 159, 353.

[d] See Ante 277 (d).

[e] M. 21. H. 6. 8. a. Fitz. Executors 16. Bro. 74.

[f] M. 2. R. 3. 20. a, b. Bro. Executors 167.

[g] M. 34. H. 6. 14. a. Fitz. Administrators 3. Bro. 7.

[h] T. 7. Ed. 4. 12. b. Fitz. Administrators 8. Bro. Executors 121.

[i] Theol. Dig. lib. 1. cap. 18. §31 2 Bac. Abr. 411. So it was held in Equity, where a Widow possessed herself of the personal Estate as Executrix under a revoked Will, and paid Debts and Legacies, but had no Notice of the Revocation, that she should be allowed those Payments, *Hale v. Stotvel*, 1 Chan. Cas. 126.

[k] T. 4. H. 7. 13. b. Fitz. Executors 41. Bro. Debt 140. Ante 185 (a).

[l] *Note*, all lawful Acts which an Executor of his own Wrong does are good, 5 Co. 30. b.

[m] Ante 14 (d).

[n] Litt. R. 71. Cro. J. 178. Owen 28. 1 Mod. Entr. 65. pl. 4. Ante 14 (d).

upon this *Dyer* cited the Caſe in 12. *H.* 7. * where the Dean and Chapter of *Paul*'s brought an Action of Treſpaſs againſt one for cutting down great Trees, and the Defendant juſtified as their Bailiff of a Manor, in which there was a Park incloſed with Pale from Time beyond the Memory of Man, and that he cut down the Trees for the neceſſary Incloſure of the Park with Pale, and applied them to that Uſe; and the Opinion of the Court was that he might juſtify, for it belongs to his Office to repair or maintain the Park or Edifices of the Manor in the ſame Condition as they have always been, but he cannot make a new Pale, or new Houſes, or any Thing in other Manner than they have uſed to be, but to maintain and keep them in the ſame Form is a part of his Office, and he ſhall be allowed for the ſame. So in the principal Caſe, if the Defendant had ſhewn that the Sale was made to him by the Adminiſtrator in diſcharge of any Thing which he had been compellible to do, the Sale ſhould not have been avoided; but he has not ſhewn any ſuch Matter, nor has he taken any ſuch Averment, and therefore it cannot be taken by the Plea that it was applied to any ſuch Purpoſe, for which Cauſe the Plea in Bar is not good, and the Plaintiff ought to recover. And (as I heard) *Anthony Brown* Juſtice afterwards declared to them that he was of the ſame Opinion, wherefore Judgment was given for the Plaintiff the ſame Term, as follows, *viz.*

* T. 12. H. 7. 26. Bro. Baily 42 Treſpaſs 288. Owen 28.

The reſt of the Record.

Judgment.

At which Day here came as well the aforeſaid *Alvared* as the aforeſaid *Robert* by their Attornies aforeſaid. And thereupon the Premiſſes being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here that the aforeſaid Plea of the aforeſaid *Robert Fox* above in Bar pleaded is inſufficient in Law to preclude the aforeſaid *Alvared* from having his Action aforeſaid againſt the ſame *Robert*. Therefore it is conſidered that the aforeſaid *Alvared* recover againſt the aforeſaid *Robert* the Goods and Chattles aforeſaid, or the Value of the ſame. And the ſame *Robert* in Mercy *&c.* And the Sheriff is commanded that he diſtrain the aforeſaid *Robert* by all his Lands, *&c.* and that of the Iſſues, *&c.* ſo that he render to the aforeſaid *Alvared* the Goods and Chattles aforeſaid; and that by the Oath of good, *&c.* he diligently enquire what Damages the aforeſaid *Alvared* hath ſuſtained, as well by Occaſion of the detaining the Goods and Chattles aforeſaid, as for his Coſts and Charges by him about his Suit in this behalf expended: And if the aforeſaid *Robert* hath not rendered the Goods and Chattles aforeſaid to the aforeſaid *Alvared*, then how much the ſaid Goods and Chattles are worth according to the true Value of the ſame, and how, *&c.* the Sheriff ſhould make appear here from the Day of the Holy *Trinity* in 15 Days under the Seal, *&c.* and the Seals, *&c.* At which Day here came the aforeſaid *Alvared* by his Attorney aforeſaid; and the Sheriff, *viz. William Devereux* Eſquire now returned, that the aforeſaid *Robert Fox* hath not rendered to the aforeſaid *Alvared* the Goods and Chattles aforeſaid, or any Parcel thereof. Alſo the ſame Sheriff returned a certain Inquiſition taken before him at *Birmingham* in the County aforeſaid the 14th Day of *June* laſt paſt by the Oath of 12, *&c.* by which it is found that the Goods and Chattles aforeſaid are worth, according to the true Value of the ſame, 4 *l.* And that the aforeſaid *Alvared* has ſuſtained Damages by Occaſion of the detaining the ſaid Goods and Chattles, beſides his Coſts and Charges by him about his Suit in this behalf expended, to the Amount of 20 *s.* and for the ſaid Coſts and Charges to the Amount of 46 *s.* 8 *d.* Therefore it is conſidered that the aforeſaid *Alvared* recover againſt the aforeſaid *Robert* the aforeſaid 4 *l.* for the Value of the Goods and Chattles aforeſaid, and alſo his Damages aforeſaid to the Amount of 46 *s.* 8 *d.* by the Inqueſt aforeſaid above found, and alſo 7 *l.* 13 *s.* 4 *d.* to the ſame *Alvared* at his Requeſt for his Coſts and Charges aforeſaid by the Court here of Increaſe adjudged. Which ſaid Damages in the whole amount to 10 *l.* And the aforeſaid *Robert* in Mercy, *&c.*

A Re-

A Report of a Judgment given in the King's Bench *in* Trinity *Term in the* ſeventh *Year of the Reign of Queen* Elizabeth, *by the Juſtices of the ſame Bench, after Argument of the Counſel for the Parties, upon a Demurrer in Law on the Count made on a Bill exhibited by* Richard Chapman, *Executor of the Teſtament of* Anne Chapman, *Executrix of the Teſtament of* John Chapman, *Plaintiff, againſt* Robert Dalton *Defendant, for a Covenant made by Indenture between the ſaid* Robert Dalton *and* Elizabeth *his Wife of the one Part, and the ſaid* John Chapman *of the other Part, and broken by the ſaid* Robert Dalton. *And the Record is amongſt the Records of* Trinity *Term* 6 Elizabeth. *Rot.* 230. *and was read as follows,*

Trin. Term 6 Eliz. Declaration. Same Precedent Raſt. Entr. 134. a. b.

BE it remembered, that heretofore, *viz.* in the Term of *Eaſter* in the *fifth* Year of the Reign of the Lady *Elizabeth* now Queen of *England*, before the ſame Lady the Queen at *Weſtminſter*, came *Richard Chapman* Executor of the laſt Will and Teſtament of *Anne Chapman* late of *Cornbrough* in the County of *York* Widow deceaſed, Executrix of the laſt Will and Teſtament of *John Chapman* late of *Cornbrough* within the Pariſh of *Sherofton* deceaſed, otherwiſe called *Richard Chapman my Son whom I make my ſole Executor*, otherwiſe called *Richard Chapman* Executor in the ſame Teſtament named, otherwiſe called *Anne my Wife whom I make my full Executrix*, otherwiſe called *Anne Chapman* Executrix in the ſame Teſtament named, by *Thomas Butler* his Attorney, and produced here in the Court of the ſaid Lady the Queen then there his certain Bill againſt *Robert Dalton* in the Cuſtody of the Marſhal, *&c.* of a Plea of Covenant broken; and there are Pledges of proſecuting, *viz. John Doe* and *Richard Roe.* Which ſaid Bill follows in theſe Words, *viz. London, viz. Richard Chapman* Executor of the laſt Will and Teſtament of *Anne Chapman* late of *Cornbrough* in the County of *York* Widow deceaſed, Executrix of the laſt Will and Teſtament of *John Chapman* late of *Cornbrough* within the Pariſh of *Sherofton* deceaſed, otherwiſe called *Richard Chapman my Son whom I make my whole Executor*, otherwiſe called *Richard Chapman* Executor in the ſame Teſtament named, otherwiſe called *Anne my Wife whom I make my full Executrix*, otherwiſe called *Anne Chapman* Executrix in the ſame Teſtament named, complains of *Robert Dalton* in the Cuſtody of the Marſhal of the Marſhalſea of the Lady the Queen before the ſaid Queen being, of a Plea of Covenant broken, for this, to wit, whereas by a certain Indenture made at *London, viz.* in the Pariſh of the bleſſed *Mary* of the *Arches* in the Ward of *Cheap* in *London* the 20th Day of *March* in the 33d Year of the Reign of Lord *Henry* the *Eighth* late King of *England*, between the aforeſaid *Robert Dalton* and *Elizabeth* his Wife, by the Names of *Robert Dalton* Son of *Thomas Dalton* of *Kingſton upon Hull* Merchant of the Staple of *Calais*, and *Elizabeth* his Wife Daughter and Heir of *John Silſtern* and *Chriſtian* his Wife, of the one Part, and the aforeſaid *John Chapman* in his Lifetime, by the Name of *John Chapman* of *Cornbrough* in the County of *York* Yeoman, of the other Part, (one Part whereof ſealed with the Seal of the ſaid *Robert* and *Elizabeth*, bearing Date the ſame Day and Year the ſame *Richard* here produces in Court) it was covenanted, granted, and agreed between the ſame Parties by the Indenture aforeſaid, as follows, to wit, that the aforeſaid *Robert* and *Elizabeth* his Wife, for the Sum of 10 *l.* of good and lawful Money of *England* to them by the aforeſaid *John Chapman* paid, in the Name of a Fine called a *Groſſome*, at the ſealing of the Indenture aforeſaid, whereof the aforeſaid *Robert* and *Elizabeth* his Wife acknowledged themſelves by the Indenture aforeſaid well and truly to be ſatisfied, contented, and paid, and the aforeſaid *John Chapman* and his Executors thereof clearly to be diſcharged, by the Indenture aforeſaid had demiſed, granted, and to farm-let, and by the ſame Indenture did demiſe, grant, and to farm-let to the aforeſaid *John Chapman* four Cloſes called *Northfield*, with all and ſingular the Appurtenances, ſituate, lying, and being in *Cornbrough* aforeſaid in the aforeſaid County of *York*, then in the Tenure and Occupation of the aforeſaid *John Chapman*; to have and to hold, occupy, and enjoy the aforeſaid four Cloſes with all and ſingular their Appurtenances, to the aforeſaid *John Chapman* his Executors and Aſſigns, from the Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin from thence next following after the Date of the Indenture aforeſaid, unto the End and Term of 21 Years from thence next and immediately following, and fully to be compleat and ended: yielding and paying therefore yearly to the aforeſaid *Robert Dalton* and *Elizabeth* his Wife, and to the Heirs of the aforeſaid *Elizabeth* 12 *l.* of good and lawful Money of *England* at the Feaſts of *St. Michael* the Archangel, and of the *Annunciation* of the bleſſed *Mary* by equal Portions during the Term aforeſaid. And if it ſhould happen that the aforeſaid annual Rent of 12 *l.* or any Part or Parcel thereof be in Arrear and unpaid at any of the aforeſaid Feaſts on which it ought to be paid, by the Space of one Month, being lawfully demanded, then it ſhould be lawful for the aforeſaid *Robert* and *Elizabeth* his Wife, and the Heirs of the ſaid *Elizabeth*, into the Premiſſes to enter, and there to diſtrain, and the Diſtreſs ſo taken to drive off, lead, carry away, and keep, until the aforeſaid *Robert Dalton* and *Elizabth* his Wife, and the Heirs of the ſaid *Elizabeth* ſhould be lawfully ſatisfied, contented, and paid for the aforeſaid annual Rent, and every Parcel thereof, together with the Arrears if any ſhould be. And alſo the aforeſaid *Robert Dalton* and *Elizabeth* his Wife for themſelves, their Heirs, and Executors covenanted and granted by the Indenture aforeſaid to and with the aforeſaid *John Chapman* and his Executors, that they the aforeſaid *Robert Dalton* and *Elizabeth* his Wife, and the Heirs of the aforeſaid *Elizabeth*, of their own proper Charges and Expences yearly during the Term aforeſaid, would content and pay, acquit, and diſcharge the aforeſaid *John Chapman* and his Aſſigns againſt the Lord the King or his Collectors concerning the Proceſs called *Greenwax*, Iſſues of Counties, called *County-Fees*, and Iſſues, with all ſuch Charges, belonging

belonging to the aforeſaid four Cloſes with the Appurtenances, provided alſo that the aforeſaid *John Chapman* and his Aſſigns of their own proper Charges acquit the aforeſaid *Robert Dalton* and *Elizabeth* his Wife, and the Heirs of the aforeſaid *Elizabeth*, againſt Suit to the Court of *Sherofton* for the aforeſaid four Cloſes with the Appurtenances during the Term aforeſaid. And further the aforeſaid *Robert Dalton* and *Elizabeth* his Wife for themſelves, their Heirs, Executors, and Adminiſtrators covenanted and granted by the Indenture aforeſaid to and with the aforeſaid *John Chapman* and his Executors, that they the aforeſaid *Robert* and *Elizabeth*, or the Heirs of the aforeſaid *Elizabeth*, after the End and Term of the aforeſaid 21 Years, ſhould make or cauſe to be made to the aforeſaid *John Chapman* and his Aſſigns a good, certain, ſufficient, and lawful Demiſe of the aforeſaid four Cloſes called *Northfield*, with all and ſingular the Appurtenances, for the Term of 21 Years, commencing at the 26th Day of *March* which ſhould be in the Year of our Lord 1563, next and immediately following the aforeſaid Term of 21 Years before named, and in the Indenture aforeſaid ſpecified and contained, without any Groſſome or Fine to be paid and rendered for the Premiſſes to the aforeſaid *Robert* and *Elizabeth*, or to the Heirs of the ſaid *Elizabeth*, but only the annual Rent to be paid or yielded for the ſame at the aforeſaid Feaſts due and accuſtomed, as by the ſame Indenture among other Tnings more fully appears. By virtue of which ſaid Demiſe the ſame *John Chapman* immediately after the Feaſt of the *Annunciation* of the bleſſed *Mary* next following the Date of the ſaid Indenture into the Tenements aforeſaid with the Appurtenances entered, and was thereof poſſeſſed: And being ſo poſſeſſed thereof, the ſame *John* afterwards, *viz.* the 18th Day of *January* in the Year of our Lord 1546. at *London* in the Pariſh and Ward aforeſaid, made and declared his laſt Will, and by the ſame conſtituted and ordained one *Anne* then his Wife his Executrix, and died; after whoſe Death the ſame *Anne* proved the ſaid laſt Will and Teſtament, and into the Tenements aforeſaid with the Appurtenances entered, and was thereof poſſeſſed. And the ſame *Anne* being ſo poſſeſſed thereof, afterwards, *viz.* the 20th Day of *September* in the Year of our Lord 1558. at *London* in the Pariſh and Ward aforeſaid, made and declared her laſt Will, and by the ſame conſtituted and ordained the aforeſaid *Richard Chapman* her Executor, and died, after whoſe Death the ſame *Richard Chapman* proved the ſaid laſt Will and Teſtament, and into the Tenements aforeſaid with the Appurtenances entered, and was thereof poſſeſſed. And afterwards, *viz.* at the Feaſt of the *Annunciation* of the bleſſed *Mary*, *viz.* the 25th Day of *March* in the *fifth* Year of the Reign of the Lady the Queen now, the aforeſaid Term of 21 Years ended and was determined. And the ſame *Richard Chapman* ſays, that although the aforeſaid *John Chapman* in his Lifetime, and the aforeſaid *Anne* after the Death of the ſaid *John*, and the ſame *Richard* after the Death of the aforeſaid *Anne*, all and ſingular the Covenants, Grants, and Agreements in the Indenture aforeſaid above ſpecified on the Part of the ſaid *John Chapman* and his Executors to be performed and fulfilled have well and faithfully, according to the Force, Form, and Effect of the Indenture aforeſaid, kept and fulfilled, nevertheleſs the aforeſaid *Robert Dalton* (for that the ſame *Robert* and *Elizabeth* after the End and Term of the aforeſaid 21 Years to the aforeſaid *Richard* Executor of the aforeſaid *Anne Chapman* Widow, Executrix of the aforeſaid *John Chapman* deceaſed, a good, ſure, ſufficient, and lawful Demiſe of the aforeſaid four Cloſes called *Northfield* for the aforeſaid Term of 21 Years to begin at the End of the aforeſaid Term of 21 Years above to the aforeſaid *John Chapman* made, *viz.* at the 26th Day of *March* which was in the aforeſaid Year of our Lord 1563, according to the Force, Form, and Effect of the Indenture aforeſaid, although often requeſted, have not made, nor cauſed to be made to the aforeſaid *Richard* after the Death of the ſaid *John* and *Anne*) the Covenant aforeſaid between the ſaid *Robert* and the aforeſaid *John* in his Lifetime made, has not kept, but broken, and the ſame to the aforeſaid *Richard* after the Death of the ſaid *Anne* hitherto to keep has wholly refuſed, and yet does refuſe, to the Damage of the ſaid *Richard* 800 *l.* and in Delay of the Execution of the Teſtaments aforeſaid; and therefore he brings the Suit, *&c.* And the ſame *Richard* produces here in Court the Letters teſtamentary as well of the aforeſaid *John* as of the aforeſaid *Anne*, by which it ſufficiently appears to the Court of the Lady the Queen here, that the ſaid *Anne* was Executrix of the Teſtament of the aforeſaid *John*, and that the ſaid *Richard* is Executor of the ſame *Anne*, and thereof hath the Adminiſttation, *&c.*

And now at this Day, *viz* on *Friday* next after the Morrow of the Holy *Trinity* in this ſame Term, until which Day the aforeſaid *Robert Dalton* had Leave to imparl to the Bill aforeſaid, and then to anſwer, *&c.* before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Richard Chapman* by his Attorney aforeſaid, as the aforeſaid *Robert Dalton* by *Wilfrid Erand* his Attorney. And the ſame *Robert* defends the Force and Injury when, *&c.* and prays Judgment of the Declaration aforeſaid, becauſe he ſays that the ſaid Declaration, and the Matter therein contained, are inſufficient in Law to compel him the ſame *Robert* to anſwer to the ſaid Declaration, to which he the ſame *Robert* has no Neceſſity, nor is by the Law of the Land in any wiſe bound to anſwer; wherefore for Want of a ſufficient Declaration in this behalf, the ſame *Robert* prays Judgment, and that the ſaid Declaration may be quaſhed, *&c.* Defendant demurs to the Declaration.

And the aforeſaid *Richard* ſays, that by any thing by the aforeſaid *Robert Dalton* above in Pleading alledged, the Declaration of the ſaid *Richard* aboveſaid ought not to be quaſhed, becauſe he ſays that the ſaid Declaration, and the Matter therein contained, are good and ſufficient in Law to compel the ſaid *Robert* to anſwer to the ſaid Declaration, to which the ſame *Robert* hitherto has not anſwered, nor the ſame yet in any wiſe denied; which ſaid Declaration, and the Matter therein contained, the ſame *Richard* is ready to verify and prove, as the Court, *&c.* wherefore for that the ſame *Robert* to the ſaid Declaration has not anſwered, he prays Judgment and his Damages by Occaſion of the Premiſſes to be adjudged to him, *&c.* Joinder in Demurrer.

Continuance. And becauſe the Court of the Lady the Queen here is not yet adviſed of giving their Judgment of and upon the Premiſſes, Day thereon is given to the Parties aforeſaid before the Lady the Queen at *Weſtminſter*, until *Monday* next after the Octave of *St. Michael*, to hear their Judgment of and upon the Premiſſes, *&c.* becauſe the Court of the Lady the Queen here thereof not yet, *&c.*

The CASE. *Trin. Term 7 Eliz.*

A. leaſes Land for 21 Years, and covenants with the Leſſee to make *to him and to his Aſſigns* a good Leaſe for 21 Years, to commence after the End of the firſt Term, the Leſſee makes his Executrix and dies, the Executrix makes her Executor and dies, the firſt Term expires, the Executor of the Executrix, being Executor to the firſt Teſtator, ſhall have an Action of Covenant for the ſecond Leaſe, and it ſhall be Aſſets in his Hands. S. C. cited 1 Co. 98. b. 3 Bulſt. 257. 2 Rol. R. 409. Litt. R. 174. Palm. 555. Bridgm. 40. Theol. Dig. lib. 1. cap. 18. § 32. Godolph. Orph. Leg. 182, § 3. Wentw. Off. of Exec. 81, 100. Nelſ. Lex. Teſtam. 92. Vin. Abr. tit. Executors G. a. pl. 51. See like Caſe 1 Rol. Abr. 913. pl. 2.

The Caſe briefly drawn out of the Record is thus, *Richard Chapman* Executor of *Anne Chapman* Executrix of *John Chapman* has counted upon a Bill exhibited by him againſt *Robert Dalton*, that by an Indenture made at *London* the 20th Day of *March Anno* 33. *H.* 8. between the ſaid *Robert* and *Elizabeth* his Wife, and the ſaid *John Chapman*, the ſaid *Robert* and *Elizabeth* leaſed to farm to the ſaid *John Chapman* four Cloſes called *Northfield*, with the Appurtenances lying in *Cornbrough* in the County of *York* for the Term of 21 Years next enſuing the Feaſt of the *Annunciation* of our Lady then next to come, rendering the Rent of 12*l.* yearly to be paid by equal Portions at the Feaſts of *St. Michael* the Archangel, and of the *Annunciation* of our Lady. And further the ſaid *Robert* and *Elizabeth* for themſelves, their Heirs, Executors, and Adminiſtrators covenanted and granted by the ſaid Indenture to and with the ſaid *John Chapman* and his Executors, that the ſaid *Robert* and *Elizabeth*, or the Heirs of the ſaid *Elizabeth*, after the End and Term of the ſaid 21 Years, ſhould make or cauſe to be made to the ſaid *John Chapman* and his Aſſigns, a good, ſure, ſufficient, and lawful Leaſe of the ſaid four Cloſes for the Term of 21 Years, to commence the 26th Day of *March* which ſhould be in the Year of our Lord 1563. next and immediately enſuing the ſaid Term of 21 Years ſpecified in the ſaid Indenture, without any Fine to be paid or rendered for the Premiſſes to the ſaid *Robert* and *Elizabeth*, but only the annual Rent to be paid at the ſaid Feaſts due and accuſtomed, as by the ſaid Indenture appears; by Force whereof the ſaid *John Chapman* immediately after the Feaſt of the *Annunciation* of our Lady then next following, entered into the ſaid four Cloſes, and was thereof poſſeſſed. And he ailedges further, that the ſaid *John Chapman* in the Year of our Lord 1546, made the ſaid *Anne* his Wife his Executrix, and died, and ſhe proved the Will, and afterwards in the Year of our Lord 1558, ſhe made her Will, and thereby made the ſaid *Richard* her Executor, and died, and the ſaid *Richard* proved the Will, and entered into the Premiſſes, and was thereof poſſeſſed. And afterwards at the Feaſt of the *Annunciation* of our Lady *Anno* 5 *Elizabeth*, the ſaid Term of 21 Years ended. And that the ſaid *Robert Dalton* and *Elizabeth*, although often requeſted, have not made to the ſaid *Richard Chapman* a new Leaſe of the ſaid four Cloſes for 21 Years, according to the Form and Effect of the ſaid Indenture, wherefore the ſaid *Robert* has not performed the ſaid Covenant, but has broken it, whereby an Action has accrued to the Plaintiff. And upon this Declaration the Defendant has demurred in Law.

For the Defendant. And the Matter was argued by *Baber* Utter Barriſter, and by *Wray* Apprentice on the Part of the Defendant, and by *Fleetwood* Apprentice, and by another Apprentice of the Middle Temple on the Part of the Plaintiff. And the Objection which the Defendant's Counſel made to the Count was in the principal Point of the Matter, *viz.* in that the Defendant had covenanted that he and his Wife, after the End of the firſt Term, would make a new Leaſe to *John Chapman* and his Aſſigns for the Term of 21 Years, and before the Time that the new Leaſe was to be made, *viz.* during the firſt Term, and before the End of it, *John Chapman* made his Executors, and died, ſo that thereby the Covenant was become impoſſible to be performed by the Act of God; for the new Leaſe ought to be made to *John Chapman* and to his Aſſigns, and he was dead before the Time limited for the making of it, and therefore the Leaſe could not be made according to the Limitation, for it ought firſt to veſt in *John Chapman*, and the Party ought not to perform it in other Manner than the Agreement was made. And the Meaning of Aſſigns here is, that it ſhall be only to him and to his Aſſigns, as *habendum* to him and to his Aſſigns, ſo that Aſſigns are Words of Limitation. For they are put in a [a] Copulative, *viz.* to him *and* to his Aſſigns, which varies from the Words, to him *or* to his Aſſigns, [b] for where the Sentence is in the Diſjunctive, if the one Part cannot be performed, and the other may, then perhaps the Party ſhall be forced to perform that which may be performed. And if it ſhould be taken in ſuch Senſe, then it would have been neceſſary that by his Will or otherwiſe he had named ſome one to whom the Leaſe ſhould be made, and ſuch Perſon named might perhaps be accounted an Aſſignee. But foraſmuch as he has not done ſo, there is no one that ſhall be an Aſſignee to him, for his Executors are not called Aſſigns, becauſe they ſhall take the Things which the Teſtator had, but this is a Thing to be done *de novo*, which the Teſtator never had, and it is to be done according to the Limitation. And if one ſhould take the Senſe of it diſjunctively, as it has been ſaid, *viz.* to him *or* to his Aſſigns, then there ought to be an Aſſignee in Deed to whom it ſhould be done, and not an Aſſignee in Law, as an Executor is. And, Sir, if an Aſſignee might be ſo expounded as that an Executor might be Aſſignee to his Teſtator, yet the Executor of an Executor cannot be ſo, for by the Courſe of the common Law he is not in ſuch Degree as an immediate Executor is. [c] For Executors of Executors ſhould not have an Action of Debt or any other Action for a Duty due to the firſt Teſtator by the Courſe of the common Law, for they were not Executors to the firſt Teſtator, nor Privies to his Will, but meer Strangers. For which Reaſon the Act of 25. *Ed.* 3. *cap.* 5. makes Proviſion in the Point, as follows, *Alſo it is accorded and eſtabliſhed, that Executors of Executors ſhall have Actions of Debts, Accounts, and of Goods carried away of the firſt Teſtator, and Execution of Statutes Merchant and Recognizances made in Court of Record to the firſt Teſtator, in the ſame Manner as the firſt Teſtator ſhould have had, if he were in Life*

[a] See Dy. 27. pl. 177.

[b] Mich. 29. Geo. 2. B. R. *Drummond v. Duke of Bolton.*

[c] Kelw. 45. a. *Per Frowick.* But ſee the contrary M. 7. Ed. 3. 62. pl. 54. *Per Rok.* 2 Init. 404, and that the Statute of 25. *Ed.* 3. as to the Action of Debt therein mentioned is but in Affirmance of the common Law, though it ſeems hereafter 290 (b) that there was ſome Doubt thereof at the common Law.

Life, as well of Actions of the Time paſt, as of the Time to come, in all Caſes where Judgment is not yet given between ſuch Executors of Executors; but that the Judgments given to the contrary in Time paſt ſhall ſtand in their Force: And that the ſame Executors of Executors ſhall anſwer to others of as much as they have recovered of the Goods of the firſt Teſtator, as the firſt Executors ſhould do, if they were in full Life. So that this Act does of Neceſſity purport that the Law was contrary before. And the Words of the Act, *viz. that Judgments given to the contrary in Time paſt ſhall ſtand in their Force*, make known to all that Judgments were given to the contrary before, and it is to be preſumed that ſuch Judgments were given according to Law, and that the Law was ſo, or elſe the Statute would not have confirmed them. And *Wray* made Uſe of this as an Objection to the Action of Covenant brought here, for he ſaid that the Executor of an Executor ſhall not have an Action of Covenant upon any Covenant broken which was made to the firſt Teſtator; for the Act only gives them Actions of Debt, Account, and of Goods carried away, and not Actions of Covenant, for which reaſon Actions of Covenant ſhall be at the common Law, and ſo the Action here brought ſhall not be maintenable. Wherefore although the firſt Executors might be reputed Aſſignees to the firſt Teſtator, yet their Executors cannot by the common Law, although they are enabled to ſue certain Actions. And beſides there is no Privity between them and the firſt Teſtator by the common Law, for which reaſon the new Leaſe cannot be made to the Plaintiff here as Aſſignee of the firſt Teſtator, becauſe he is Executor to the Executrix of the firſt Teſtator. And alſo it was ſaid that the matter will not bear the Covenant to be ſo ſtrained as to be performed to the Plaintiff, becauſe if the Leaſe ſhould be made to the Plaintiff, it would be of another Effect than if it had been made to *John Chapman*, for if it had been made to *John Chapman* and to his Aſſigns, according to the Words of the Covenant, and he had died, and the Term had come to the ſaid *Anne*, and from *Anne* to the Plaintiff, as her Executor, in this Caſe the Plaintiff ſhould have had the Term to the Uſe of the firſt Teſtator, and it ſhould have been Aſſets in his Hands of the Goods of the firſt Teſtator. [a] But here if the Leaſe ſhould be made to the Plaintiff, and he ſhould be the firſt in whom it veſted, he would be a Purchaſer of the Leaſe, in which Caſe he would not have it to perform the will of the firſt Teſtator, nor could it be put in Execution as Part of his Chattles, becauſe it never was in him. So that in Subſtance and in Matter it would not be all one to have the Leaſe made to the firſt Teſtator, and to have it made to the Plaintiff, for the Plaintiff would be poſſeſſed of it in different Reſpects. And for theſe Cauſes they took it that the Plaintiff ſhould be barred. And they amplified and enlarged theſe Arguments and Reaſons with many Caſes, which I ſhall not here recite at large, my Intention being only to relate briefly the material Points of the Matter debated.

[a] See to the contrary Ante 286 the Books there cited at the Head of the Caſe, and Poſt 292 (d).

E contra for the Plaintiff.

And the Apprentices on behalf of the Plaintiff maintained the Count with two diſtinct Arguments, each of them tending to confute the Argument on the other Side. And in the firſt Part of their Argument they ſaid that where the Covenant was to make the Leaſe at a Day to come to *John Chapman* and to his Aſſigns, the Words *(to him and to his Aſſigns)* are to be conſidered, and their true Meaning is to be diſcuſſed. And firſt it is to be conſidered [b] that every Covenant and Grant ſhall be taken moſt ſtrongly againſt him that makes it, and moſt beneficially for him to whom it is made. And if the Words of it have a double Signification, that which tends moſt to the Prejudice of him that ſpeaks them, and to the Advantage of the other, ſhall be preferred. Then here as to the Word *(Aſſigns)* ſome effectual Senſe muſt be made of it, by the ſaid Rule, to the Avail and Benefit of him to whom the Thing is to be done. And according to the Expoſition before made by thoſe who argued on the other Side, the Word *(Aſſigns)* has not any effectual Meaning. For if it is applied in the Senſe of a Limitation, *viz.* to have and to hold to him and to his Aſſigns for 21 Years, the Word *(Aſſigns)* is meerly void. For if I make a Leaſe to a Man for 21 Years, his Aſſigns ſhall have it as much as if I had leaſed it to him and to his Aſſigns, for the Law gives him Power to aſſign it to another; ſo that to make a Leaſe to a Man for 21 Years is the ſame in Effect as if the Leaſe had been to him and to his Aſſigns for 21 Years, and *Aſſigns* ſo taken is but a Word of Abundance, and is in Effect but a Cypher in Arithmetic, and conveys no Benefit to him to whom the Covenant is made, for which reaſon another Senſe of it muſt be found out. And, Sir, the Word *(Aſſignee)* has two Senſes; in the one it ſignifies the Perſon to whom a Thing granted or given ſhall be afterwards granted or conveyed by him that has the Thing. As if a Man makes a Leaſe for Years of a Houſe, and grants to the Leſſee that he and his Aſſigns ſhall have 20 Cart-loads of Wood yearly in a Wood of the Leſſor, there the Aſſignee ſignifies the Perſon to whom the Leſſee ſhall aſſign the Leaſe. And ſo if a Man makes a Feoffment in Fee, and warrants the Land to the Feoffee and to his Heirs and Aſſigns, there the Aſſignee is he to whom the Feoffee or his Heirs ſhall aſſign the Land, for if ſuch Feoffee makes a Feoffment, the ſecond Feoffee ſhall vouch. So if a Man ſells a Horſe, upon Condition that if he pays 40*s.* to the Vendee or to his Aſſigns, he ſhall have the Horſe again, there the Aſſignee is he to whom the Vendee ſhall grant or give the Horſe. So that ſuch Sort of Aſſigns are thoſe Perſons to whom a Thing firſt granted or given is afterwards conveyed over. But there is no ſuch Perſon in our Caſe, for here there is no Eſtate made, nor Thing granted, and therefore an Aſſignee cannot be ſo taken in our Caſe, for in ſuch Senſe it has no Place here, and therefore we ought to look out for another Senſe of the Word *Aſſigns*. And in the other Senſe it ſignifies the Perſons to whom a Thing ſhall be done, which is not done. [c] As if I am bound in an Obligation upon Condition to make a Feoffment to you or to your Aſſigns, there Aſſigns are ſuch whom you ſhall name to me, to whom I am to make the Feoffment. So if the Condition be that ſuch a Day I ſhall give to you or to your Aſſignee a Horſe, there Aſſignee ſhall be taken for ſuch Perſon whom you ſhall appoint to receive the Horſe from me.

[b] See Ante 10(i). and the Books there cited.

[c] Bridgm. 40.

ner. So that in this Senſe an Aſſignee is before the Thing given or granted, and in the other Senſe he is after the Thing given or granted. And, Sir, Aſſigns in the laſt and in the firſt Senſe alſo (though in the firſt Senſe we have nothing to do with them here) are in two Manners, *viz.* Aſſigns in Deed and Aſſigns in Law. Aſſigns in Deed are thoſe whom the Party actually aſſigns to receive the Thing, as in the ſaid Caſe where the Condition is that ſuch a Day I ſhall give to you or to your Aſſignee a Horſe, there if you appoint *J. S.* to whom you would have me give the Horſe, he is your Aſſignee in Deed, becauſe you aſſigned him in Deed to receive the Horſe. Aſſigns in Law are Executors who are named by the Party, but the Things which they ſhall have are limited and conveyed to them by the Law, for they are reputed in the Law ſuch as ſhall have all the Goods and Chattles which the Teſtator had, and Contracts perſonal, and therefore Chattles real are removed by the Law from the Teſtator to them, and they repreſent the Perſon of the Teſtator for thoſe Things, and they ſhall have them to the Uſe of the Teſtator, for which Reaſon they are called his Aſſigns in Law. And therefore in the Caſe beforementioned of a Condition that I ſhall give ſuch a Day to you or to your Aſſigns a Horſe, if before the Day you make your Executors, and die, there at the Day I ought to give the Horſe to your Executors, becauſe they are your Aſſigns for this Purpoſe, and they repreſent your Perſon as to receiving any Chattles real or perſonal. And inaſmuch as you have not aſſigned any one in Deed to receive the Horſe, the Law ſays that the Executors, who are your general Receivers of Things perſonal, ſhall have the Horſe, for they were named by you to ſuch Purpoſe; and when they are named by you, the Law, without any Words ſpoken touching the Thing, ſays that they are the Perſons who ought to have the Thing, for they are your Aſſigns in Law. * And upon this the Caſe in 27. *H.* 8. was cited, where Executors brought a Writ of Debt upon an Obligation made to the Teſtator, and the Defendant ſaid that the Obligation was endorſed upon Condition, that if the Defendant ſhould perform all the Covenants compriſed in certain Indentures made between the Teſtator and the Defendant, that then, *&c.* and by the Indentures the Teſtator had leaſed certain Lands to the Defendant for the Term of 20 Years, and there was a Clauſe in the Indenture that he ſhould deliver to the Leſſor or to his Aſſigns at the End of the Term a true Rental of all the Lands to him leaſed, and the Defendant alledged in Diſcharge of this Covenant, that before the End of the Term the Leſſor died, and made no Aſſignee, and he alledged Performance of the other Conditions; and the Plaintiff replied that the Leſſor made him (the Plaintiff) his Aſſignee, and upon this they were at Iſſue; and there *Wilby* ſaid that this Iſſue was misjoined, for the Defendant has not denied but that the Plaintiff is Executor to the Teſtator, and thereby he is Aſſignee in Law, and the contrary to the Iſſue appears to the Court: And *Engleſield* and *Shelley* ſaid that ſo it ſeemed to them. So that by this Caſe it appears that Executors are Aſſigns in Law for the taking of Chattles real and perſonal. Then as to our Caſe here, there is no Aſſignee in Deed appointed by the Teſtator, to whom the new Leaſe ſhall be made, for *John Chapman* appointed no Perſon in Deed to whom it ſhould be made, and therefore we ought to reſort to an Aſſignee in Law. And here we have an Aſſignee in Law, *viz.* *Anne* who was his Executrix, and ſhe has made the Plaintiff her Executor, who is Aſſignee in Law to the firſt Teſtator.

* P. 27. H. 8. 2. pl. 5. Bro. Deputy 1. Condition 5. Expoſition 4. Hob. 9, 10. Moor 482.

But here an Objection may be made why the new Leaſe ſhall not be made to the Plaintiff, nor to *Anne*, if ſhe had lived to the End of the Term, notwithſtanding that they ſhould be called Aſſigns in Law, and that is, becauſe the Covenant is that they ſhall make the new Leaſe to *John Chapman and* to his Aſſigns, which Word *(and)* is a Copulative, ſo that in this Caſe (it may be ſaid) the Aſſignee ought to be a joint Taker with *John Chapman*, for the Clauſe is not that the Leaſe ſhall be made to him *or* to his Aſſigns, for if it had been ſo, then if the Executor be adjudged an Aſſignee, it might be made to him, but the Aſſignee here is copulatively joined to him, ſo that *John Chapman* muſt of Neceſſity be one who ſhall take the Leaſe, and becauſe he is dead it cannot be made to him *and* to his Aſſigns, for the one Part of the Copulative fails, and therefore the Covenant cannot be performed; Sir, to this Objection it may be anſwered, that he who puts this Expoſition upon it expounds it contrary to all Reaſon, or utterly deſtroys the Covenant. † And he is a bad Expoſitor that deſtroys the Text. And that ſuch an Expoſition is abſurd, or deſtroys the Text, is very evident; for from thence it would follow, that if *John Chapman* had been alive at the Time of the firſt Leaſe ended, the ſecond Leaſe could not have been made to him alone, nor could it have been made to his Aſſigns alone, if he were dead, but to him and to his Aſſigns jointly; ſo that his Aſſignee muſt have been a Jointenant with him, and the Leaſe could not have been made until *John Chapman* had named an Aſſignee who ſhould take jointly with him. And to expound it in ſuch Manner that *John Chapman* alone could not have taken the Leaſe, if he had been alive at the Time when it ought to be made, is contrary to the Intent of the Parties to the Covenant, and contrary to all common Conſtruction of the Word *(Aſſigns)* and meerly abſurd. So that an Aſſignee in Deed could not be joined to him in taking the Leaſe by any reaſonable Intendment. And, Sir, Aſſigns in Law, *viz.* his Executors, cannot take the Leaſe jointly with him, for when he is alive he cannot have any Executor. And then to ſay that becauſe he could not have an Executor who ſhould take jointly with him, the Defendant and his Wife are not bound to make the Leaſe to him alone if he was alive, becauſe the Leaſe ought to be made to him and to his Aſſigns jointly, would be meerly a Deſtruction of the Text, for it is impoſſible to make the Leaſe jointly to him and his Executors, and to excuſe himſelf from making any Leaſe at all for ſuch Cauſe is an abſolute Deſtruction of the Covenant. So that to take the copulative *(and)* in the literal Senſe of the Word, would not ſuffer either the Aſſignee in Deed or the Aſſignee in Law to have any Place, but the literal Senſe of it would be Nonſenſe.

† *Mala eſt Expoſitio quæ corrumpit viſcera textus*, Hardr. 149. Wing Max. reg. 17. Ante 196 (*).

Nonſenſe. And therefore to join the Aſſignee in Deed with *John Chapman* in taking the Leaſe makes the Senſe abſurd, and ſo does it to join the Aſſignee in Law with him in taking the Leaſe, becauſe of the Impoſſibility of it, and ſuch Expoſition utterly deſtroys the Text. And foraſmuch as the literal Senſe begets Abſurdity or Impoſſibility, we ought not to follow it, but to make ſome other Senſe of it, and ſuch as may ſtand with Reaſon and the Intent of the Parties, and that is, to take the Word *(and)* for *(or)* viz. the Copulative as the Disjunctive. So that where the Words are, that they covenanted to make a Leaſe at ſuch a Time to *John Chapman and* to his Aſſigns for 21 Years, they ſhall be taken in this Senſe, viz. that they ſhall make the Leaſe to *John Chapman or* to his Aſſigns for 21 Years. And accordingly in our Law we may frequently ſee the Disjunctive taken as the Copulative, and the Copulative as the Disjunctive, in order to make the Words ſtand with Reaſon and the Intent of the Parties. [a] And hereupon was cited the Caſe in 21. *Ed.* 3. in an Action of Debt, where the Defendant bound himſelf by Indenture to pay the Plaintiff a certain Sum, if ſo be that the Defendant did not enfeoff the Plaintiff or his Heirs of certain Land when he came to his Aunt, and the Plaintiff declared that the Defendant came to his Aunt, and that he (the Plaintiff) required him to enfeoff him, and he did not enfeoff him, whereby an Action accrued to the Plaintiff, &c. and Exception was taken to the Declaration, becauſe the Condition was in the Disjunctive, viz. that the Plaintiff ſhould have the Sum if the Defendant did not enfeoff him or his Heirs, and he has ſaid that he did not enfeoff him, but ſays nothing of the Feoffment to his Heirs, and if he had performed any Part of the Disjunctive, the Plaintiff could not have the Debt; but the Declaration was held good enough notwithſtanding this Exception, becauſe the Plaintiff could not have any Heir during his Life: So that altho' the Condition was in Words disjunctive, yet inaſmuch as the Plaintiff was alive, in Senſe it was not disjunctive, for he could not have any Heir whilſt he was alive, and the Senſe of the Words are to be taken to enfeoff the Plaintiff if he is alive, and if he dies, then to enfeoff his Heirs, and therefore the Defendant was driven to anſwer to the Count. And as the Plaintiff there could not have any Heir during his Life, ſo here *John Chapman* could not have any Executor during his Life; and as the Condition there in the Disjunctive to enfeoff at a Time to come him or his Heirs was taken to enfeoff him if at the Time limited he was alive, and if he was dead at the Time, then to enfeoff his Heirs, ſo here the Covenant in the Copulative to make a Leaſe at a Time to come to him and to his Aſſigns ſhall be taken disjunctively, that is to ſay, to him if he be alive, and to his Aſſigns if he be dead. So that the ſaid Caſe bears a great Reſemblance to our Caſe here. And in many Caſes Words ſpoken in the Copulative ſhall be taken in the Disjunctive, if ſuch Senſe be moſt ſtrong againſt thoſe that ſpeak them. [b] As if I am ſole ſeized of Land, and *J. S.* is alſo ſole ſeized of other Land, and I and he grant to another a Rent Charge of 20 s. out of all the Lands which he and I have, the Grantee ſhall have 20 s. out of my Land, and other 20 s. out of the Land of *J. S.* and yet the Grant was out of the Lands which he *and* I had, but the Word *(and)* which is a Copulative cannot ſtand with the Operation of the Law, which makes the Grant disjunctive. [c] So if I and *J. S.* give to another all the Goods which I and he have, the Donee ſhall have all the Goods which each of us have ſeverally by ourſelves. [d] And ſo, it was ſaid, by the Book in 19. *H.* 6. in a *Scire facias* to have Execution upon a Recovery in Maintenance, if a Man releaſes to *J. S.* and *J. K.* all Actions and Suits which he has againſt the ſame *J. S.* and *J. K.* thereby all Actions and Suits which he has againſt either of them by himſelf are releaſed; ſo that altho' the Word *(and)* literally couples them together, yet in Senſe the Releaſe goes to them ſeverally. [e] And ſo if I of the one Part, and *J. S.* and *J. K.* of the other Part ſubmit ourſelves to ſtand to the Arbitrement of certain Perſons, touching all Actions between me and the ſaid *J. S.* and *J. K.* the Arbitrators may make an Award of all Actions between me of the one Part, and *J. S.* or *J. K.* ſeverally by himſelf of the other Part, as it is held in 2. *R.* 3. notwithſtanding the Words are in the Copulative, viz. *J. S. and J. K.* So in the common Caſe in Indentures, if a Man bargains and ſells his Land to another, and covenants to make a good and ſufficient Eſtate in Fee-ſimple to the Bargainee and to his Heirs in the Term of *St. Michael* then next enſuing, or within two Months next enſuing, and before the Term of *St. Michael*, or within the two Months the Bargainee dies, there the Bargainor may and ought to make an Eſtate to the Heir of the Bargainee in the Term of *St. Michael*, or within the two Months, and yet the Words were that he ſhould make the Eſtate to the Bargainee and to his Heirs; in which Caſe if one ſhould reſt upon the Letter, the Copulative *(and)* purports that the Feoffment cannot be made but to the Bargainee and to his Heirs jointly, but the Bargainee cannot have any Heir in his Life time, and therefore the Senſe of the Words muſt be ſo taken that the Feoffment ſhall be to the Bargainee, if he be alive at the Time, and if he be dead, then to his Heirs. And ſo if the Covenant was that at ſuch a Day the Bargainor ſhould deliver the Evidences to the Bargainee and to his Heirs, there if the Bargainor dies before the Day, he ought at the Day to deliver them to his Heirs, for the Covenant cannot be literally performed, viz. to him *and* to his Heirs jointly, nor was there any Poſſibility at firſt for it to be performed literally, and therefore ſuch Senſe ought to be made of it as may beſt be performed, and as ſtands with Reaſon, and that is, to take the Copulative as the Disjunctive, viz. to him *or* to his Heirs. So in the principal Caſe, the Covenant to make the Leaſe at ſuch a Day to *John Chapman and* to his Aſſigns for 21 Years ought to be conſtrued that it ſhall be made for the Term of 21 Years to him *or* to his Aſſigns, that is to ſay, to the ſaid *John Chapman* or to ſuch Perſon as he ſhall name, if the ſaid *John Chapman* be then alive, and if he be not then alive, but dead, then it ſhall be made to his Aſſigns, that is, to his Aſſigns in Deed, if he has made any, and if not, then

A covenants with B to make a Leaſe for Years of Land to him *and* to his Aſſigns at ſuch a Time, this ſhall be conſtrued to him *or* to his Aſſigns, ſo that if B dies before the Time, it ſhall be made to his Aſſigns alone. S. P. cited 1 Leon. 74. Bridgm. 40. And ſee other like Caſes where the Words *(and)* and *(or)* have been taken for each other, 5 Co. 112. a. 1 Brownl. 122. Ley 79. Ld. Raym. 505. 506. 1 Bac. Abr. 431.

[a] M. 21. Ed. 3. 29. pl. 9. Bro. Conditions 47. 5 Co. 112. a. 1 Brownl. 122. 1 Rol. Abr. 450. pl. 13. Vin. Abr. tit. Condition S. b. pl. 1. So *vice verſa* a Covenant to enfeoff J. S. *and* his Heirs, whereas it is impoſſible to enfeoff his Heirs whilſt J. S. himſelf is living, therefore it ſhall be taken for a Disjunctive, Gouldſb. 71. Owen 52.

[b] See Ante 140 (i). 161 (h). 171 (d).

[c] M. 19. H. 6. 4. a. *per Newton.* Bro. Done 12. Grants 148. Jointenants 15. Hetley. 9.

[d] M. 19. H. 6. 3. b. Fitz. Releaſe 3. Bro. 21. Jointenants 66.

[e] M. 2. R. 3. 18. b. Bro. Arbitrement 44. 5 Co. 8. a. 8 Co. 98. a. 3 Bulſt. 65. 1 Brownl. 112. Bridgm. 91. 1 Rol. R. 298, 375, 376. Yelv. 203. 1 Rol. Abr. 246. pl. 5. Hardr. 399. Lutwy. 1628. Comyns 547. 1 Vern. 259.

then rather than the Covenant ſhall be loſt, it ſhall be made to his Aſſigns in Law, which are his Executors.

And as to what has been ſaid, that the Plaintiff is Executor of an Executor, and is not by the Common Law Executor to the firſt Teſtator, but is in another Degree by the Common Law than the immediate Executor is, Sir, this is not ſo, [a] for if I ordain by my laſt Will that *J. S.* ſhall alien my Land, and he does ſo, this is my Alienation by him. So if I give Authority to my Steward to demiſe my Land, and he does ſo, this is my Demiſe by him. So if I give Authority to my Bailiff to alien my Sheep or other Chattles, and he does ſo, this is my Sale by him. [b] So when a Man makes *J. S.* his Executor, therein it is implied to be his Intent that if *J. S.* makes his Executor, and dies, his Executor ſhall be Executor to the firſt Teſtator, for the firſt Executor intended it, and ſo the ſecond Executor is made Executor to the firſt Teſtator by the Nomination and Election of the ſecond Teſtator, to whom the firſt Teſtator committed ſuch Authority of Election and Nomination. [c] So that the ſecond Executor after the Death of the firſt Executor ſhall be immediate Executor to the firſt Teſtator, as choſen by the ſecond Teſtator by Force of the Authority given him by the firſt Teſtator, and therefore he ſhall be in ſuch Degree to the firſt Teſtator as the firſt Executor was, or elſe all Contracts between Man and Man would by the Common Law periſh in a ſhort Time, viz. after the Death of the firſt Executor. For neither the Ordinary nor his Adminiſtrator could by the Common Law have any Action of Debt or other Action given to the firſt Teſtator, [d] for they could not have any Action given to the Inteſtate, until the Statute of 31. *Ed.* 3. *cap.* 11. was made, which gives ſuch Actions to Adminiſtrators. So that by this Means no Contract could be of Continuance at the Common Law, and therefore ſuch Defect was not at the Common Law. And upon this divers Caſes were cited which happened before the Statute of 25. *Ed.* 3. [e] *And Note that in* Mich. 10. Ed. 2. Fitz. Executors 110, *the Executors of an Executor brought an Action of Debt for the Arrears of an Annuity due to the firſt Teſtator, and it was well debated whether there is any Privity between them and the firſt Teſtator, and whether the Action ſhould be maintenable, and after having taken Time for Deliberation, all the Juſtices awarded that they ſhould be anſwered.* And it was ſaid that the chief Purview of the Statute of 25. *Ed.* 3. was for the two other Actions given by that Act to Executors of Executors, viz. the Action of Account, and of Treſpaſs for Goods carried away, which Actions [f] Executors could not have by the Common Law until they were given by Statutes, [g] and they were not extended by Equity to the Executors of Executors. [h] But as to the Action of Debt, it was not neceſſary to be put in the Statute, for the Law gave it to the Executor of an Executor before, and yet many doubted thereof, to remove which Doubt it was well done to put it in the Act, and to make Proviſion that all Judgments before given to the contrary ſhould ſtand in Force, for thereby all Diſputes, which might otherwiſe have happened, are avoided. So that Executors of Executors were by the Common Law, as to all Contracts, in the ſame Degree as the firſt Executors were, and might have all Actions which the Common Law gave to the firſt Executors, and ſo they might have Actions of Covenant, and if they could not, yet they are given [i] to Executors of Executors by Equity of the ſaid Statute of 25. *Ed.* 3. So here *Richard Chapman* the Plaintiff, being Executor of an Executrix, is as well an Aſſignee to the firſt Teſtator as the firſt Executrix was, and ſhall as well maintain an Action of Covenant as the firſt Executrix might have done, and therefore the Action ſhall be maintenable.

The other Argument which they made in Support of the Declaration was, that admitting *Aſſigns* to be a Word of Limitation, as *habendem* to him and to his Aſſigns, and ſo to be a void Word, as it was taken by the other Side, or admitting that it had been out of the Covenant, then the Covenant is that the Huſband and Wife at the End of the firſt Term ſhall make a new Leaſe for 21 Years to *John Chapman*, and he dies before the End of the firſt Term, in this Caſe the Huſband and Wife ought to make the Leaſe to the Plaintiff being Executor of the Executrix of *John Chapman*, and they ſhall not be diſcharged of the Covenant by the Death of the Party to whom it ſhould be made. [k] For in every Agreement made between any Parties the Intent is the chief Thing to be conſidered, and if by the Act of God, or by other Means not ariſing from the Party himſelf, the Agreement cannot be performed according to the Words, yet the Party ſhall perform it as near to the Intent of the Agreement as he can. And the Intent here was that a new Leaſe ſhould be made at the End of the firſt Leaſe; and to whom ſhould it be made? to this it may be anſwered, to *John Chapman*; and if he be dead, ſhall no Leaſe be made then? yes ſurely; and to whom? to thoſe who ſhould have had it, if it had been made to *John Chapman* himſelf; and who are they? his Executors, and to them ſhall the new Leaſe be made; for the Subſtance of the Agreement was that the Eſtate ſhould be made, and that the Intereſt ſhould be had, and the Perſon to whom it ſhould be made was not the principal Point of the Agreement. But if the Tenant is bound in an Obligation to his Lord, or covenants with him to do to him at ſuch a Time Homage, or Fealty, or other corporal Service, there if the Lord dies before the Day, it ſhall not be done to his Executor or Heir, for the corporal Service ſhall in ſuch Caſe be done to the Body of the Lord, and when he dies, the Thing dies alſo, for the ſame Homage or Fealty cannot be done to another, tho' other Homage or Fealty may be due to the Heir. So that if the Body dies, being the chief Cauſe for which a Thing is to be done, the Thing alſo dies with it. But here the Term and the Eſtate in the Land is the principal Thing, for if it had been made to *John Chapman*, and he had died, the Eſtate had not died, but ſhould have continued during the Term. And by the like Reaſon if he dies before the Eſtate can be made, the Eſtate ſhall be made to thoſe who ſhould have

[a] Godolph. Orph. Leg. 478, § 145.

[b] Salk. 303. *per Powel* J.

[c] Palm. 156. *per Dodder.* J. Swinb. 329. Godolph. Orph. Leg. 87. Wentw. Off. of Exec. 255, 256. 1 Finch 150. 2 Finch 173.

[d] Ante 278 (e). 2 Inſt. 398, 404.

Nota bene by the Reporter.

[e] 1 Finch 150. 2 Finch 173. See Palm. 156. *Doderidge* J. ſays that from this Caſe of 10 *Ed.* 2. unto the preſent Time it was always allowed for a Rule that the Executor of an Executor ſhould be Executor to the firſt Teſtator.

[f] M. 7 Ed. 3. 62. pl. 54. *per Schard.* H. 19 Ed. 3. Fitz. Account 56. F. N. B. 117. c. in Margine. 2 Inſt. 404. 1 Finch 149. 2 Finch 167.

[g] See Accord M. 7 Ed. 3. 62. pl. 54. 2 Inſt. 404. Sed vide Wentw. Off. of Exec. 256.

[h] M. 7 Ed. 3. 62. pl. 54. *per Rok.* 2 Inſt. 404. Sed Contra Kelw. 45. a. *per Frowick.* Ante 286 (c).

[i] Moor 482.

[k] Vin. Abr. tit. Contract E. pl. 11. tit. Intent A. pl. 3.

have had it if it had been made. And when the Leaſe was limited to be made at a Day to come, viz. at 21 Years afterwards, it was then well enough known and conſidered by each of the Parties, that he to whom the Leaſe was to be made was ſubject to Death, and that the Hour of his Death was incertain, and that it was probable enough he might die before the Time when the Leaſe was to be made. And therefore it cannot be preſumed that the Party intended to have the Agreement diſſolved by his Death, nor can any one imagine that he would be guilty of ſo much Folly, or that the other intended by ſuch Event to be diſcharged from making the Leaſe, but it ſhall be preſumed that it was the Intent of both the Parties that the Leaſe ſhould be made, notwithſtanding the Death of him that ſhould take it, and he has left others after him able to take the Leaſe, viz. his Executors, and he who is to make it receives no more Damage by making the Leaſe to the Executor than by making it to the Teſtator. So that altho' he cannot perform the Covenant according to the Words, yet he ſhall perform it according to the Intent. [b] As in the Caſe in *Littleton*, where a Man makes a Feoffment upon Condition that the Feoffee ſhall make an Eſtate in ſpecial Tail to the Feoffor and to his Wife, and to the Heirs of their two Bodies, there if the Huſband dies before the Eſtate made, it ſhall be made as near the Condition as may be, that is, he ſhall make an Eſtate to the Wife for Life without Impeachment of Waſt, Remainder to the Iſſues in Tail according to the firſt Limitation of the Tail; [c] and if the Wife be dead, then the Feoffee ought to give the Land to the Iſſues, and to the Heirs of the Body of the Father and Mother begotten. And ſo in the other Caſes there put the Intent ſhall be performed as near as it can be where the Words cannot be performed. And it is not always requiſite that in Agreements every Thing ſhould be performed according to the Words. [d] For if there be a Feoffee in Mortgage to whom 10 l. ought to be paid, and the Mortgagor pays a Cup or a Horſe to the Mortgagee in Satisfaction thereof, he has performed the Condition, as *Littleton* ſays. [e] So if the Condition be that he ſhall pay it at ſuch a Place, and he pays it at another Place, and the Mortgagee accepts it, *Littleton* ſays that it ſhall be good enough, for the Value is the Subſtance. [f] So if a Man be bound in 20 *l.* to pay 10 l. ſuch a Day at ſuch a Place, and he does not come to the Place at the Time appointed to receive the Sum, he has not loſt it, as 7. *Ed.* 4. is; [g] but if he ſues an Action for the Penalty, the Obligor ought to ſhew the Matter, and ſay that he was ready at the Place and Time appointed to pay the leſſer Sum, and alſo that he is yet ready; [h] and if the Obligor had paid the Sum in another Place to the Obligee, the Penalty had been ſaved. So if the Mortgagor ought to pay to the Mortgagee a Sum at a certain Day, [i] or if a Man is bound in a greater Sum for the Payment of a leſſer Sum at a certain Day, there if he pays the Sum before the Day, the Condition is performed. [k] So if the Condition upon a Mortgage is, that if the Feoffor at ſuch a Day pays ſuch a Sum, then he and his Heirs ſhall re-enter, in this Caſe if he dies before the Day, his Executors, or his Heir (as *Littleton* ſays) may pay it, [l] for the Payment at the Day is more the Effect and Subſtance of the Matter than the Perſon of the Feoffor: So that another Perſon may pay it than he who is limited by the Words. [m] So if a Feoffment is made upon Condition that if the Feoffee does not pay the Feoffor ſuch a Sum at ſuch a Day, then the Feoffor ſhall enter, there if the Feoffee before the Day makes a Feoffment over, and at the Day does not pay the Sum, the ſecond Feoffee at the Day may tender and pay the Sum, notwithſtanding that the Agreement reached no further than that the firſt Feoffee ſhould pay it. [n] So where an Agreement is made that a Sum ſhall be paid to one Man, it may be paid to another, by 17. *Aſs.* where the Diſſeizor granted by Indenture that if the Diſſeizee paid ſuch a Sum to him at ſuch a Day, then a Releaſe made to him by the Diſſeizee ſhould be void, and before the Day the Diſſeizor made a Feoffment, there the Sum was paid to the Feoffee. From which Caſes we ſee that where Agreements are made that one Thing ſhall be done, another Thing may be done for it; and where it is agreed to be done at one Place, it may be done at another Place; and where it is to be done at one Day, it may be done at another Day; and where by or to one Perſon, it may be done by or to another Perſon, and yet at the ſame Time the Agreement is performed, and not broken. And the Reaſon thereof is, becauſe the Intent is performed, which [o] is the principal Point in all Agreements, and if this be performed, it is ſufficient, altho' every Circumſtance is not performed according to the Words; and if the Words are performed, and not the Intent (as it may be in ſome Caſes) yet the Agreement is not performed. [p] As in the Caſe of 21. *H.* 6. in Debt, where the Defendant was bound upon Condition that if his Feoffees of his Manor of *W.* granted to the Plaintiff an annual Rent of 40 s. out of the ſaid Manor, that then, &c. and he had three Feoffees, and two of them granted the Rent to the Plaintiff; there the Words of the Condition were performed, becauſe his Feoffees granted the Rent, but yet he had not performed the Condition, for all the Juſtices there took it that all the Feoffees ought to have granted the Rent: And ſo they certainly ought, for there the third might have had the Land by Survivorſhip, and he ſhould have avoided the Rent, and alſo more than two Parts of the Manor was not charged with the Rent; ſo that the Intent was not performed, altho' the Words were performed. [q] So it is put in 3. *H.* 7. that if one is bound to enfeoff me of the Manor of *D.* and he makes a Feoffment to another of Parcel, and afterwards enfeoffs me of the Manor, there he has performed the Words, but yet he has not performed the Intent, which was that I ſhould have the whole Manor as it then was. [r] So in the Caſe of *Colthirſt v. Bejuſhin* in 4. *Ed.* 6. a Remainder was limited to *Bejuſhin*, if he would inhabit and be reſident upon the Land during the Term, there it is taken that if he be reſident a Week during the Term he has performed the Words of the Condition, but not the Intent, for the Intent was that he ſhould be reſident during the whole Term. So in

[b] Litt. § 352. 1 Vent. 381.
[c] Ante 7 (n). and the Books there cited. 2 Leon. 25. W. Jones 181. 1 Vent. 381.
[d] Litt. § 344. Perk. § 749. Dy. 1. pl. 3. 1 Rol. R. 256. at the Bottom.
[e] Litt. § 343. 1 Rol. R. 297, at the Top.
[f] P 7. Ed. 4. 4. Fitz. Dette 79. Bro. Condition 145.
[g] T. 19. H. 8. 12. a. Bro. Touts temps priſt 1. Co. Litt. 207. a.
[h] Perk. § 748. Dy. 222. pl. 22.
[i] H. 10. H. 7. 14. pl. 11 *per Fineux*. Perk. § 748. 1 Rol. R. 297. Dy. 2. 2. pl. 22.
[k] Litt. § 334. T. 27. H. 8. 19. b. *per Audley*. O. Bendl. 134, 135, 137. Moor 336. 4 Leon. 176. Winch 116. 10 Mod. 420. Strange 133. Preced. Cha. 487.
[l] O. Bendl. 137.
[m] Litt. § 336. O. Bendl. 134. 135, 137. Moor 336. Winch 116. 4 Leon. 176. 5 Co. 96. b. 10 Mod. 420. Vin. Abr. tit. Tender C. pl. 5.
[n] 17 Aſs. pl. 2. Fitz. Condition 14. Bro. 103.
[o] O. Bendl. 137. *per Bramſton* C. J. Vin. Abr. tit. Contract. T. pl. 4.
[p] M. 21. H. 6. 10. pl. 22. Fitz. Bar 154. Bro. Condition 56. Perk. § 790. 2 Bulſt. 178. Ante 23 (b). 30 (f). 34 (f).
[q] H. 3. H. 7. 4. b. *per Vavisor*. Fitz. Bar. 129. Bro. Condition 126. Ante 23 (a). and ſee the other Books there cited.
[r] Ante 23. *per Pollard, arguendo*.

in the Caſe in 49. *H.* 6. * where an Abbot was Parſon Imparſonee from Time, &c. and he had an Annuity from Time beyond the Memory of Man in Right of the Parſonage, and he brought a Writ of Annuity as Abbot without naming himſelf Parſon, and counted upon a Preſcription in him and his Predeceſſors Abbots, and the Preſcription was traverſed, and found for the Plaintiff, there every Word of the Verdict was true, and yet [a] Attaint lay againſt the Jury, for when he brought the Writ by the Name of Abbot, and as ſuch claimed the Annuity, he was not ſeized of it in that Form, but as Parſon, and becauſe he did not claim it as Parſon, they ought not to have found the Iſſue for him; ſo that altho' every Word of the Verdict was true, yet their Verdict was falſe, for the Words of the Verdict and the Intent of the Verdict did not agree together. [b] Wherefore the Intent in every Matter ought to be reſpected, and if this be performed it is ſufficient, altho' the Words are not performed. So here in our Caſe the Intent of the Covenant is performed, if the Leaſe be made to the Executor, altho' the Words were that it ſhould be made to the Teſtator himſelf. And as to the Objection made, viz. [c] that if the Leaſe ſhould be made to the Plaintiff, it would have quite another Effect than if it had been made to the Teſtator himſelf, becauſe if it is made to the Plaintiff, he will not have it to the Uſe of the firſt Teſtator, nor ſhall it be accounted Aſſets in his Hands of the Goods of the firſt Teſtator, Sir, [d] this is quite otherwiſe, for the Covenant was made to the firſt Teſtator, and the Title thereto was derived from him to the Plaintiff, and that which is done in Performance of the Covenant ought to be in the Plaintiff in the ſame Degree as the Covenant was in him, ſo that he ſhall have the Leaſe in the like Manner as he had the Covenant, which was the Cauſe and Origin of the Leaſe. [e] And therefore, it was ſaid, if an Executor aſſigns Auditors to one who was Accountant to the Teſtator, and the Auditors find him in Arrears, the Action of Debt, which the Executor ſhall have, ſhall be in the *detinet* only, as it is taken in 11. *H.* 6. for the Debt ſhall be in him as Executor, and it has Reſpect to the Foundation of it. [f] So if a Man has a Villain for Years as Executor, and the Villain purchaſes Land, and the Executor enters, the Land ſhall be to the Uſe of the Teſtator, and ſhall be Aſſets in his Hands, becauſe to ſuch Uſe he was poſſeſſed of the Villain, who was the [g] Cauſe of the Land coming. So here the Covenant which was the Cauſe of the Leaſe came to the Executor in Right of the Teſtator, and in the ſame Right ſhall the Leaſe be poſſeſſed; for which Reaſons it ſeemed to them that the Plaintiff ſhould recover. And theſe Grounds and Reaſons were amplified with many Caſes, all which it is not my Deſign to recite at large.

* H. 10 Ed. 4. 16. b. Fitz. Fauxer de recov. 18.

[a] F. N. B. 106. h. 107. a. many good Caſes there to ſame Purpoſe.

[b] Vin. Abr. tit. Intent A. pl. 4.

[c] Ante 287 (a).

[d] See the Books cited Ante 286 at the Head of the Caſe.

[e] H. 11. H. 6. 17. *per Paſton et Newton.*

[f] P. 32. H. 8. Bro. Villenage 46. B. N. C. § 194. Dr. & Stud. lib. 2. cap. 18, fo. 170. Bro. Villenage 70. Co. Litt. 117. a. 124. a. 2 Rol. Abr. 734. G. pl. 1. Weſt's Symb. pt. 2. fo. 181. b. Godb. 30. Godolph, Orph. Leg. 183, § 4. Wentw. Off. of Exec. 73. 3 Danv. Abr. 377. pl. 16. Plowd. Quær. § 234.

[g] See 2 Rol. Abr. 735. J.

And after theſe Arguments had, all the four Juſtices of the King's Bench aſſembled this preſent *Trinity* Term at *Serjeant's-Inn* in *Fleetſtreet*, in the Chamber of *Catline* Chief Juſtice of *England*, to confer together upon this Matter. And they all unanimouſly agreed that the Action was maintenable. And the Chief Juſtice told me that the principal Reaſon which ſatisfied him was the latter of the two laſt Arguments; and the Opinion of the other Juſtices was accordingly. Wherefore the ſame Term they gave Judgment for the Plaintiff without arguing the Matter at large, and the Judgment was as follows.

The reſt of the Record.

At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid. Whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Queen here more fully underſtood, and mature Deliberation being had thereupon, for that it ſeems to the Court of the Lady the Queen here that the Declaration aforeſaid and the Matter therein contained are good and ſufficient in Law to compel the ſaid *Robert* to anſwer to the ſaid Declaration, whereby the aforeſaid *Richard* ought to recover his Damages by Occaſion of the Premiſſes: But becauſe it is unknown to the Court of the Lady the Queen what Damages the aforeſaid *Richard* has ſuſtained as well by Occaſion of the Premiſſes as for his Coſts and Charges by him about his Suit in this Behalf expended, therefore the Sheriffs are commanded that by the Oath of good and lawful Men of their Bailiwick they diligently enquire what Damages the aforeſaid *Richard* has ſuſtained as well by Occaſion of the Premiſſes as for his Coſts and Charges by him about his Suit in this Behalf expended, and the Inquiſition which they ſhall take thereupon to ſend to the Lady the Queen at *Weſtminſter* on *Wedneſday* next after the Octave of *St. Michael* under the Seals, &c. and the Seals, &c. together with the Royal Writ to them thereupon directed, &c. The ſame Day is given to the aforeſaid *Richard* there, &c. At which Day before the Lady the Queen at *Weſtminſter* came the aforeſaid *Richard* by his Attorney aforeſaid: And the Sheriffs returned a certain Inquiſition before them taken at the *Guildhall* of the City of *London* ſituate in the Pariſh of *St. Lawrence* in the *Old Jewry* in the Ward of *Cheap* of the ſame City, the 26th Day of *September* in the *ſeventh* Year of the Reign of the Lady the Queen now, whereby it is found that the aforeſaid *Richard* hath ſuſtained Damages by Occaſion of the Premiſſes, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to the Amount of 330 l. and for the ſaid Coſts and Charges 5 l. Therefore it is conſidered that the aforeſaid *Richard* recover againſt the aforeſaid *Robert* his Damages aforeſaid found by the Inqueſt aforeſaid, and alſo 12 *l.* for his Coſts and Charges aforeſaid to the aforeſaid *Richard* by the Court of the ſaid Lady the Queen here by his Aſſent of Encreaſe adjudged, which ſaid Damages amount in the whole to 347 l. And the aforeſaid *Robert* in Mercy, &c.

1 Judgments 239, 240.

Judgment.

A Report of a Judgment given in the King's Bench *by the Juſtices of the ſame Bench in* Michaelmas *Term in the* ſeventh *and* eighth *Years of the Reign of Queen* Elizabeth, *upon a ſpecial Verdict found in an Action of* Treſpaſs *brought by* Margery Oſborn *Plaintiff, againſt* Thomas Carden *and* John Joy *Defendants. And the Record thereof appears among the Records of* Michaelmas *Term* 6 & 7 Elizabeth. Rot. 136.

IT appears by the ſaid Record that *Margery Oſborn*, in *Eaſter* Term laſt paſt before the ſaid Term of *St. Michael*, exhibited a Bill of Treſpaſs againſt *Thomas Carden* and *John Joy* for breaking and entering into her Cloſes and Houſes at *Ledes* in the County of *Kent* the 20th Day of *July* in 5th Year of the Reign of the preſent Queen, and declared of her Graſs ſpoiled, and of 40 Cart-loads of Underwood cut and carried away, *&c.* to the Value of 40 *l.* The Defendants pleaded not-guilty, and the Jury as to the 40 Cart-loads of Underwood found the Defendants not-guilty; and as to the reſt of the Treſpaſs they gave a ſpecial Verdict, and found that *Thomas Ford* was ſeized in his Demeſn as of Fee of the Meſſuages and Tenements in which the Treſpaſs was aſſigned, and held them of *Warham Seintleger* as of his Manor of *Ledes* in Socage, *viz.* by Fealty and Rent, and died ſo ſeized thereof; and that the Tenements were of the Tenure and Nature of Gavelkind, and always partible amongſt the Heirs Males. And that after his Death the Tenements deſcended to *John Ford*, then being of the Age of 16 Years, and to *Walter Ford*, then being of the Age of 5 Years and a half, as Sons and Heirs of the ſaid *Thomas*, according to the Cuſtom aforeſaid, and afterwards *John* died without Heir of his Body, after whoſe Death his Part deſcended to the ſaid *Walter* as his Brother and Heir, which *Walter* at the Time of his Death was of the Age of 5 Years and a half, by Force whereof the ſaid *Margery* now Plaintiff being natural Mother of the ſaid *Walter*, as Guardian in Socage, ſeized the Body of the ſaid *Walter*, and entered into the Tenements, and was thereof poſſeſſed. And being ſo poſſeſſed, ſhe took to Huſband *Thomas Oſborn*, whereby he and the ſaid *Margery* were poſſeſſed. And they being ſo poſſeſſed, the 23d Day of *June* in the 3d Year of the Reign of the preſent Queen, by their Indenture bearing the ſame Date, demiſed and leaſed the ſame Tenements to the ſaid *Thomas Carden*, to have to him and to his Aſſigns from the Feaſt of *St. Michael* the Archangel next enſuing the Date of the ſaid Indenture, unto the End and Term of 8 Years thence next following. By Force whereof he was poſſeſſed, and being ſo poſſeſſed, the ſame 23d Day of *June* he leaſed the ſame Tenements to the ſaid *John Joy* one of the Defendants, to have and to hold to him unto the End of 4 Years from thence next enſuing; by Force whereof he entered, and was poſſeſſed, and he being ſo poſſeſſed, the ſaid *Thomas Oſborn* the 10th Day of *June* in the 5th Year of the Reign of the ſaid preſent Queen died, after whoſe Death the ſaid *Margery*, claiming the Tenements as Guardian in Socage to the ſaid *Walter* in Form aforeſaid, entered into the Tenements, and was thereof poſſeſſed until the Defendants, at the ſaid Time when the Treſpaſs is alledged to be done, re-entered into the Meſſuage and Tenements aforeſaid, upon whoſe Entry the ſaid *Margery* has ſued her Bill. And further they ſaid, that the ſaid *Walter Ford* was yet within the Age of 14 Years, *viz.* of the Age of 12 Years. And upon this the Jury prayed the Advice of the Court, whether the Entry of the ſaid *Margery*, notwithſtanding the Demiſe aforeſaid, was lawful after the Death of the ſaid *Thomas Oſborn*, or not: And if it ſeemed to the Court that the Entry of the ſaid *Margery* was not lawful, then the Jury ſaid that the Defendants were not guilty; and if it ſeemed to the Court that the Entry of the ſaid *Margery* was lawful, notwithſtanding the ſaid Demiſe by her Huſband and her made as before, then they ſaid that the Defendants were guilty of the reſt of the ſaid Treſpaſs alledged againſt them, in Manner and Form as the Plaintiff had alledged, and then they aſſeſſed Damages to the Plaintiff, beſides her Coſts, to 11 *l.* and for her Coſts to 5 *l.*

A Woman Guardian in Socage marries, and joins with the Huſband in a Leaſe of the Infant's Land, it ſhall not bind her after the Huſband's Death. S. P. 1 Rol. Abr 343. F. pl. 3. 2 Rol Abr. 46. H. pl. 2. 1 Finch 144. 2 Finch 147, 148. Crompt. J. C. 118. a. 1 Bac. Abr. 303. 2 Bac. Abr. 683. 3 Bac. Abr. 309, 408. Vin. Abr. tit. Guardian Q. pl. 4. in notis.

And upon this Verdict the Counſel for the Plaintiff, taking the ſaid Demiſe to be voidable by the Wife, and that her Entry was lawful, oftentimes prayed the Judgment of the Court, and the Defendants prayed their Judgment that ſhe might be barred, and the Matter was frequently touched and debated as well by the Juſtices as by the Counſel for the Parties. And at laſt the Court awarded that the Plaintiff ſhould recover, becauſe the Demiſe did not bind the Wife longer than the Coverture. [a] For the Law gives the Guardianſhip of the Body and Lands of the Infant to the Wife being his Mother, or other of his Parents or Anceſtors, for the great Affection which the Law preſumes to be in the Mother, or other Parent or Anceſtor towards the Infant, for greater Love there cannot be, in the Suppoſition of Law, than the Anceſtor has for the next of his own Blood; and it is an old Saying, that Love deſcends, and is tried to be more true than aſcending. For which reaſon the Law, which greatly tenders the Preſervation of Infants, has appropriated the Care of them and of their Lands in Socage to their Parents, and for Default of them, to their other Anceſtor who is the next in Blood and in natural Affection to them. And all this is for the Advantage of the Infant, and not of the Parent, or other Guardian, for the Guardian ſhall reap no Benefit from it, but the Infant, for the Guardian ſhall maintain the Infant with his Land, and of the reſt of the Profits ſhall render an [b] Account to the Infant. So that the whole Eſtate and Intereſt of the Guardian is to the Uſe of the Infant, and no Part of it is to the Uſe of the Guardian. [c] And therefore if the Guardian in Socage dies, his Executors ſhall not have the Wardſhip of the Body, nor of the Lands of the Infant, for they ſhall have nothing but what the Teſtator had to his own Uſe; and alſo the Executors have not ſuch a natural Affection for the Infant as the Teſtator had for him, and therefore when the Guardian is dead, the Executors ſhall not have the Wardſhip, but the next Anceſtor to the Infant, who has the like natural Affection for him.

[a] Crompt. J. C. 118. a.

[b] 1 Finch 143. 2 Finch 147.

[c] Litt. § 125. Vaugh. 181, 183. 2 P. Wms. 121. Crompt. J. C. 118 a. 1 Finch 7, 144. 2 Finch 9, 147. Wing. Max. reg. 19. pl. 60. 2 Bac. Abr. 681. Vin. Abr. tit. Guardian N. 4. pl. 5.

him. [a] And this is the Reaſon that if the Guardian in Socage is outlawed or attainted, he ſhall not forfeit the Wardſhip to the King, becauſe the Intereſt which he had was to the Uſe of another, and not to his own Uſe, and beſides there is not ſuch Proximity of Blood nor natural Affection between the King and the Infant as there was between his Anceſtor and him. Then here when the Wife, being Guardian in Socage, took Huſband, the Huſband had an Intereſt in the Wardſhip in Right of the Wife, for the Huſband partakes with the Wife in all her Prerogatives; and therefore when the Wife had the Wardſhip of the Infant, and the Huſband had the Wardſhip and Direction of the Wife, therein he had the Wardſhip of all thoſe Things of which the Wife had the Wardſhip before, for the Law does not deprive the Huſband of any Intereſt, Prerogative, or Thing, which the Wife had, but veſts the Intereſt in him with his Wife, becauſe they are but one Perſon in Law. [b] But if a Woman Guardian in Socage takes Huſband, and dies, now the Huſband has loſt his Intereſt, for the Wife had it to the Uſe of another, and alſo there is not ſuch Affection in the Huſband towards the Infant after the Coverture is diſſolved, as there was in the Wife, and therefore *ceſſante cauſâ, ceſſabit effectus.* Then here when the Huſband made a Leaſe of the Land of the Infant, and died, leaving the Wife, yet ſhe remains Guardian in Socage of the Body, and therefore the Huſband's Demiſe of the Land is voidable by the Wife, for the Huſband and Wife had it only to the Uſe of the Infant, and the Infant ought to live of it, and be maintained by the Profits of the Land. So that the Body being the Principal requires the Profits of the Land to be applied to its Support, and of the Reſidue to have an Account, which the Act of the Huſband cannot take away, for his Eſtate and Intereſt was but to another's Uſe, and the Uſe ſhall be required by the Infant of every one that has the Land; and inaſmuch as he who has the Uſe cannot, by reaſon of the Imbecillity of his Age, and Want of Diſcretion, meddle with the Profits of the Land, the Wife, who is authorized thereunto, ſhall in his Right take upon her the Management of the Land and the Profits thereof, and in his Right and for his Gain and Advantage ſhall ouſt every one that holds the Land to another Purpoſe. [c] Wherefore although the Wife ſhould not avoid the Act of her Huſband as to the Giſt, Demiſe, or Sale of the Chattles real or perſonal which ſhe had to her own Uſe, yet in the Caſe here ſhe ſhall, becauſe the Thing demiſed is held in another's Right, and for the Intereſt of the Infant it ſhall be avoided. So that this plainly differs from the other Caſes, for it is in Effect the Act of the Infant by the Guardian. And therefore the Direction and Management of the Land cannot be deveſted out of the Wife by the Act of another, any more than the Privity of Blood, or the Juriſdiction of the Perſon of the Infant may, for the Land is for his Suſtenance. And divers other Things were ſaid by the Juſtices more at large to enforce the Entry of the Wife, for which Reaſon Judgment was entered, as follows.

[a] M. 33. H. 6. 55. pl. 49. Bro. Forfeiture 70. Gard. 6. Co. Litt. 88. b. 3 Co. 39. a. 7 Co. 13. b, *Calvin's* Caſe. 7 Co. 12. b. Godb. 316. Cro. J. 99. Owen 115. 2 Rol. R. 323. Crompt. J. C. 118. b. 2 Bac. Abr. 681.

[b] Co. Litt. 89. a. 351. a. 1 Finch 7. 2 Finch 9, 147. Dy. 251. pl. 90. 1 Rol. Abr. 345. pl. 12. 2 Bac. Abr. 681.

[c] Dr. & Stud. lib. 1. cap. 7. Co. Litt. 351. a.

Judgment. At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid, whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, it is conſidered that the aforeſaid *Margery* recover againſt the aforeſaid *Thomas* and *John* her Damages aforeſaid by the Jurors aforeſaid in Form aforeſaid aſſeſſed, and alſo 4 *l.* 15 *s.* for her Coſts and Expences aforeſaid to the ſame *Margery* by the Court of the Lady the Queen here with her Aſſent of Increaſe adjudged, which ſaid Damages amount in the whole to 16 *l.* And the aforeſaid *Thomas* and *John* be taken, *&c.*

A Re-

A Report of a Judgment given in the Court of Wards and Liveries *by Sir* William Cecil *Knight Chief Secretary of our Lady the Queen, Maſter of the ſame Court, and by others of the Counſel of the ſame Court, in* Michaelmas *Term in the* ſeventh *and* eighth *Years of the Reign of our Sovereign Lady Queen* Elizabeth, *upon a Bill exhibited in the ſame Court for* John Carell *an Infant and Ward of the Queen, by* John Carell *Attorney of the Court of the* Dutchy *of* Lancaſter *his Grandfather on the Part of the Father, and* Prochein Amy, *againſt* Richard Cuddington *Eſquire Huſband to* Elizabeth *Grandmother to the ſame Infant on the Part of his Mother, touching the Point whether the ſaid Grandfather or Grandmother ſhould be Guardian in Socage to the ſame Infant.*

THE Caſe was thus. One *Thomas Buckenham* Eſquire was ſeized in his Demeſn as of Fee of and in the Manor of *Great-Livermore* in the County of *Suffolk*, and alſo of and in the Manor of *Suitterton*, otherwiſe *Clareball* and *Oldhall* in the County of *Norfolk*, and he had to Wife the ſaid *Elizabeth*, and conveyed to her for Term of her Life for her Jointure the Manor of *Great-Livermore*, and afterwards died ſeized of the Reverſion thereof, and alſo died ſeized of the ſaid Manor of *Suitterton*, having Iſſue by the ſaid *Elizabeth*, *John Buckenham* and *Dorothy Buckenham*. And afterwards the ſaid *John Buckenham* entered into the ſaid Manor of *Suitterton*, and being ſeized thereof, and of the Reverſion of the Manor of *Great-Livermore*, died without Iſſue, by whoſe Death the ſaid Manor of *Suitterton*, and the Reverſion of the ſaid Manor of *Great-Livermore* deſcended to the ſaid *Dorothy*, as Siſter and Heir of the ſaid *John Buckenham*, by Reaſon whereof ſhe entered into the ſaid Manor of *Suitterton*, and was ſeized thereof, and of the Reverſion of the ſaid Manor of *Great-Livermore*. And the ſaid *Dorothy* being ſo ſeized took to Huſband *Thomas Carell* Son and Heir apparent of the ſaid *John Carell* Attorney of the Dutchy, whereby he and the ſaid *Dorothy* were ſeized of the ſaid Manor of *Suitterton*, and of the Reverſion of the ſaid Manor of *Great-Livermore* in Right of the ſaid *Dorothy*, and they being ſo ſeized, by Fine *ſur conuſance de droit come ceo que il ad de ſon done* granted the ſaid Manor of *Suitterton*, and the Reverſion of the other Manor to one *Richard Noy* in Fee, and took back by Grant and Render an Eſtate to them and to the Heirs Males of the Body of the ſaid *Thomas Carell* by him upon the Body of the ſaid *Dorothy* lawfully begotten, the Remainder to the right Heirs of the ſaid *Dorothy* in Fee. And afterwards the ſaid *Dorothy* died, having Iſſue the ſaid *John Carell* an Infant begotten upon her by the ſaid *Thomas Carell*. And afterwards and now lately in the Time of the preſent Queen the ſaid *Thomas Carell* died, the ſaid *John Carell* his Son and Heir being within the Age of 14 Years, after whoſe Death as well the Manor of *Suitterton*, as the Reverſion of the Manor of *Great-Livermore* deſcended to the ſaid *John Carell* the Infant. And becauſe the Reverſion of the ſaid Manor of *Great-Livermore* was held of the Queen as of the late diſſolved Abbey of *Bury* in the County of *Suffolk* by Knight's-Service, and not *in capite*, the Wardſhip as well of the Body of the ſaid *John Carell* the Infant, as of the Reverſion of the ſaid Manor of *Great-Livermore* belonged to the Queen, and the ſaid Manor of *Suitterton* was held of the Biſhop of *Norwich* in Socage. And the ſaid *Richard Cuddington*, who after the Death of the ſaid *Thomas Buckenham* had married the ſaid *Elizabeth*, pretending to be Guardian in Socage to the ſaid *John Carell* the Infant, of the ſaid Manor of *Suitterton*, in Right of his Wife Grandmother to the ſame Infant on the Part of his Mother, had entered into ſame Manor, and had taken and detained the Iſſues and Profits of it to the Uſe of the ſaid Infant. And the ſaid Infant by the ſaid *John Carell* his Grandfather exhibited his Bill in the ſaid Court againſt the ſaid *Richard Cuddington*, complaining that the ſaid *Richard* had wrongfully entered into the ſaid Manor, and taken the Rents, Iſſues, and Profits of it, and detained the Evidences thereof. And the ſaid *Richard Cuddington* made his Anſwer, and the ſaid Infant replied, and in the Bill and Pleading all this ſaid Matter was diſcloſed. And the whole was reduced to one Point, *viz.* whether *John Carell* Grandfather to the Infant on the Part of his Father, or the ſaid *Elizabeth* being Grandmother to the Infant on the Part of his Mother, ought to be Guardian in Socage to the Infant of the ſaid Manor of *Suitterton*. For if *John Carell* the Grandfather ought to be Guardian in Socage, then the Entry of the ſaid *Richard Cuddington* into the ſaid Manor, and the taking the Profits, and detaining the Evidences thereof, was not lawful; but if the ſaid *Elizabeth* ought to be Guardian in Socage, and not the ſaid *John Carell* the Grandfather, then the Entry of the ſaid *Richard Cuddington* her Huſband, and the taking the Profits, and detaining the Evidences of the ſaid Manor, was lawful.

Where upon Marriage Lands deſcending on the Part of the Wife are ſettled by Fine ſur Grant and Render in Tail ſpecial, Remainder in Fee to the right Heirs of the Wife, and Huſband and Wife die, leaving Iſſue under 14 Years of Age, the Grandfather on the Part of the Father ſhall have the Cuſtody preferable to the Grandmother on the Part of the Mother, for tho' they are in equal Degree as to the Eſtate-tail, yet as to the Inheritance of the Fee-ſimple, it can never by any Poſſibility deſcend to the Grandfather on the Father's Side, or to any of his Blood, being Strangers to the Wife from whom the Land moved; but on the other Hand, as the Land came from the Mother, and as ſhe by the Fine became a Purchaſer of the Fee-ſimple, thoſe of her Blood may inherit, and thro' them the Grandmother may by Poſſibility take, and therefore ſhe is by Law diſabled to have the Guardianſhip. S. C. cited Crompt. J.C. 118.b. Vin. Abr. tit. Guardian O. pl. 8. Poſt 446.

But See Cary's Rep. 137, 138. where an Infant was ſeized of an Eſtate-tail, with a Limitation in Remainder to the Grandfather on the Father's Side, and it appearing that there were divers Remainders between his and the Infant's Eſtate, the Court would not interpoſe in favour of the Grandfather on the Mother's Side, to whom the Land could not deſcend. 20 Eliz. *Sweetman v. Edge.*

For the Plaintiff

And *John Carell* the Grandfather apprehended that he ought to be Guardian in Socage, becauſe two Eſtates of Inheritance in the ſaid Manor of *Suitterton* are deſcended to the Infant from two ſeveral Anceſtors, the one is an Eſtate-tail in Poſſeſſion to the Heirs Males deſcended to him from his Father, the other is an Eſtate in Fee-ſimple in Remainder deſcended to him from his Mother. And the ſaid *John Carell* the Grandfather is Grandfather and next Anceſtor to the Infant on Part of his Father, and if the Infant ſhould die, he is not inheritable to either of the Eſtates, for if the Infant ſhould die having Iſſue, then the Iſſue would inherit, and if he ſhould die without Iſſue, then the Eſtate-tail to the Heirs Males is determined, and there is none to inherit it. So that he being Grandfather cannot poſſibly reap any Advantage from the Death of the Iſſue, in reſpect of this Eſtate; no more can he in reſpect of the Fee-ſimple. But the ſaid *Elizabeth* the Grandmother may have Advantage from it; for when *Thomas Carell* and *Dorothy* his

Wife gave the Fee-ſimple of the Manor by Fine to *Richard Noy*, and took back an Eſtate to them and to the Heirs Males of the Body of the ſaid *Thomas Carell* by him begotten upon the Body of the ſaid *Dorothy*, the Remainder to *Dorothy* in Fee, now *Dorothy* was a Purchaſer of the Fee-ſimple, for her former Eſtate in the Fee-ſimple was out of her by the Fine, and veſted in *Noy* the Conuſee, and ſhe by the Grant and Render in the Fine had the Fee ſimple back from *Noy* the Conuſee, as a new Purchaſe, in which Caſe if ſhe had died without Iſſue, the Fee-ſimple ſhould have deſcended to the Heirs on the Part of the Mother of the ſaid *Dorothy*, in Default of Heirs on the Part of her Father. [a] And ſeeing that ſhe had Iſſue, if that Iſſue ſhould die without Iſſue, the Fee-ſimple would deſcend in the ſame Manner, *viz.* to the Heirs on the Part of the Father of *Dorothy*, if there be any, and if not, to the Heirs on the Part of the Mother of *Dorothy*, which is the ſaid *Elizabeth*. And perhaps the Land might deſcend to the Brother of *Elizabeth*, if ſhe has a Brother, and if not, to ſome Couſin of *Elizabeth*, and from ſuch Brother or other Couſin to *Elizabeth*; ſo that here there is a Poſſibility for *Elizabeth* the Grandmother to have the Land by Deſcent, if the Heir ſhould die without Iſſue, but there is no ſuch Poſſibility in favour of the ſaid *John Carell* being Grandfather on the Part of the Father. For *Thomas Carell* the Father, and his Anceſtors, and all his Blood are Strangers to *Dorothy* the Purchaſer, and there is no Poſſibility that the Land could deſcend to them, if *Dorothy* or her Iſſue ſhould die without Iſſue. And therefore if the Queen had not had the Wardſhip of the Body of the Infant, and he had had no Land holden by Knight's-Service, yet *Elizabeth* the Grandmother ſhould not have had the Wardſhip of his Body, becauſe the Law preſumes that the Heir would not be ſo [b] ſafe in her Wardſhip, as in the Wardſhip of the ſaid *John Carell* being his Grandfather on the Part of the Father, to whom there is no Poſſibility of the Land coming by Deſcent, and who can have no Expectation of Gain by the Death of the Heir. And as ſhe ſhould not have had the Wardſhip of the Body, ſo ſhe ſhall not have the Wardſhip of the Land, where the Queen has the Body. For the Law which directs the Wardſhip of the Body of the Heir in Socage, where he has no Land holden by Knight's-Service, gives the ſame Direction for the Profits of his Land holden in Socage, whether he has Lands holden by Knight's-Service of the Queen (not *in capite*) or of any other. So that the ſame Law, and no other, remains in Regard to his Lands, altho' another has his Body; for which Reaſon the ſaid *John Carell* apprehended that he, being Grandfather on the Part of the Father, ſhould have the Wardſhip of the ſaid Manor of *Suitterton* until the Infant came to the Age of 14 Years, and not the ſaid *Elizabeth*, nor her Huſband.

[a] Vin. Abr. tit. Heir W. a. pl. 5.

[b] See Forteſc. de laud. leg. Angl. cap. 44. And Selden's Notes thereon. Cowel's Inſt. 32.

E contra for the Defendant,

On the contrary the Defendant ſaid, that firſt of all it is to be granted that two Inheritances in the Manor of *Suitterton* are deſcended to the Infant, the one in Tail, and the other in Fee, both which are in him, and although the Grandmother on the Part of the Mother be nearer to the Poſſibility of having the Fee-ſimple by Deſcent, if the Infant die without Iſſue, than the Grandfather on the Part of the Father is, yet it is as abſolutely impoſſible for the Grandmother on the Part of the Mother to have the Land by Deſcent in Reſpect of the Eſtate-tail as it is for the Grandfather on the Part of the Father to have it, for both the one and the other are utterly incapable of having the Land in Reſpect of that Eſtate, becauſe neither of them come under the Tail; and therefore there is no Poſſibility that this Eſtate-tail ſhould deſcend to either of them. Then here, although both the Eſtates of Inheritance are in the Heir, yet the one is before the other, *viz.* the Eſtate-tail is before the Fee-ſimple, and precedes the Fee-ſimple. For if the Lord paramount would make Avowry upon the Heir, he ſhall not avow upon him as upon his very Tenant, but he ought to ſhew both the Eſtates, and ſhall avow upon him as upon his very Tenant by the Manner. [c] For the Fee ſimple does not merge the Eſtate-tail precedent, as it ſhall do an Eſtate for Life, but the Eſtate-tail remains, and is executed, and is in Poſſeſſion, and the Fee-ſimple is expectant, and not executed. For if the Eſtate-tail here is executed by Entry, or by *Scire facias* grounded upon the Fine, and the Iſſue die without Iſſue of his Body, the collateral Heir ſhall have another *Scire facias* to execute the Fee-ſimple, which proves that the Fee-ſimple is not executed, but the Eſtate-tail, and that the Eſtate-tail is an Eſtate in Poſſeſſion. And in Reſpect thereof ſhall the Profits and Iſſues of the Manor be received; for if the ſaid *Dorothy* and her Huſband had conveyed the Fee-ſimple to another, reſerving the Tail, yet the Profits ſhould be taken and received in reſpect of the Tail. So that the Fee is not the Reaſon of ſeizing the Heir, and taking the Profits by the Guardian in Socage, but only the Eſtate-tail, to which the Grandmother here is as much a Stranger as the Grandfather is. But if the Heir had not had any Land holden by Knight's-Service, ſo that the Queſtion here had been which of them ſhould have the Wardſhip of the Body and Land, there indeed it might have gone againſt the Grandmother, becauſe it might be objected in that Caſe that if ſhe ſhould have the Wardſhip of the Body of the Infant, ſhe might perhaps, by deſtroying him, be nearer to the Land, that is, if he had no Heir on the Part of the Father of *Dorothy*, for if he dies without Iſſue, the Eſtate-tail is determined, and the Fee ſhall be executed in the collateral Heir, which might by Poſſibility bring the Land to the Grandmother. But here no ſuch Objection can be made, for the Queen has the Wardſhip of the Body, ſo that that Point is put out of Queſtion. And the Matter in Diſpute here is in regard to the Land only, and the Perception of the Profits thereof in reſpect of the Eſtate-tail, to which the Grandmother is as much a Stranger as the Grandfather is, and in *rei veritate* they are in equal Degree; [d] in which Caſe ſuch of them as firſt enters into the Land ſhall hold it againſt the other, for the other ſhall not deveſt it if he has not a better Right, which he has not here, for they are in equal Degree, and therefore inaſmuch as the Defendant entered into the Land, as Guardian in Socage, in Right of his Wife the Grandmother of the Infant, before the Grandfather of the Infant entered, he ſhall hold the Land againſt him, *quia in æquali jure melior eſt conditio poſſidentis*. As if upon the Render of the Eſtate-tail by the Fine the Remainder in Fee

[c] 2 Co. 61. a. 3 Co. 74. b. 75. a.

[d] Co. Litt. 88. a. 1 Finch 21. 2 Finch 30, 31. Wing. Max. reg. 98. pl. 2, 3.

Fee had been limited to a Stranger, and the Eſtate-tail only had deſcended to the Infant, in this Caſe the Defendant, being Huſband to the Grandmother on the Part of the Mother, ſhould have kept his Poſſeſſion, and the Grandfather on the Part of the Father ſhould not have deveſted it out of him, becauſe they are in equal Degree to the Tail, for which Reaſon he that firſt gets the Poſſeſſion ſhall hold it againſt the other. So is it as the Caſe now ſtands, and therefore he prayed to be diſmiſſed with his Poſſeſſion.

And afterwards, this being a difficult Point, the Court made the Parties to agree in a Caſe containing the Matter, which was delivered in Writing by the Court to the Lord *Dyer* Chief Juſtice of the Common Bench, and to *Saunders* Chief Baron of the Exchequer, who were of Counſel with the Court, to have their Opinions therein, who upon great Advice and Conference with the other Juſtices declared it to be their reſolute Opinion, that *John Carell* the Grandfather on the Part of the Father ought to be Guardian in Socage of the ſaid Manor, and that the Law was the ſame in Regard to the Land only, as it ſhould be in Regard to the Body and Land together, if both were in Queſtion. And upon this the Court gave Judgment accordingly, as appears by their Decree made in the Cauſe, which Decree follows entire except in the Rehearſal of the Pleading, which being no more than a State of the Caſe, I have for Brevity's Sake omitted it, as a Thing not very material to be recited.

The Decree. And after upon the hearing and debating of the ſaid Matter before the Maſter and Counſel of the ſaid Court of Wards and Liveries, it was agreed by the Counſel learned of both the ſaid Parties, that a Caſe ſhould be put into this Court touching the Matter whether the ſaid *John Carell* the Grandfather of the ſaid Ward, or the ſaid *Richard Cuddington* and *Elizabeth* his Wife Grandmother of the ſaid Ward, ſhould and ought by the Law to take the Iſſues and Profits of the ſaid Manors, Lands, and Tenements of the ſaid *John Carell* the Son holden in Socage, as *Prochein Amy* to the ſaid Infant. Whereupon a Caſe was agreed upon by the ſaid Parties, and the ſame Caſe put into this Court by the Counſel learned of the Defendant. And the ſaid Maſter and Counſel of the ſaid Court delivered the ſaid Caſe to the Queen's Juſtices being Aſſiſtants to the ſaid Court for all Matters in Law ariſing in the ſaid Court, who upon great Adviſement and Conference with the reſt of the Queen's Juſtices declared to the ſaid Maſter and Counſel of the ſaid Court their reſolute Opinion of the Law touching the ſaid Caſe. And foraſmuch as upon the hearing and debating of the ſaid Matter in this Court, and alſo by the Opinion of the ſaid Juſtices, it appeared to this Court that the ſaid *John Carell* the Grandfather is Grandfather to the Infant on the Part of the Father of the ſaid Infant, and that the ſaid Lands and Tenements could not by any Poſſibility deſcend or come to the ſaid *John Carell* the Grandfather, nor to any the Heirs of the ſaid Infant on the Part of his ſaid Father, and it appeared to this Court that the ſaid Manors, Lands, and Tenements may by Poſſibility deſcend and come to the ſaid *Elizabeth* Grandmother to the ſaid Infant, and to others of the Blood and Heirs of the ſaid Infant on the Part of his ſaid Mother, for that the ſaid *Dorothy* his ſaid Mother was a Purchaſer of the Fee-ſimple of the Premiſſes; and ſo for the Cauſe of the Poſſibility of the Inheritance of the Fee-ſimple that may deſcend to the ſaid Blood of the Part of the Mother of the ſaid Infant, neither the ſaid *Elizabeth*, nor any of the Part of the Mother of the ſaid Infant, to whom the Inheritance of the Premiſſes by Poſſibility may deſcend, may by the Law have the Cuſtody of the Body or Lands of the ſaid Infant holden in Socage, but are diſabled thereunto by the Laws of this Realm, by Reaſon whereof ſhe may not by Law be preferred to be *Prochein Amy* and Guardian in Socage of the ſaid Infant. Therefore and for divers other good Conſiderations and weighty Cauſes the ſaid Maſter and Counſel of the ſaid Court moving, it is now ordered and decreed by the ſaid Maſter and Counſel of the ſaid Court, that the ſaid *John Carell* the Grandfather ſhall and may from henceforth peaceably and quietly take, perceive, and have all the Rents, Iſſues, Revenues, and Profits of the ſaid Manor of *Suitterton*, and of all other the ſaid Lands, Tenements, and Hereditaments in *Suitterton* or elſewhere in the ſaid County of *Norfolk*, being of Socage Tenure, as *Prochein Amy* to the ſaid Infant, to the Uſe of the ſaid Infant, without any Let or Interruption of the ſaid *Richard Cuddington* and *Elizabeth* his Wife, or either of them, or of any other Perſon or Perſons by the Commandment or Procurement of them or either of them. And it is further ordered by the ſaid Court, that the ſaid Defendant ſhall at or before the Feaſt of *Eaſter* next coming pay or cauſe to be paid to the ſaid *John Carell* the Grandfather, to the Uſe of the ſaid *John Carell* the Son, all the Rents, Revenues, and Iſſues of all ſuch Socage-lands of the ſaid Infant in the ſaid County as they have received ſince the Death of the ſaid *Thomas Carell* Father of the ſaid Infant. Nevertheleſs it is further ordered by the ſaid Court, that the ſaid *John Carell* the Grandfather ſhall permit and ſuffer the ſaid Defendant and his Aſſigns to have and occupy the ſaid Lands and Tenements in *Suitterton* aforeſaid until the Feaſt of *St. Michael* the Archangel next coming, yielding the yearly Rents and Charges for the ſame, which was yielded and paid for the ſame to the ſaid *Thomas Carell* by the ſaid *Richard Cuddington* in his Life time for the ſame,

A Report of a Caſe argued in the King's Bench *before the Juſtices there in* Michaelmas *Term in the* ſeventh *and* eighth *Years of the Reign of Queen* Elizabeth, *and adjudged in* Trinity *Term in the* eighth *Year of the Reign of the ſaid Lady the Queen, upon a Bill of* Treſpaſs *brought by* Henry Sharington *and* Gabriel Pledall *Plaintiffs, againſt* Thomas Strotton *and others Defendants. And the Record appears amongſt the Records of* Michaelmas *Term* 6 & 7 Elizabeth. Rot. 253. *and it was read as follows,*

Mich. Term 6 & 7 Eliz. Rot. 253. Wilts. Declaration. Same Precedent Raſt. Entr. 659. b.

BE it remembered, that heretofore, viz. in the Term of *Eaſter* laſt paſt, before the Lady the Queen at *Weſtminſter* came *Henry Sharington* Eſquire and *Gabriel Pledall* Gentleman by *Thomas Stranſham* their Attorney, and brought here into the Court of the ſaid Lady the Queen then there their certain Bill againſt *Thomas Strotton, Walter Gale, Edward Wetherhead, Richard Aldridge, Robert Prater, Henry Maſſey*, and *John Gilden* in the Cuſtody of the Marſhal, &c. of a Plea of Treſpaſs; and there are Pledges of proſecuting, viz. *John Doe* and *Richard Roe*. Which ſaid Bill follows in theſe Words, viz. *Wilts.* viz. *Henry Sharington* Eſquire and *Gabriel Pledall* Gentleman complain of *Thomas Strotton, Walter Gale, Edward Wetherhead, Richard Aldridge, Robert Prater, Henry Maſſey* and *John Gilden* in the Cuſtody of the Marſhal of the Marſhalſea of the Lady the Queen before the ſaid Queen being, for that they the 20th Day of *March* in the 6th Year of the Reign of the Lady *Elizabeth* now Queen, with Force and Arms, &c. the Cloſe of the ſaid *Henry Sharington* and *Gabriel*, called *Haſelond-wood*, containing by Eſtimation 30 Acres of Wood, at *Bremble* in the County aforeſaid broke and entered, and the Wood of the ſaid *Henry* and *Gabriel* there then growing cut down, and 200 Cart-loads of the Wood aforeſaid to the Value of 40 l. took and carried away, and alſo the Germins of the Wood of the ſaid *Henry Sharington* and *Gabriel* there lately growing with certain of their Cattle, viz. Horſes, Oxen, Cows, and Sheep eat up, trod down, and deſtroyed; and other Wrongs to them did, to the Damage of the ſaid *Henry Sharington* and *Gabriel* 100 Marks; and againſt the Peace of ſaid Lady the Queen now, &c. and therefore they bring the Suit, &c.

Bar.

And now here at this Day, viz. on *Monday* next after the Octave of *St. Michael* in this ſame Term, until which Day the aforeſaid *Thomas, Walter, Edward, Richard, Robert, Henry Maſſey*, and *John* had Leave to imparl to the Bill aforeſaid, and then to anſwer, &c. before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Henry Sharington* and *Gabriel* by their Attorney aforeſaid, as the aforeſaid *Thomas, Walter, Richard, Robert, Henry Maſſey*, and *John* by *Richard Haywood* their Attorney. And the ſame *Thomas, Walter, Edward, Richard, Robert, Henry Maſſey*, and *John* defend the Force and Injury when, &c. And as to the coming with Force and Arms, or whatever is againſt the Peace of the ſaid Lady the Queen now, they ſay that they are not guilty thereof; and of this they put themſelves upon the Country, and the aforeſaid *Henry Sharington* and *Gabriel* likewiſe, &c. And as to the Reſidue of the Treſpaſs aforeſaid above ſuppoſed to be done, the ſame *Thomas, Walter, Edward, Richard, Robert, Henry Maſſey*, and *John* ſay that the aforeſaid *Henry Sharington* and *Gabriel* their Action aforeſaid againſt them ought not to have or maintain, becauſe they ſay that the Cloſe aforeſaid, and alſo the Places in which the Treſpaſs aforeſaid is ſuppoſed to be done, are, and at the aforeſaid Time when the Treſpaſs aforeſaid is ſuppoſed to be done were, 30 Acres of Wood with the Appurtenances in *Bremble* otherwiſe *Bremell* aforeſaid. Which ſaid 30 Acres of Wood with the Appurtenances are, and at the aforeſaid Time when, &c. and alſo from Time whereof the Memory of Man is not to the contrary were, parcel of the Manor of *Bremell* in the County aforeſaid, of which ſaid Manor with the Appurtenances whereof, &c. one *Andrew Baynton* Eſquire long before the aforeſaid Time when, &c. was ſeized in his Demeſn as of Fee. And the ſame *Andrew* being ſo ſeized thereof, before the aforeſaid Time when, &c. viz. the 3d Day of *July* in the 2d Year of the Reign of the Lady the Queen now, at the City of *New-Saliſbury* in the County aforeſaid, by a certain Indenture made between the ſaid *Andrew*, by the Name of *Andrew Baynton* of *Bromham* in the County of *Wilts*. Eſquire, of the one Part, and one *Edward Baynton* by the Name of *Edward Baynton* of *Rowdon* in the ſaid County of *Wilts* Eſquire Brother of the ſaid *Andrew*, of the other Part, (one Part whereof ſealed with the Seal of the aforeſaid *Andrew*, the ſame *Thomas, Walter, Edward Wetherhead, Richard, Robert, Henry Maſſey*, and *John* here produce in Court, the Date whereof is the ſame Day and Year) it was covenanted, granted, and agreed between the aforeſaid *Andrew* and the aforeſaid *Edward Baynton* in Manner and Form following, viz. whereas the aforeſaid *Andrew* at the Day of the Date of the ſame Indenture had no Iſſue Male of his Body lawfully begotten, and the ſame *Andrew* then being fully determined and reſolved how, and in what Manner, Quality, and Degree the Manors, Lands, Tenements, and Hereditaments then afterwards by the ſame Indenture mentioned and contained, of which the ſame *Andrew* was ſeized in his Demeſn as of Fee, and all other his Manors, Lands, Tenements, and Hereditaments with the Appurtenances in the County of *Wilts* ſhould continue, remain, and be, as well in the Lifetime of the ſaid *Andrew* as after his Deceaſe, and alſo the ſame *Andrew* then being deſirous that the ſaid Manors, Lands, Tenements, and Hereditaments then in the ſame Indenture expreſſed might come, remain, and deſcend to the Heirs Males of his Body lawfully begotten, in Manner and Form then in the ſame Indenture likewiſe expreſſed, and to the Intent that all the ſame Manors, Lands, Tenements, and Hereditaments might continue and remain to ſuch of the Blood and Name of *Baynton*, as in the ſame Indenture

ſhould be named, mentioned, and contained, the ſame *Andrew Baynton*, as well for the Cauſes aforeſaid, as for the good Will, fraternal Love, and Favour which he bore as well to the ſame *Edward Baynton* his Brother, as alſo to ſuch others of his Brothers as in the ſame Indenture ſhould be named, covenanted and granted for himſelf and his Heirs, that he the ſame *Andrew Baynton* his Heirs and Aſſigns, and all and every other Perſon or Perſons, and their Heirs, who then were ſeized, or from thenceforth ſhould ſtand and be ſeized of and in the Manor aforeſaid with the Appurtenances, whereof the aforeſaid 30 Acres of Wood with the Appurtenances then were Parcel, ſhould from thenceforth ſtand and be ſeized thereof, and of every Part or Parcel thereof, to ſuch Intents and Purpoſes as in the ſaid Indenture further and more fully ſhould be ſpecified, that is to ſay, to the Uſe of the ſaid *Andrew* for and during his natural Life, without Impeachment of any Waſt during the Life of the ſaid *Andrew*, and after his Death to the Uſe of the ſaid *Edward Baynton* and *Agnes* his Wife and their Aſſigns for Term of their natural Lives, without Impeachment of any Waſt during the Life of the ſame *Edward Baynton*, and after the Death of the ſaid *Edward Baynton* and *Agnes*, to the Uſe of the Heirs Males of the ſaid *Andrew* lawfully begotten or afterwards to be begotten on the Body of *Frances Lee* Daughter of *Richard Lee* deceaſed, and for Default of ſuch Iſſue Male of the Body of the ſaid *Andrew*, to the Uſe of the Heirs Males of the ſaid *Edward Baynton* lawfully begotten, and for Default of ſuch Iſſue Male of the Body of the ſaid *Edward Baynton* lawfully begotten, to the Uſe of *Henry Baynton*, another of the Brothers of the aforeſaid *Andrew* and *Edward Baynton*, and of the Heirs Males of the Body of the ſaid *Henry* lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of *Henry Baynton* a younger Brother of the aforeſaid *Andrew* and *Edward Baynton* of the half Blood, and of the Heirs Males of the Body of the ſaid *Henry Baynton* the younger, half Brother of the aforeſaid *Andrew* and *Edward*. And further it was covenanted and granted between the Parties aforeſaid for themſelves and their Heirs by the ſame Indenture, that all Feoffments, Fines, Recoveries, and all other Conveyances and Aſſurances from thence happening to be made, had, or ſuffered by the ſame *Andrew Baynton* his Heirs and Aſſigns, or by any other Perſon or Perſons, ſhould be to the Uſes, Intents, and Purpoſes in the ſaid Indenture contained, expreſſed, and ſpecified, and to no other Uſes and Purpoſes, as by the ſame Indenture more fully appears. By Reaſon of which ſaid Covenants, Grant, and Agreement, and by Force of a certain Statute at *Weſtminſter* in the County of *Middleſex* the 4th Day of *February* in the 27th Year of the Reign of Lord *Henry* the *eighth* late King of *England*, Father of the Lady the Queen now, concerning the transferring of Uſes into Poſſeſſion, then made and provided, the aforeſaid *Andrew* was ſeized of the aforeſaid Manor of *Bremble* with the Appurtenances whereof, &c. in his Demeſn as of Freehold without Impeachment of any Waſt, Remainder thereof to the aforeſaid *Edward Baynton* and *Agnes* his Wife and to their Aſſigns for Term of their Lives, without Impeachment of any Waſt during the Life of the ſame *Edward Baynton*, Remainder thereof to the Heirs Males of the aforeſaid *Andrew* lawfully begotten or to be begotten on the Body of the aforeſaid *Frances Lee* Daughter of *Richard Lee* deceaſed, and for Default of ſuch Iſſue Male of the Body of the aforeſaid *Andrew*, Remainder thereof to the Heirs Males of the Body of the ſaid *Edward Baynton* lawfully begotten, Remainder thereof to *Henry Baynton* the elder Brother of the aforeſaid *Andrew* and *Edward Baynton*, and to the Heirs Males of the Body of the ſaid *Henry* lawfully begotten, and for Default of ſuch Iſſue Male of the Body of the ſaid *Henry*, Remainder thereof to *Henry Baynton* the younger, half Brother of the aforeſaid *Edward* and *Henry*, and to the Heirs Males of the Body of the ſaid *Henry Baynton* the younger lawfully begotten. And the ſaid *Andrew* being in Form aforeſaid ſeized of the aforeſaid Manor of *Bremble* with the Appurtenances whereof, &c. Remainder thereof in Form aforeſaid, the ſame *Andrew* before the aforeſaid Time when, &c. viz. the 21ſt Day of *February* in the 6th Year of the Reign of the Lady the Queen now, at *Chippenham* in the County aforeſaid, died, without Heirs Males by the ſaid *Andrew* on the Body of the aforeſaid *Frances Lee* lawfully begotten; after whoſe Death, and before the aforeſaid Time when, &c. the ſaid *Edward Baynton* and *Agnes* his Wife entered into the aforeſaid Manor of *Bremble* with the Appurtenances whereof, &c. and were thereof ſeized, viz. the ſame *Edward* in his Demeſn as of Fee-tail, and the ſame *Agnes* in her Demeſn as of Freehold, Remainder thereof in Form aforeſaid. And the aforeſaid *Henry Sharington* and *Gabriel* claiming the aforeſaid 30 Acres of Wood with the Appurtenances by Colour of a certain Deed of Demiſe to them thereof made for Term of their Lives by the aforeſaid *Andrew Baynton* long before the aforeſaid Indenture between the ſame *Andrew* and the aforeſaid *Edward Baynton* in Form aforeſaid made (where nothing of the ſame 30 Acres of Wood ever paſſed by that Deed into the Poſſeſſion of the ſaid *Henry* and *Gabriel)* into the aforeſaid 30 Acres of Wood with the Appurtenances before the aforeſaid Time when, &c. entered, upon the Poſſeſſion thereof of which ſaid *Henry Sharington* and *Gabriel* the ſame *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John*, as Servants of the aforeſaid *Edward Baynton* and *Agnes* his Wife, and by their Command, at the aforeſaid Time when, &c. entered, and the Cloſe aforeſaid there then growing cut down, and the aforeſaid 200 Cart-loads of Wood took and carried away, and alſo the Germins of the Wood there then growing with the Cattle aforeſaid eat up, trod down, and deſtroyed, as it was lawful for them to do. And this they are ready to verify, wherefore they pray Judgment if the aforeſaid *Henry Sharington* and *Gabriel* their Action aforeſaid againſt them ought to have or maintain, &c. Colour.

And

Plaintiffs demur.

And the aforeſaid *Henry Sharington* and *Gabriel* ſay that by any Thing by the aforeſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John* above in Pleading alledged, they ought not to be precluded from having their Action aforeſaid againſt the ſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John*, becauſe they ſay that the Plea aforeſaid in Manner and Form aforeſaid above pleaded is inſufficient in Law to preclude them the ſaid *Henry Sharington* and *Gabriel* from having their Action aforeſaid againſt the ſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John*, to which they the ſame *Henry Sharington* and *Gabriel* have no Neceſſity, nor are by the Law of the Land in any wiſe bound to anſwer: And this they are ready to verify, wherefore for Want of a ſufficient Anſwer in this Behalf, the ſame *Henry Sharington* and *Gabriel* pray Judgment and their Damages by Reaſon of the Treſpaſs aforeſaid to be adjudged to them, &c.

Joinder in Demurrer.

And the aforeſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John* ſay that the Plea aforeſaid in Manner and Form by them the ſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John* above pleaded is good and ſufficient in Law to preclude the aforeſaid *Henry Sharington* and *Gabriel* from having their Action aforeſaid againſt them the ſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John*, which ſaid Plea and the Matter therein contained they the ſame *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John* are ready to verify, whereunto the aforeſaid *Henry Sharington* and *Gabriel* hitherto do not anſwer, nor the ſame in anywiſe deny, but the ſaid Averment wholly refuſe to admit, wherefore they pray Judgment, and that the aforeſaid *Henry Sharington* and *Gabriel* may be precluded from having their Action aforeſaid againſt them the ſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John*. And becauſe

Continuance.

the Court of the Lady the Queen here is not yet adviſed of giving their Judgment of and upon the Premiſſes, Day thereon is given to the Parties aforeſaid before the Lady the Queen at *Weſtminſter* until *Tueſday* next after the Octave of *St. Hillary*, to hear their Judgment of and upon the Premiſſes, &c. becauſe the Court of the ſaid Lady the Queen here thereof not yet, &c.

THE CASE.

Mich. Term 7 & 8 Eliz.

Affection for the Proviſion of the Heirs Males which a Man ſhall beget, and the Continuance of the Land in his Name and Blood, and brotherly Love, are ſufficient Conſiderations to raiſe a Uſe in Land by Way of Covenant, but not long Acquaintance or Familiarity. S. P. 1 Finch 18. 2 Finch 25.

The Caſe was recited in this Manner. It appears by the Record that *Henry Sharington* and *Gabriel Pledall* have exhibited a Bill of Treſpaſs againſt *Thomas Stretton* and others, for entering into their Cloſe called *Haſelond-Wood*, containing 30 Acres of Wood, at *Bremble* in the County of *Wilts*, the 20th Day of *March* in the 6th Year of the Reign of the preſent Queen, and cutting down their Wood, and carrying away 200 Cart-loads of Wood to the Value of 40 l. And the Defendants plead in Bar, that the Place where, &c. is 30 Acres of Wood, which are, and at the Time of the Treſpaſs done, and for Time immemorial were, parcel of the Manor of *Bremble* in the ſaid County, of which Manor whereof, &c. one *Andrew Baynton*, before the Treſpaſs, was ſeized in his Demeſn as of Fee. And being ſo ſeized, before the Treſpaſs, viz the 3d Day of *July* in the 2d Year of the Reign of the preſent Queen, at the City of *New-Saliſbury* in the ſaid County by an Indenture made between the ſaid *Andrew* of the one Part, and one *Edward Baynton* Brother of the ſaid *Andrew* of the other Part (one Part whereof ſealed with the Seal of the ſaid *Andrew* the Defendants ſhew forth) it was covenanted, granted, and agreed between the ſame *Andrew* and the ſaid *Edward* in Manner and Form following, that is to ſay, whereas the aforeſaid *Andrew Baynton* at the Date of the ſame Indenture had no Iſſue Male of his Body lawfully begotten, and the ſame *Andrew* then being fully determined and reſolved how, in what Manner, Quality, and Degree, the Manors, Lands, Tenements, and Hereditaments mentioned in the ſame Indenture, of which the ſame *Andrew* was ſeized in his Demeſn as of Fee, and all other his Manors, Lands, and Tenements with their Appurtenances in the County of *Wilts* ſhould continue, remain, and be, as well in the Life time of the ſaid *Andrew*, as after his Death, and alſo the ſame *Andrew* then being deſirous that the ſaid Manors, Lands, Tenements, and Hereditaments ſpecified in the ſame Indenture might come, remain, and deſcend to the Heirs Males of his Body begotten, in Manner and Form afterwards in the ſame Indenture expreſſed, and to the Intent that all the ſame Manors, Lands, Tenements, and Hereditaments might continue and remain to ſuch of the Blood and Name of *Baynton* as in the ſame Indenture ſhould be named, mentioned, and contained, the ſame *Andrew* as well for the ſaid Cauſes, as for the Good-will, brotherly Love, and Favour which he bore as well to the ſame *Edward Baynton* his Brother, as to ſuch others of his Brothers who ſhould be in the ſame Indenture named, covenanted and granted for himſelf and his Heirs, that he the ſame *Andrew Baynton* his Heirs and Aſſigns, and all and every other Perſon or Perſons and their Heirs, who then were ſeized, or who ſhould afterwards ſtand or be ſeized of and in the ſaid Manor with the Appurtenances whereof the 30 Acres then were parcel, ſhould from thence ſtand and be thereof ſeized, and of every Part thereof, to ſuch Intents and Purpoſes as in the ſame Indenture are ſpecified, that is to ſay, to the Uſe of the ſame *Andrew* for Term of his natural Life without Impeachment of any Waſt, and after his Death to the Uſe of the ſaid *Edward Baynton* and *Agnes* his Wife and their Aſſigns for Term of their Lives, without Impeachment of any Waſt during the Life of the ſaid *Edward Baynton*, and after the Death of the ſame *Edward Baynton* and *Agnes*, to the Uſe of the Heirs Males of the ſaid *Andrew* lawfully begotten or to be begotten on the Body of one *Frances Lee* Daughter of *Richard Lee* deceaſed, and for Default of ſuch Iſſue Male of the Body of the ſaid *Andrew*, to the Uſe of the Heirs Males of the ſaid *Edward Baynton* lawfully

begotten, and for Default of ſuch Heirs Males of the Body of the ſaid *Edward Baynton* lawfully begotten, to the Uſe of *Henry Baynton*, another Brother of the ſaid *Andrew* and *Edward*, and of the Heirs Males of the Body of the ſaid *Henry* lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of *Henry Baynton*, the younger Brother of the ſaid *Andrew* and *Edward* of the half Blood, and of the Heirs Males of his Body, as by the ſame Indenture appears. By force of which Covenant, Grant, and Agreement, and of the Statute made the 4th Day of *February* in the 27th Year of the Reign of King *Henry* 8. concerning the transferring of Uſes into Poſſeſſion made and provided, the ſaid *Andrew Baynton* was ſeized of the ſaid Manor of *Bremble*, whereof, *&c.* in his Demeſn as of Freehold, without Impeachment of Waſt, the Remainder over to the ſaid *Edward Baynton* and *Agnes* for their Lives, without Impeachment of any Waſt during the Life of *Edward*, the Remainder over to the Heirs Males of the ſaid *Andrew* lawfully begotten on the Body of the ſaid *Frances Lee*, and for Default of ſuch Iſſue, the Remainder to the Heirs Males of the Body of the ſaid *Edward Baynton* lawfully begotten, with the Remainders over as before. And the ſaid *Andrew* being ſo ſeized of the ſaid Manor whereof, *&c.* the Remainders over in Form aforeſaid, the 21ſt Day of *February* in the 6th Year of the Reign of the preſent Queen, at *Chippenham* in the ſaid County of *Wilts* died, without Heirs Males by the ſaid *Andrew* on the Body of the ſaid *Frances Lee* lawfully begotten. After whoſe Death, and before the Time of the Treſpaſs, the ſaid *Edward Baynton* and *Agnes* entered into the ſaid Manor of *Bremble*, whereof, *&c.* and were thereof ſeized, *&c.* And the Plaintiff's claiming the 30 Acres of Wood by colour, *&c.* entered, *&c.* upon the Poſſeſſion of whom the Defendants as Servants of the ſaid *Edward* and *Agnes*, and by their Commands, at the ſaid Time when, *&c.* re-entered, and did the Treſpaſs, *&c.* And upon this Plea in Bar the Plaintiff's have demurred in Judgment.

And the Matter was argued in *Michaelmas* Term in the 7th and 8th Years of Queen *Elizabeth* by *Fleetwood* and *Wray* on the Part of the Plaintiffs, and by *Thomas Bromley*, and an Apprentice of the Middle Temple on the Part of the Defendants. And thoſe who argued on behalf of the Plaintiffs ſaid that the Matter of the Bar was inſufficient, and that there was no Uſe here made by this Indenture, nor was any Poſſeſſion conveyed to the ſaid *Edward Baynton* and *Agnes* by the Statute *of Uſes* upon this Covenant and Agreement by the Indenture. For they ſaid, firſt it is to be conſidered that *Andrew Baynton*, at the Time of making the Indenture, was ſeized of the ſaid Manor in Fee-ſimple, clear of all Eſtates and Intereſts of any Stranger therein, and if he intended to make a Stranger have a Uſe in it, he ought to have taken one of theſe two Ways to raiſe ſuch Uſe. The one is, to part with the Poſſeſſion, by the Circumſtances required by the common Law, to the Uſe intended, as to make a Feoffment, to levy a Fine, or to ſuffer a Recovery of the Land to the Uſe intended; and this Way the common Law is ſatisfied, as well as the Party alſo who has the Uſe, for the Circumſtances of the common Law are purſued, and the Uſe is no more than a Confidence annexed to the Eſtate which the Perſon parts with, and when he parts with the Eſtate by his own Conſent, he may make it upon Confidence, and this way the Uſe is properly made. The other way is, to keep the Land in his Hands without parting with it, and yet to do ſuch a Thing as ſhall make the Poſſeſſion to be to the Uſe of another, and that cannot be unleſs the Thing done imports in itſelf a good and ſufficient Conſideration to make the Poſſeſſion be to the Uſe of another, which ſhall be upon a Contract, or upon a Covenant or Grant on Conſideration. [a] As if a Man is ſeized of Land in Fee, and bargains and ſells the Land to another in Conſideration of a certain Sum paid to him, or agreed to be paid at a certain Day, here is a Contract, and the Bargainor ſhall be ſeized to the Uſe of the Bargainee by the Courſe of the common Law, becauſe he has done an Act upon Conſideration, that is, he has bargained the Land for Money; and inaſmuch as he hath the Money, or Security for it, it is reaſonable that the Bargainee ſhould have ſomething for it, and the Land he cannot have as his own, becauſe he had not Livery of Seizin, and therefore Reaſon has neceſſarily veſted the Uſe in him, which is but a Right in Conſcience to have the Profits, and to have the Land ordered according to his Will; [b] and if the Bargainor will not permit him ſo to have it, Reaſon veſts in the Bargainee a Title to compel him by the Judge of Conſcience to do it. So is it in the Caſe of a Covenant upon Conſideration, [c] as if I promiſe and agree with another that if he will marry my Daughter, he ſhall have my Land from thenceforth, and he does ſo, there he ſhall have a Uſe in my Land, and I ſhall be ſeized to his Uſe, becauſe a Thing is done whereby I have Benefit, *viz.* the other has married my Daughter, whoſe Advancement in the World is a Satisfaction and Comfort to me, and therefore this is a good Conſideration to make him have a Uſe in my Land. [d] So that a good Conſideration is always requiſite to create a Uſe *de novo* in the Land of another, where there is no Tranſmutation of the Poſſeſſion of the Land. Then in our Caſe here, inaſmuch as *Andrew Baynton* was ſeized of the Land in Fee-ſimple, and intended to raiſe Uſes in it without any Tranſmutation of the Poſſeſſion, which he cannot do by the Courſe of the common Law unleſs the Circumſtances purſued in the raiſing of ſuch Uſes import a good and ſufficient Conſideration to ſupport the ſame, for this Reaſon we ought to weigh the Conſiderations here, and ſee what Subſtance they have in the Law. And the Cauſes contained in the Indenture are three; firſt, a Deſire which he had that the Lands might come, remain, and deſcend to the Heirs Males of his Body limited in the Indenture; ſecondly, his Intent that the Lands ſhould continue and remain to ſuch of the Blood and Name of *Baynton* as are named in the Indenture; thirdly, the good Will, and brotherly Love and Favour, which he bore to his Brother *Edward Baynton*, and to his other Brothers. And theſe are all the Conſiderations, for the Matter in the Rehearſal, *viz.* that the ſaid *Andrew* had no Iſſue Male, and that he was determined and reſolved how his

For the Plaintiffs.

[a] H. 21. H. 7. 18. b. *Per Read.* M. 6. Ed. 6. Bro. Faits enrol. 9. *in fine.*

[b] P. 32. H. 8. Bro. Conſcience 25. B. N. C. § 181.

[c] M. 36. H. 8. Bro. Feoffments al Uſe 54. 2 Rol. R. 105. Crompt. J. C. 60. b. Dy. 96. pl. 41. Vide Ibid. 296. pl. 22.

[d] Cart. 138. T. Raym. 46. Curſon 338. Crompt. J. C. 61. a.

Manors and Lands ſhould remain and be as well in his Lifetime as after his Death, is no Conſideration at all, but the Want of Iſſue Male is the Cauſe that moved him to reſolve, and the Reſolution is but a Demonſtration of his Mind, and none of them is any Conſideration, for the Conſiderations are the three beforementioned. And as to the firſt, *viz.* his Deſire that the Lands might come to the Heirs Males of his Body, this does not ſeem to be any Conſideration to the Father, for the Father has no Gain or Advantage by it, but the Heirs Males of his Body. And the Conſideration ought to be to him that is ſeized of the Land, for if he has no Recompence, there is no Cauſe why the Uſe of his Land ſhould paſs. And none of the Conſiderations contain a Recompence here, for the Continuance of the Land in his Blood and Name of *Baynton* is no Recompence to him, nor Cauſe worthy to raiſe a Uſe; no more is the brotherly Love and Favour which he bore to *Edward Baynton* or to his other Brothers, for although theſe Cauſes induce Affection, yet every Affection is not a ſufficient Cauſe to alter the Uſe. [a] For if a Man grants to *J. S.* that in Conſideration of their long Acquaintance, or of their great Familiarity, or of their being Scholars together in their Youth, or upon ſuch like Conſiderations, he will ſtand ſeized of his Land to his Uſe, this will not change the Uſe, for ſuch Conſiderations are not looked upon in the Law as worthy to raiſe a Uſe, becauſe they don't import any Value or Recompence. For if upon Conſideration that you are my familiar Friend or Acquaintance, or my Brother, I promiſe to pay you 20 *l.* at ſuch a Day, you ſhall not have an Action upon the Caſe, or an Action of Debt for it, for it is but a nude and barren Contract, *et ex nudo pacto non oritur actio*, and there is no ſufficient Cauſe for the Payment, nor is any Thing done or given on the one Part, for you were my Brother or my Acquaintance before, and ſo will you be afterwards; ſo that nothing is newly done on the one Part, as is requiſite in Contracts, and alſo in Covenants upon Conſideration. As if I ſell my Horſe to you for Money or other Recompence, here is a Thing given on both Sides, for the one gives the Horſe, and the other the Money, or other Recompence, and therefore it is a good Contract. So is it in the Caſe of a Covenant upon Conſideration, as if I covenant with you, that if you will marry my Daughter, you ſhall have my Land, or I ſhall be ſeized to your Uſe, here is an Act on both Parts, for you are to marry my Daughter, and for that I grant to you the Uſe; ſo that there is an Act done and a Cauſe ariſing newly on each Part. But in the principal Caſe there is no ſuch Thing, for the Iſſue Male of *Andrew Baynton* ſhould have been his Iſſue Male, and his Name and Blood ſhould have been his Name and Blood, and his Brothers ſhould have been his Brothers, and fraternal Love ſhould have been between them, if this Covenant or Grant had not been made, ſo that all this was before the Indenture or Covenant, and ſhould have been after the Time of the Indenture or Covenant, if the ſame had not been made. Wherefore no new Thing is here done or cauſed by the one Side, and there is no Cauſe here but what would have been if no ſuch Covenant or Indenture had been made. But the common Law requires that there ſhould be a new Cauſe, whereof the Country may have Intelligence or Knowledge for the Trial of it, if need be, ſo that it is neceſſary for the Public-weal. [b] For Livery of Seizin was firſt invented as an Act of Notoriety, whereby People might have Knowledge of Eſtates, and be more able to try them, if they ſhould be empanneled on a Jury; and by the like Reaſon when a Uſe ſhall paſs, there ought to be, by the common Law, a Contract, or a public and notorious [c] Conſideration to a Covenant, which may cauſe the Country to have Knowledge of the Uſe for the better Trial thereof, if it ſhould be neceſſary. And ſuch was the Intention of the Parliament in 27. *H.* 8. when they made the Act that the Poſſeſſion ſhould be where the Uſe was, one of the great Cauſes of making which Act was to remove Ignorance, and that the Country might know in whom the Eſtate of the Land was. [d] And the like Conſideration they had in making the Act *of Inrollments*, which reſtrains Eſtates of Freehold from paſſing by Bargain and Sale, except it be by Writing indented enrolled within ſix Months. And if Uſes might be ſo eaſily raiſed by Covenants upon ſuch Conſiderations as theſe here are, where no Act or Thing apparent is done whereof the Country may have Notice, it would deſtroy the Effect of the ſaid Statute *of Uſes*, and would be pernicious to the Public-weal, and make it very difficult for the People to know who were the Owners of Lands and Tenements. And it is to be preſumed that the Makers of the ſaid Act of *Inrollments* did not take the common Law to be ſo, for if they had, they would have remedied it in this Caſe, as well as they did in the Caſe of a Bargain and Sale, which is much more notorious than a Covenant upon ſuch ſecret Conſideration, where no apparent Act or Thing is done to inform the Country of the Alteration of the Eſtate in the Land; and foraſmuch as they did not add any Remedy to it, it is an Argument that they did not take the Law to be that Uſes might paſs upon ſuch Covenants without notorious Conſiderations. But if the Uſe had been in *eſſe*, it might well enough have paſſed to a Stranger by the Grant of *ceſtuy que uſe* without any Conſideration; [e] for the *ceſtuy que uſe* may as well give or grant his Uſe without Conſideration as he may his Horſe or other Chattle, and he may alſo [f] deviſe it, but to create it *de novo* out of Land cannot be done without good Conſideration. [g] And to this Purpoſe they alledged the Opinions of *Read* and *Tremail*, two of the Juſtices of the King's Bench, in the Caſe of an Office traverſed in 21. *H.* 7. and the Caſe there put by *Read*, *fo.* 19. was alſo cited, *viz.* it was covenanted by Indenture between Sir *John Mordant* and his Wife and one *T.* that the ſaid *T.* ſhould have the Land to him and to his Heirs of his Body, and that for Default of ſuch Iſſue, the Lands ſhould remain to Sir *John Mordant* and his Wife in Fee, and it was adjudged that he ſhould not have any Uſe by Force of the Indenture, as it is there rehearſed by *Read*, but they were put to their Action of Covenant. So here no Uſe ſhall be raiſed upon theſe Conſiderations, for they are utterly

[a] S. P. agreed *Per Curiam* Trin. 3 Jac. 1. B. R. *Ward v. Tuddingham.* 2 Rol. Abr. 783. pl. 5. 6. Cart. 139. 1 Finch 18. 2 Finch 25. Curſon 338.

[b] 5 Co. 84. b.

[c] Cart. 138. T. Raym. 46.

[d] Cart. 138. Curſon 338.

[e] Dr. & Stud. lib. 2. cap. 22. fo. 185. lib. 2. cap. 23. fo. 187, 188. 2 Finch 34.

[f] Godolph. Orph. Leg. 391, § 2.

[g] 8 H. 21. H. 7. 18, 19. Bro. Feoffments al Uſes 16. Crompt. J. C. 62, b.

terly ineffectual to ſuch Purpoſe, and then if no Uſe could be raiſed by the common Law, from thence it follows that the Statute does not execute any Poſſeſſion here, for it executes no Poſſeſſion but where there was a Uſe before; for which Reaſon the Bar is not good, but the Plaintiffs ſhall recover. And many other Things were ſaid, and many Caſes put to enforce this Argument, which I have omitted, my Deſign being only to ſhew briefly the principal Reaſons thereof.

E contra for the Defendants.

On the contrary *Thomas Bromley* and the ſaid Apprentice argued for the Defendants. And firſt they admitted that if a Man who is ſeized of Land has a Mind to raiſe a Uſe in it without any Tranſmutation of the Poſſeſſion, there are two Ways by the common Law to do it, *viz.* by Bargain and Sale, or by Covenant upon Conſideration. For the Statute of 27. *H.* 8. *cap.* 10. for executing the Poſſeſſion according to the Uſe, ſays in the Purview, *where any Perſon ſtands ſeized of any Lands, &c. by any Bargain, Sale, Covenant, Agreement, &c. the Perſon who has the Uſe ſhall be ſeized of the Land.* [a] So that by the Intent of the Makers of the Act a Man might be ſeized by Bargain and Sale, or by Covenant or Agreement. And a Bargain and Sale is, when a Recompence is given by both the Parties; as if a Man bargains his Land to another for Money, here the Land is a Recompence to the one for the Money, and the Money is a Recompence to the other for the Land, and this is properly a Bargain and Sale. But here there is no ſuch Bargain and Sale, nor ſuch Recompence given on both Sides, and therefore we have no Need to diſpute upon this Point. The other is the Covenant or Agreement, and this is to be intended in every Caſe upon Conſideration. But this Conſideration may ariſe on the one Side only, and it is not requiſite to have a Conſideration and a new Act done by both Parties; and ſuch Conſideration ought to be ſufficient. And therefore, they ſaid, the Conſiderations are to be weighed. And hereupon the Apprentice divided the Matter into two diſtinct Points. Firſt, whether the Grant and Agreement upon theſe Conſiderations (admitting it had been without Deed or Writing) had been ſufficient to raiſe the Uſes according to the Agreement or not. Secondly, admitting the Conſiderations to be inſufficient if they had been without Deed, or admitting that there were no Conſiderations at all, if nevertheleſs the Uſes ſhall be raiſed here, inaſmuch as the Agreement thereunto is by Deed.

[a] Crompt. J. C. 60. b.

1 Point.

And as to the firſt Point, which contains the Conſiderations, he ſaid that the Conſiderations are in Number four, and each of them is ſeveral, and he made ſeveral Points of them, and argued to them ſeverally.

1 Conſideration. If the Affection for the Proviſion of the Heirs Males which the Covenantor ſhall beget is ſufficient to raiſe a Uſe. S. P. 2 Rol. Abr. 785. pl. 6. 1 Finch 18. 2 Finch 25. Wing. Max. reg. 78. pl. 15.

The firſt is, the Affection of the ſaid *Andrew Baynton* for his Heirs Males which he ſhould beget on the Body of *Frances Lee*, and his Proviſion in the Eſtate made for their Security accordingly. For the Deed is recited to contain theſe Words, *the ſame Andrew Baynton as well for the Cauſes aforeſaid, as for &c.* ſo that ſome of the Conſiderations precede the *(as well)* and ſome follow the *(as alſo)*, and the firſt of them which precede the *(as well)* is the Conſideration for the Iſſues Males begotten by him upon *Frances Lee*, and their Security made by the Limitation of the Eſtate accordingly. And it was ſaid, this Cauſe proceeds from Nature, for when God had firſt created Man and Woman, and other living Creatures, he ſaid to them, *encreaſe and multiply*, and the Way to encreaſe and multiply is by Procreation, and therefore when he ſaid *(encreaſe and multiply)*, he intended it to be by Procreation, and he was willing that it ſhould be done, and for that Purpoſe he inſtilled into Mankind an Appetite for Procreation, which Inſtinct is Nature in them, and the Appetite for the ſame is natural; ſo that to beget is natural, and the End of it is to have Iſſues, and the having Iſſue is the Continuance of the People, for otherwiſe the World would be at an End. But all Procreation is not lawful, [b] only that which is by Marriage. And Matrimony is ordained by God, and limited to rational Creatures to beget and procreate Iſſues; ſo that Matrimony is the Means of Procreation, to which Nature urges us. And therefore the Philoſopher *Ariſtotle* in his Book of *Politics*, in which for the Inſtruction of the World he deviſed a Public-weal with Laws and Governments, perceiving that it would be in vain to make Laws but to a People, and that People are neceſſary before Laws, and that People are made by Procreation, and that Procreation is urged by Nature, and ought to be in Matrimony, begins at the Foundation, and treats firſt of Matrimony in his firſt Book *of Politics*, and ſays, *principio neceſſarium eſt maris et fœminæ conjugium, quorum uterque ſine altero debilis eſt, nec poteſt conſiſtere procreandi cauſa; idque non animi judicio, ſed ut in cæteris animantibus et iis rebus quæ terra eduntur, naturale eſt deſiderium, quale quicque eſt, tale quid alterum relinquendi.* So that he, having ſearched deep into the Laws of Nature, found that Marriage is neceſſary between Man and Woman for the Sake of Procreation of Children, and that the one of them is feeble without the other, neither can the one ſtand without the other, and that there is a natural Deſire in them and in all other living Things to beget and leave behind them in the World a Thing like themſelves. So that a Bull has a natural Deſire to beget a Bull, and an Ape to beget an Ape, and a Man to beget a Man, and that *non animi judicio*, that is, as a Thing indifferent, which one may do or not do, but it is a natural Appetite to which Nature urges us. Wherefore to beget Iſſues proceeds from Nature.

[b] Poſt 415 (b).

And this Point of Nature has another Point of Nature joined with it, and that is, when the Thing like itſelf is begotten, to nouriſh it. For it would be in vain to beget a Thing, and to ſuffer it to periſh, for then Nature loſes its Effect; and the Appetite of Procreation is not without its End and Deſign, which is, to bring to Perfection the Thing begotten, and to leave it alive after him that begot it. And for this Purpoſe Nature has inſtilled in the Sire a Love for the Thing begotten, which urges him to take care of the Education and Nurture of it, and to provide it with every Thing that is neceſſary, and to defend it againſt all Dangers, *nam cuique naturale eſt id quod procreavit tueri.* And becauſe Nature has appointed the Iſſue to be nouriſhed, defended, and ſupported by the Father, *Ariſtotle* in his ſaid Book has appropriated him to be

Part of the Family of his Father. And therefore in enumerating the Parts of a Family, he ſays, *primæ autem et minimæ familiæ partes ſunt dominus, ſervus, vir et uxor, pater et liberi.* And afterwards in reciting the Governments which the Father of a Family has in his Family, he ſays, *inde dominatus, patrium imperium, et res uxoria*; for it is fit that the Iſſue ſhould be in Subjection to the Father, and that the Father ſhould have the Superiority and Lordſhip over him, and thereupon *Ariſtotle* ſays of Parents in his ſaid Book, *id quod procreavit ac genuit, id ut præſit, et amicitiæ ratio et ſenectutis poſtulat.* From whence it is evident that to beget is natural, and to preſerve the Thing begotten, and provide every Thing neceſſary for its Support, is alſo natural.

Then let us conſider the Parts hereof in our Caſe. *Andrew Baynton* recited that he was deſirous that the Tenements and Hereditaments whereof he was ſeized (Part of which are now in Queſtion) might come and deſcend to the Heirs Males of his Body begotten, in Manner and Form in the ſaid Indenture expreſſed, and for this Cauſe he covenanted and granted to ſtand ſeized of the ſame Lands to the Uſe of himſelf for Life, and afterwards to the Uſe of *Edward Baynton* and *Agnes* his Wife for their Lives, and afterwards to the Uſe of the Heirs Males of the ſaid *Andrew* lawfully begotten or to be begotten on the Body of *Frances Lee*. Here this Conſideration recited, and the Limitation of the Eſtate accordingly, is founded purely on the ſaid Principles of Nature, *viz.* of begetting and procreating a Thing like unto himſelf, and alſo of providing for its Suſtenance, Education, and Living afterwards. For the Tail limited to *Andrew Baynton* ſhall in all Probability deſcend to the Iſſue, and it is an Inheritance certainly made and appointed for the Benefit and Advancement of the Iſſues Males of the Body of *Andrew* only, and of none other. And the Statute of *Weſtminſter 2. cap.* 1. ordains in ſuch Caſe, *that the Will of the Donor ſhall from thenceforth be obſerved*; ſo that by this Act the Eſtate is amortiſed to the Iſſues of his Body, though the Fee-ſimple is not, and the Iſſues ſhall, by the Intent of *Andrew Baynton* who is here Donor, have the Lands as long as ſuch Iſſues ſhall endure; and in his Proviſion for them he followed Nature for his Guide, which is a ſufficient Conſideration in our Law. And if the Philoſophers have ſearched ſo deeply for the Law of Nature, and in their Laws which they have deviſed and written for the Government of the People, have commanded us to follow Nature, and have taken Nature to be one of the Foundations whereupon all Laws are built, and have eſteemed it a ſufficient Cauſe to perform what Nature moves us to (as indeed it is), we ought not to think that the Founders of our Law were remiſs in ſearching after the Law of Nature, or that they were ignorant of it. Nor have we any Reaſon, from the Laws which they have made, to conceive ſo low an Opinion of them, for their Laws argue to the contrary, and ſhew that they who made them were Men of the greateſt and moſt profound Judgment, and acquainted as well with the Law of Nature, as with the Law of Reaſon, and the Law of God alſo. For there is nothing ordained in our Law contrary to Nature, or Reaſon, or the Law of God, but our Law is agreeable to them all. And becauſe Nature, Reaſon, and the Law of God countenance and reſpect the Love which is between the Father and his Iſſues, the Founders of our Law have alſo purſued the ſame, and in regard thereof have eſtabliſhed divers Maxims and Laws. [a] And therefore the common Law gives to the Father the Care and Education of his Son, [b] and if any other takes him from his Father, he ſhall have an Action againſt him, and the Words of the Writ are, *wherefore his Son and Heir he took*, and this Law is intended to give Nature her due. And if the Father be killed, the Son ſhall have an Appeal of his Death, for the Death of the Father is a great Loſs to the Son, and therefore the common Law gave the Appeal to the Son preferable to any other, becauſe it is to be preſumed that the Son has the ſincereſt Love and Affection for the Father, and will moſt ſeverely revenge his Death. Which Caſes ſhew us what mutual Love there is between the Father and the Son in the Opinion of our Law. And the Statute of *Articuli ſuper chartas cap.* 11. ordains, *that no Officer, nor any other (to have Part of the Thing in Plea) ſhall take upon him the Buſineſs that is in Suit, nor ſhall any one upon any ſuch Covenant give up his Right to another*; but the Statute ſays, *it is not to be underſtood that any Perſon ſhall be prohibited to have Counſel of Pleaders, and of learned Men in the Law for his Fee, or of his Parents and next Friends*; [c] and in 6. *Ed.* 3. the Father being impleaded made a Feoffment to his eldeſt Son and Heir apparent, pending the Suit, and the King brought a Writ of Champerty againſt the Father and the Son, and there it ſeems by the clearer Opinion that the Action is not maintenable, and yet the Caſe is within the Danger of the Words of the Act; for although the Father might, by the Act, have Counſel of his Son, as of one of his next Friends, yet to make an Eſtate to him is forbidden by the Words; but it is there held that by every Law the Son ought to aid his Father, and therefore it ſhall not be taken that the Son was intended by the Statute: So that notwithſtanding he is within the Words, he is out of the Intent of the Act, for no reaſonable man can make ſuch an Expoſition of it as to ſeparate the Son from the Father, or *e contra*, in Aſſiſtance and Counſel, they being ſo nearly connected by Nature. [d] And *note* that there *Herle* put the Caſe that in an Appeal brought by a Woman of the Death of her Huſband, the Son being Abettor ſhall not render Damages, but ſhall avow the Abetment, becauſe he was next of Blood. So that our Law encourages between the Father and the Son this Love and all other Things which Nature has ordained, and does nor break or violate the ſame in any Reſpect. [e] And if the Son and Heir apparent to the Father takes a Wife, and endows her of the Land of the Father *ad oſtium Eccleſiæ ex aſſenſu patris*, and dies, the Wife ſhall enter, and ſhall have it for her Dower. So that the Wife of the Son ſhall have Dower of the Land of the Father by the Marriage of the Son, and that ſhall be called Dower, and ſhe ſhall have it without Livery of Seizin, by the Aſſent of the Father only; but the Wife of no Stranger can have ſuch Dower by ſuch Aſſent.

[a] Litt. § 114. Lect. Frowick Bro. Gard 120. M. 33. H. 6. 55. pl. 49. *Per Litt.* Bro. Gard 6. H. 9. Ed. 4. 53. pl. 16. *Per Cateſby.* Bro. Gard 55. Dy. 190. pl. 19. Vaugh 180. Forteſc. Rep. 406. Swinb. 211.

[b] F. N. B. 90. h. 143. r. Bro. Gard 110. in fine. M. 3 Ed. 4. 12. pl. 5. *Per Danby.* Fitz. Brief 145. Bro. 481. Faux Latin 81. H. 9. Ed. 4. 53. pl. 16. *Per Cateſby.* Bro. Gard 55. Dy. 190 pl. 19. 3 Bac. Abr. 17. Forteſc. Rep. 22. Swinb. 211.

[c] T. 6. Ed. 3. 33. pl. 19. Fitz. Champerty 10. Bro. 11. Ante 88 (e). and ſee the Books there cited.

[d] See Ante 88 (f). and the Books there cited.

[e] Litt. § 40. 2 Bac. Abr. 154.

And

And thus we ſee that the Dower of the Wife of the Son ſhall be tranſlated from the Son to the Land of the Father by his Aſſent only without other Act, for the Wife of his Son is in a Manner his own Wife, and within his Care, in Reſpect of the Love which the Law preſumes to be between the Father and the Son. [a] And ſo if a Man is ſeized in Fee of Land holden of *J. S.* by Fealty and 10 l. Rent, and gives it in Frank-marriage to one with his Daughter, the Father ſhall pay the 10 l. annually until the fourth Degree is paſt, and ſhall have nothing of the Donees for it, tho' he ſhould have the Rent of every other Donee, and the Reaſon thereof is, becauſe it was given with his Daughter in Marriage, by which it is preſumed that his Daughter is advanced, and therefore the Father ſhall pay the Rent. So that for the Advancement of the Daughter the Father ſhall be charged by a Maxim of the Common Law, and the Charge is tranſlated from the Daughter to the Father, and this is grounded upon the Conſideration of Nature. For the Land was given to the Huſband in Marriage with his Wife, by which Acceptance the Huſband takes upon him to find the Wife with every Thing that is neceſſary, and in Conſideration thereof the Father ſhall bear the Charge of the Rent, becauſe his Daughter is to live by the Land given with her in Marriage. [b] And if I make a Contract with another, that if he will take my Daughter to Wife, I will give him 20 l. in this Caſe if he takes her to Wife, he ſhall have an Action of Debt for the 20 l. in our Law by 22. *Aſs.* and yet I have nothing for it, and if it was not out of Regard to Nature, this ſhould be called a nude Contract, *et ex nudo pacto non oritur actio.* But, Sir, my Daughter is advanced by the Marriage, which is a ſufficient Conſideration to me for the 20 l. So that a Conſideration proceeding from Nature is a ſufficient Conſideration in our Law. And from theſe Reaſons and Caſes it is manifeſt that Things proceeding from Nature are reſpected not only in Philoſophy, but alſo in our Law, and are of great Force and Operation in our Law, and therefore are eſteemed to be good and ſufficient Conſiderations. From whence it follows that the Conſideration of *Andrew Baynton* here expreſſed for the Proviſion [c] of his Heirs Males is a ſufficient Conſideration to raiſe a Uſe in the Land.

[a] Litt. § 19.

[b] 22 Aſs. pl. 70. *per Thorp.* Fitz. Prohibition 2. Bro. Debt 134. Juriſdiction 63. F. N. B. 44. a. 120. k. Dr. & Stud. lib. 2. cap. 24. fo. 195. Hardr. 72. 1 Freem. 97. 1 Rol. Abr. 593. pl. 1. 1 Rol. R. 433. Cro. C. 194. Cart. 234.

[c] 2 Rol. Abr. 785. pl. 6. 1 Finch 18. 2 Finch 25.

The ſecond Conſideration is the Continuance of the Land in the Name of *Baynton*, and this ſeems to be a good Conſideration to raiſe a Uſe. For by the Continuance of it in the Name of *Baynton* he intended to exclude all Females from inheriting the Land, and to place it in the Heirs Males. [d] For a Female by Marriage changes her Surname for the Surname of her Huſband, and loſes that of her Father, but the Male continues his firſt Name. And divers good Reaſons might move him ſo to do. For God has divided rational Creatures into two Sexes, Male and Female, [e] the Male is the Superior, the Female the Inferior, and as *Ariſtotle* in his ſaid Book of *Politics* ſays, *Mas eſt præſtantior, deterior fœmina.* Alſo Men are for the greateſt Part more reaſonable than Women, and have more Diſcretion to guide and manage Things than Women have, for to govern and direct is more ſuitable to the Capacity of the Male than of the Female. And therefore *Ariſtotle* ſays, *Mas ad Principatum aptior eſt naturâ quam fœmina.* And as a Woman is not as fit to govern in Things of a higher Nature as a Man is, ſo is ſhe not as fit to govern in Things of a lower Nature, which perhaps *Andrew Baynton* conſidering apprehended that the Profits of his Inheritance would not be ſo well expended and employed by Females as by Males, nor the Lands ſo well ordered, nor Hoſpitality ſo well kept up by the one as by the other, and that there would not be ſo great Comfort and Support to his Race, or Kindred, or Allies, or Friends and Acquaintance, as well as to the Country in general where he and his Parents dwelt, if his Inheritance ſhould come to Females, which are Things a Man cannot think of without Uneaſineſs and Diſcontent. Alſo if his Inheritance ſhould come to a Female, in all Probability ſhe would take a Huſband, to whom by her Marriage ſhe ſubmits herſelf and all that ſhe has, and conſequently ſhe and the whole Inheritance would be ſubject to the Will of a Stranger, and be governed by him. And every Man has a natural Deſire to leave the Inheritance which he has gotten by Toil and Labour to one of his own Blood, who may uſe and enjoy it according to his own Will, and no Man would willingly ſuffer a Stranger to reap the Fruits of his Labour; and therefore ſuch of his Blood to whom he deſires to leave his Subſtance is an Heir Male, and the Want of an Heir Male is a great Grief. [f] For which Reaſon in the Old Teſtament God ſays by his Prophet *Elias* to King *Achab*, whom he intends to plague, *I will kill of* Achab *him that piſſeth againſt the Wall*, which is but a Circumlocution of Males only, and not of Females, for Males emit their Urine ſtanding, but Females don't, and it is as much as if he had ſaid, I will kill all the Males coming from *Achab*. So that in the Judgment of God it is a greater Plague to want Males than Females, and it is a great Bleſſing of God to have Iſſue Male, to whom it is a Comfort to Man to leave the Fruits of his Labour. Alſo by eſtabliſhing the Inheritance in the Heirs Males having the Name of *Baynton*, *Andrew* will thereby obtain Fame, and be remembered by his Poſterity, which is what every Man deſires to obtain, and this Paſſion urges many to do noble Actions in their Life time, which may remain as Monuments of them for Ages after Death, and it is a laudable Paſſion. And to eſtabliſh a great Inheritance, as this is, in one Name, is an Action for which he deſerves to be greatly celebrated and commended by his Poſterity, and to be called the Founder of the Family, and it ſhall be held in as great Memory by all who ſhall be relieved by it, as the Foundation of a College, or School, or the like. And thoſe eſpecially who ſhall inherit the Lands, and reap the Benefit of them, ought to give him greater Praiſes, and (if they are not ungrateful) pray to God for him. [g] As if a Man gives Land in Franka'moign, they are bound to make Oriſons to God for him, and in Conſideration of ſuch Oriſons he is bound to pay to the chief Lord all Rents and Services iſſuing out of the Land. [h] And in 17. *Ed.* 4. it is taken by many, that if I promiſe a Surgeon a certain Sum for

2 Conſideration. If the Continuance of the Land in the Name and Blood of the Covenantor is a ſufficient Conſideration to raiſe a Uſe. S. P. 2 Rol. Abr. 785. pl. 8. Davis 30. a. Cart. 141. 2 And. 77.

[d] M. 40. Ed. 3. 37. pl. 9. *per Wiching.* Bro. Pleading 16. M. 2. H. 4. 1. pl. 5. Fitz. Brief 207. Bro. 92. Noſme 7. H. 27 H. 6. 8. pl. 10. *per Priſot.* Bro. Negativa pregnans 2. Perk. § 41. Andrew's Rep. 134.

[e] Poſt 445.

[f] 3 Book of Kings cap. 21. v. 21.

[g] Litt. § 135, 142.

[h] T. 17. Ed. 4. 5. a. *per Rogers et Suliard.* Bro. Debt 161. M. 37 H. 6. 9. a. *per Moile.* Dr. & Stud. lib. 2. cap. 24. fo. 194. 1 Rol. Abr. 593. pl. 3, 4. Cro. J. 521. Owen 94. 5 Mod. 13. 1 Finch 50. Vin. Abr. tit. Nudum Pactum A. pl. 6.

for curing ſuch a poor Man, [a] or if I promiſe a Labourer ſo much Money for repairing ſuch a Way, which is a Highway, he ſhall have an Action of Debt for it, becauſe it is a Work of Charity, and I deſerve Commendation for it, and therefore it ſhall not be called *nudum pactum*. So here *Andrew Baynton* deſerves to be praiſed and commended for his Gratuity by all thoſe of the Name of *Baynton* who ſhall inherit theſe Lands, or ſhall be relieved by their being eſtabliſhed in the Name of *Baynton*. And therefore for theſe Reaſons there is a ſufficient Conſideration in the Limitation of the Name to raiſe a Uſe.

[a] T. 17. Ed. 4. 5. a. *per Rogers et Suliard.* Bro. Debt 161. 1 Rol. Abr. 593. pl. 5. Dr. & Stud. lib. 2. cap. 24. fo. 194.

3 Conſideration. If brotherly Love is a ſufficient Conſideration to raiſe a Uſe. S.P. 2 Rol. Abr. 785. pl. 3. 1 Finch 18. 2 Finch 25. Moor 505. Rep. *temp.* Hardwick 108.

The third Conſideration here is, the brotherly Love, and Continuance of the Land in ſuch of the Blood of the ſaid *Andrew* as are mentioned in the Indenture, viz. his Brothers, for this is but one Conſideration, that is, his Blood, and the Brother is one of the next Degrees of the Blood, after his Parents and Iſſues. And as to this Conſideration, viz. the Continuance of the Land in his Brothers and others of his Blood, it is alſo founded upon Nature. For thoſe who deſcend from one ſame Parentage, and are joined neareſt in Blood, are by Nature joined in Love. And the Founders of our Law knowing this have purſued the ſame, and in Reſpect thereof have eſtabliſhed divers Maxims and Laws. [b] And therefore if the Father dies ſeized of Land, and the youngeſt Son enters, the eldeſt Son ſhall not have an Aſſize of *Mortdanceſtor*, nor a Writ of Right, nor any other Action againſt him, [c] for the Law preſumes that he who is ſo near to him in Blood, is alſo as near to him in Love, and therefore it cannot be ſuppoſed that he entered as an Enemy, but as a Friend to preſerve the Inheritance in his Abſence. So that the Common Law, purſuing the Dictates of Nature, has not given any Action againſt him. [d] And for this Reaſon alſo the Deſcent of the younger Brother, or of any of his Iſſues, ſhall not take away the Entry of the eldeſt, or of his Iſſues; for the Common Law will not believe that any of them claimed any Freehold or Inheritance, but held it rather as Bailiff or Friend of the eldeſt, and therefore the Deſcent ſhall not take away his Entry. [e] And upon this Preſumption of Law it is, that a collateral Warranty made by the Brother, or other of the Blood more diſtant, is a Bar to him upon whom it deſcends without Aſſets; for the Law does not preſume that he would hurt his Heir who is the next of his Blood, without otherwiſe advancing him as much as he has hurt him by the Warranty. And herein the Law is founded upon great Reaſon and Conſideration, for the Founders of our Law did not make Laws to countenance Things againſt Nature, which are monſtrous and ſeldom happen, but to licenſe Things which are conſiſtent with Nature and often happen, and therefore the Common Law preſumes that he is advanced as much by other Means as he is hurt by the Warranty. [f] And Brothers or Couſins ſhall not wage Battle in a Writ of Right, for the Law thinks it not good to give the Writ of Right between them with Liberty of Battle. [g] But if they are Siſters, or Brothers in Gavelkind, the *Nuper obiit* lies between them where the Anceſtor died ſeized, and this is only for the Trial of the Blood, for they ſhall not wage Battle in it. [h] And if the Anceſtor did not die ſeized of the Freehold, and the one enters into the whole Land to which ſhe and the others have Right, the others ſhall have a Writ of Right *de rationabili parte*, in which no Battle lies, but it is a Writ for the Trial of the Blood. And if the Blood is tried in theſe Writs, then the Demandant ſhall have Judgment of his Part, as a Thing purſuant, and not as the principal Point. [i] And it is a good principal Challenge in every Action to ſay that the Juror is Brother or Couſin to one of the Parties, in Reſpect of the Affection and Love which the Law preſumes to be between them. [k] And in 20. *H.* 7. it appears that the Duke of *Buckingham*, becauſe of a Marriage intended between the Lord *Henry* his Brother and the Lady of *Wiltſhire*, covenanted with *Reinold Bray* and others that certain Manors ſhould be to the ſaid Lady, and to the Heirs Males which the Lord *Henry* ſhould beget of her Body, and afterwards they intermarried, and then the Duke granted to the ſaid Lord *Henry* and Lady the ſaid Manors for their Lives, and it was there debated whether the Uſe ſhould paſs in Reverſion to the ſaid Lord *Henry* for his Life, ſo as that he ſhould have it for his Life after the Lady was dead without Iſſue, and there it was ſaid that the Uſe ſhould be to the Lord *Henry* in Reverſion for his Life, for the Grant was upon good Conſideration, for the elder Brother is bound by the Law of Nature to aid and comfort his younger Brother, as the Father is the Son, in which Caſe the Uſe was executed; but indeed the Book is not adjudged, tho' this ſeems to be the better Opinion. And ſo ſhall the Conſideration in our Caſe be ſufficient. And in the Old Teſtament God prohibits Marriage within the Levitical Degrees, which was upon no other Conſideration than to encreaſe Love; for God, who knows the Nature and Affections of Men better than Man himſelf, ſaw that Love grew by Nature between Couſins and thoſe who are near in Blood, and being deſirous to enlarge that Love further, he prohibited certain Degrees, within which it was not lawful for any to marry, to the Intent that they ſhould marry into other Families, and thereby bind their Lineages together in Love, ſo that Love might be encreaſed, which God deſires above all other Things. And this Prohibition he made upon divine Policy, for Love was ſufficiently implanted by Nature in thoſe who are near to each other in Blood, and there was no Need to make it greater than Nature had made it, but to marry elſewhere begets other Love in other Families, whereby Love is propagated and encreaſed. So that the Degrees were prohibited upon divine Policy, and by the Laws of Holy Church the Degrees of Marriage are further prohibited upon the Reaſon aforeſaid. From whence we ſee that by the Law of Nature, and by the Law of the Realm, and by the Law of God (which in Intent approves them both) brotherly Love and Advancement of one's Blood is taken to be of great Effect, and ſeems to be a ſufficient Conſideration to raiſe a Uſe in Land. [l] And *Bromley* ſaid that when a Felon was found guilty in an Appeal of Murder, the ancient Uſage was, that all thoſe of the Blood of him who was murdered ſhould draw the Felon by a long Cord to the Place of Execution, which

Cuſtom

[b] 8 Co. 101. b. Sed *Contra* M. 21. H. 6. 25. a. *per Port.*

[c] 2 Rol. Abr. 785. pl. 3.

[d] Litt. § 396. P. 40. Ed. 3. 24. pl. 26. Fitz. Entry congeable 23. Bro. 6.

[e] Litt. § 709. Co. Litt. 373. a. Wing. Max. reg. 79. pl. 1.

[f] 1 Finch 18, 362. 2 Finch 25. Wing. Max. reg. 78. pl. 17.

[g] Regiſt. 226. b. Co. Litt. 175. a. 1 Finch 2 9, 362. Booth 119.

[h] Booth 119, 120.

[i] P. 21. Ed. 4. 33. a. Bro. Challenge 180. Co. Litt. 157. a.

[k] M. 20. H. 7. 10. b. Winch 36.

[l] M. 11. H. 4. 12. a. *per Tirw. et Gaſcoign.* 3 Inſt. 131. 1 Hawk. P. C. 70.

Cuſtom was founded upon the Loſs which the whole Blood ſuſtained by the Murder of one of them, as well as to ſhew their Revenge againſt the Offender, and the Love they bore to the Perſon killed.

The fourth Conſideration is the Marriage had between *Edward Baynton* and *Agnes* his Wife; for the Uſe is limited after the Death of *Andrew* to *Edward Baynton* and *Agnes* his Wife for Term of their Lives. In which Words *(his Wife)* it is implied that Marriage was before had between *Edward Baynton* and the ſame *Agnes*, for without Marriage ſhe could not be his Wife. And then none of the Conſiderations ſpecified before the Eſtate limited ſerve as an Inducement to the Eſtate of *Agnes* but one, and one does, which is, the Good-will and brotherly Love which *Andrew* bore to the ſaid *Edward Baynton*. So that the whole being put together, the Senſe is, that *Andrew Baynton*, in Conſideration of the Good-will and brotherly Love which he bore to *Edward Baynton* his Brother, covenanted to ſtand ſeized to the Uſe of himſelf for his Life, and afterwards to the Uſe of the ſaid *Edward* and *Agnes* his Wife, whom he had before married; which cannot be otherwiſe taken than for the [a] Jointure of *Agnes*, and it is within the Words of the Act of 11. *H.* 7. *cap.* 20. in that it is given by the Anceſtor of the Huſband, and it is within the Words of the Act of 27. *H.* 8. *cap.* 10. which excludes Dower, and every Jointure is in Conſideration of Marriage. So that it is proved by the Matter that the Marriage between *Edward* and *Agnes* is the Conſideration of the Limitation of the Eſtate to them, altho' it is not plainly ſo expreſſed. And therefore *Agnes* ſhall have an Eſtate therein, and conſequently the Defendants as Servants as well to her as to *Edward* may juſtify the Treſpaſs. And thus the four Conſiderations and the Efficacy of them are diſcloſed, which are greater than any Money or Matter of Recompence, and the more ſo, in that ſome of them are founded meerly upon Nature, *et naturæ vis maxima*, and ſome of them are founded upon other Cauſes of great Importance, and each of them alone by itſelf is ſufficient to raiſe the Uſes, and when they are all put together, they are of greater Force, *nam omnis vis unita fortior eſt*. So that the Uſes are here raiſed by theſe Conſiderations, and then the Statute *of Uſes* executes the Poſſeſſion accordingly without Inrolment of the Deed within ſix Months. For the Act *of Inrolments* extends only to Bargains and Sales, whereas this is no Bargain and Sale, as it is before granted, but a Covenant and Grant upon Conſideration, which is out of the Statute *of Inrolments*, for which Reaſon the Poſſeſſion is executed according to the Limitation of the Uſes. And therefore *Agnes* ſhall have a joint Eſtate with *Edward*, and the Defendants as Servants to them both, and by their Command, have well juſtified the Treſpaſs. But if it ſhould be taken that the Eſtate here is not limited to *Agnes* in Conſideration of the Marriage, and that this Cauſe would be inſufficient to convey the Uſe to her, yet, the Apprentice ſaid, if any of the other Conſiderations, either for the Advancement of the Iſſue of the ſaid *Andrew*, or of his Blood, or any of the other Conſiderations are ſufficient to raiſe a Uſe in Tail to *Andrew*, or to any of his Brothers, this ſhall be ſufficient to convey an Eſtate to *Agnes* alſo. [b] For, he ſaid, if A. is ſeized of Land in Fee, and covenants with B. that in Conſideration that B. will marry his Daughter, he will from the Time of the Marriage ſtand ſeized of his Land to the Uſe of himſelf for his Life, and afterwards to the Uſe of one C. and to the Heirs of his Body begotten, and afterwards to the Uſe of one D. and to the Heirs of his Body begotten, and afterwards to the Uſe of the ſaid B. and of the ſaid Daughter of the ſaid A. and to the Heirs of their Bodies begotten; there after the Marriage had, the ſaid A. ſhall be ſeized by the Common Law to the Uſe of himſelf for Life, and afterwards to the Uſe of C. in Tail, and afterwards to the Uſe of D. in Tail, and afterwards to the Uſe of the ſaid B. and his Wife Daughter of the ſaid A. in Tail, according to the Limitation, and yet there is no Conſideration for which the ſaid C. and D. ſhould have the Uſe in Tail, for the Marriage of B. is a private and ſeveral Conſideration for himſelf to have the Eſtate-tail, but it is no Conſideration for C. and D. who are Strangers; and altho' it be not, yet inaſmuch as the Eſtate to B. and to his Wife is limited after the Death of A. and after the Death of C. and D. without Iſſue, and not before, it follows that B. and his Wife ought to have it in ſuch Form, and not otherwiſe, and that is, in Remainder. And this Remainder ought to be in him immediately after the Marriage, for the Covenant is, that from the Time of the Marriage he will ſtand ſeized to the Uſes, &c. and this by Neceſſity of Reaſon makes the Uſes to veſt in C. and D. for the Sake of the Remainder of B. and his Wife, becauſe they ſhall precede the Eſtate of B. and his Wife. [c] But if the Limitation to C. and D. had been after the Eſtate of B. and his Wife, as if the Covenant had been that A. ſhould ſtand ſeized to the Uſe of himſelf for Life, and afterwards to the Uſe of B. and his Wife in Tail, and afterwards to the Uſe of C. in Tail, and afterwards to the Uſe of D. in Tail, there the Remainders to C. and D. ſhould be void, becauſe there is no Conſideration to make them good; for the Marriage between B. and his Wife is only a Conſideration for the Eſtate of B. and his Wife, and the Marriage touches their particular Perſons, which is no Conſideration to a Stranger. [d] Yet Money might be given by one in Conſideration of all the Eſtates, but this Conſideration of Marriage is limited to the Perſons married, and to the Father whoſe Daughter is married, and is no Conſideration for a Stranger, as it ſeems. But foraſmuch as the Eſtate of the Wife of *Edward Baynton* is precedent to the Eſtates-tail limited to *Andrew* and his Brothers, and not ſubſequent to them, this is a ſufficient Reaſon to make her Eſtate good. And conſequently the Juſtification in the Name of her and of her Huſband is good. And as to the Opinions of the Judges in [e] 21. *H.* 7. *Bromley* admitted the Law to be, that [f] no Uſe could be there raiſed as the Caſe was, for there the Covenant was in the future Tenſe, viz. that the Land ſhall revert, remain, or deſcend, which is in the Diſjunctive and incertain, and at the Election of the Covenantor to make the Land come to him by the one Way or the other; and it is in Fee-ſimple, or Fee-tail, which is alſo incertain, for which Reaſons the Uſe could not be had there, but the Party ſhould be driven to a Writ of Covenant. And in the Caſe there put of *Mordant*, that was in the future Tenſe alſo, and no

4 Conſideration. If the Marriage of the Brother of the Covenantor is a Conſideration to raiſe a Uſe to the Brother's Wife. S. P. 2 Rol. Abr. 783, 784. pl. 1. 785. pl. 2. Moor 505.

[a] 2 Vin. Abr. tit. Jointure J. pl. 11.

3

[b] S. P. Crompt. J. C. 63. a. But 4 Leon. 137. it is ſaid by *Moor*, *arguendo*, that this Conceit was ruled in the *Ld. Paget's* Caſe not to be Law.

[c] 2 Rol. Abr. 784 pl. 5.

[d] 2 Rol. Abr. 784. pl. 7.

[e] Ante 302 (g).

[f] S. P. Winch 36, 60, 61. Dy. 55. a. pl. 2. in Margine. Crompt. J. C. 62. b.

Conſideration is there put. But there is no ſuch Matter here in our Caſe. And therefore for the Conſiderations here, and the Cauſes before alledged, the Uſes ſhould have been raiſed if there had been no Deed in the Caſe, and conſequently the Bar ſhall be good.

2 Point. Then as to the ſecond Point, admitting the Conſiderations to be inſufficient, or admitting that no Conſiderations had been expreſſed, yet the Covenant of itſelf without Conſideration is ſufficient to raiſe the Uſes. And in order to underſtand this the better, let us ſee what Advantage the Party here ſhall have by the Deed, if the Deed be not ſufficient to raiſe the Uſes. And it ſeems clearly that he ſhall have none. For he cannot have an Action of Covenant upon the Deed, becauſe there is nothing executory here; for *Andrew* has covenanted with *Edward* that he and all Perſons ſeized of the Land ſhall from thenceforth ſtand and be ſeized to the Uſes limited. And if they did not ſtand ſeized, there is no Default in *Andrew*, but in the Law, for he granted that from thenceforth, viz. immediately, he would be ſeized, and no Default can be charged in him if he did not ſtand ſeized. Nor can *Edward* have an Action of Covenant againſt him, [a] for an Action of Covenant ſhall never be brought, but where it is covenanted that a Thing ſhall be done in Time to come, or that it was done in Time paſt. As in the Caſe put in 21. *H.* 7. where the Covenant was that the Land ſhall revert, remain, or deſcend: Or if a Man covenants to build a Houſe, or to give a Horſe, or to make ſuch an Aſſurance, or the like, which may be executed and performed afterwards; or where I have done ſuch a Thing. But there is no ſuch Matter here, for he covenanted and granted preſently to ſtand ſeized to Uſe, upon which no Action of Covenant lies. For if I covenant and grant with you, that my white Horſe ſhall from henceforth be your Horſe, you ſhall not have an Action of Covenant againſt me altho' I detain the Horſe, for I have not covenanted to do any Thing in Time to come, nor that any Thing was done in Time paſſed; but the Phraſe of Speech amounts to the Effect to veſt a preſent Property in you. So here when he covenanted from thenceforth to be ſeized to the Uſes limited, the Phraſe contains in Effect a preſent actual Seizin to Uſe, and if the Law be that the Uſes ſhall be preſently made by it, then is he ſeized to the Uſes, and if the Law be not ſo, and will not ſuffer it, then he is not ſeized to the Uſes, and there is no Default in him; and from thence it follows that the Covenant and Grant and the Deed ſhall be void and of no Effect. But here *Andrew* made the Deed, and ſealed and delivered it, and it was according to the Intent of both the Parties, and *Andrew* could never plead *non eſt factum*; and then if it be his Deed, to make it of no Value would be a hard Expoſition, and inconſiſtent with the Exiſtence of the Deed. For a Deed is not a Deed but to ſome End and Effect, and to ſay that it is a Deed and of no Effect is a Contrariety. And if the Uſes ſhould not be raiſed, no other Advantage, Benefit, or Effect could be made of it here. So that we ſee no Action of Covenant ſhall be maintenable upon the Deed, nor any other Advantage made of it, if it does not raiſe the Uſes. Then let us hear and weigh the Objection made againſt the raiſing of the Uſes. And the Objection is, that the Uſes ſhall not be raiſed becauſe there is no Conſideration. And as to this, when God had firſt created Heaven and Earth, and all living Things upon the Earth, he made Man Sovereign over all, and gave to Man the Dominion of all, and to him he gave the whole Earth, as the Scripture ſays, *the Earth he gave to the Sons of Men.* So that Men are by the Endowment of God made Lords of the Earth, and Poſſeſſors of all Things in it. But how much of the Earth and of the Things therein one Man ſhall have, and how much another, God has left to be aſcertained and ſettled by Mankind by Laws to be made by them for that Purpoſe, and by ſuch Laws Proviſion is made accordingly in every Realm and Country. Then when *Andrew Baynton* by the Laws of this Land had the Manor of *Bremble* in Fee-ſimple, by our Law and by the Law of God alſo he had the Dominion thereof, and the Manor was ſubject to him; and if he had the Dominion over the Land, and the Land was ſubject to him, then was it ſubject to his Will, for his Will proceeds from his Mind, which is the principal Part of him, and which directs his Body and all that he has; and if his Land be ſubject to his Will, then is his Will a ſufficient Conſideration for which the Land ſhall go as his Will is. Then when *Andrew Baynton* had the Land to his own Uſe, and made an Indenture between him and *Edward Baynton*, that from thenceforth he ſhould be ſeized of it to other Uſes, here is a ſufficient Conſideration why the ſame ſhould be done, viz. the Will of him that has the Thing, and greater than this there is no Conſideration. And, Sir, by the Law of this Land there are two Ways of making Contracts or Agreements for Lands or Chattles. The one is, by Words, which is the inferior Method; the other is, by Writing, which is the ſuperior. [b] And becauſe Words are oftentimes ſpoken by Men unadviſedly and without Deliberation, the Law has provided that a Contract by Words ſhall not bind without Conſideration. [c] As if I promiſe to give you 20 l. to make your Sale *de novo*, here you ſhall not have an Action againſt me for the 20 l. as it is affirmed in the ſaid Caſe in 17. *Ed.* 4. for it is a nude Pact, *et ex nudo pacto non oritur actio.* And the Reaſon is, becauſe it is by Words which paſs from Men lightly and inconſiderately, but where the Agreement is by Deed, there is more Time for Deliberation. [d] For when a Man paſſes a Thing by Deed, firſt there is the Determination of the Mind to do it, and upon that he cauſes it to be written, which is one Part of Deliberation, and afterwards he puts his Seal to it, which is another Part of Deliberation, and laſtly he delivers the Writing as his Deed, which is the Conſummation of his Reſolution; and by the Delivery of the Deed from him that makes it to him to whom it is made, he gives his Aſſent to part with the Thing contained in the Deed to him to whom he delivers the Deed, and this Delivery is as a Ceremony in Law, ſignifying fully his Good-will that the Thing in the Deed ſhould paſs from him to the other. So that there is great Deliberation uſed in the making of Deeds, for which Reaſon they are received as a *lien* final to the Party, and are adjudged to bind the Party [e] without examining upon what Cauſe or Conſideration they were made. And therefore in the Caſe put in 17. *Ed.* 4. put it thus,

[a] 1 Finch 158.

[b] Ld. Raym. 648. *per Gould.* J. 1 Finch 159. Vin. Abr. tit. Nudum Pactum A. pl. 2.

[c] T. 17. Ed. 4. 4. b. 5. a. *per Townſend.*

[d] 1 Finch 159.

[e] Cowel's Inſt. 178. Crompt. J. C. 49. b.

thus, that I by Deed promiſe to give you 20 *l.* to make your Sale *de novo*, here you ſhall have an Action of Debt upon this Deed, and the Conſideration is not examinable, for in the Deed there is a ſufficient Conſideration, *viz.* the Will of the Party that made the Deed. [a] And ſo where a Carpenter by Parol without Writing undertook to build a new Houſe, and for the not doing of it the Party in 11. *H.* 4. brought an Action of Covenant againſt the Carpenter, there it does not appear that he ſhould have any Thing for building the Houſe, and it was adjudged that the Plaintiff ſhould take nothing by his Writ: But if it had been by Specialty, it would have been otherwiſe; and ſo it is there held by *Thirning*, *cauſa qua ſupra*. [b] So in 45. *Ed.* 3. in Debt, the Plaintiff counted that a Covenant was made between him and the Defendant, that the Plaintiff ſhould marry the Defendant's Daughter, and that the Defendant ſhould be bound to him in 100 *l.* and he ſaid that he had married his Daughter; and the Count was challenged, becauſe this Debt is demanded upon a Contract touching Matrimony, which ought to be in Court chriſtian; but notwithſtanding this, foraſmuch as he demanded a Debt upon a Deed, whereby it was become a lay-Contract, he was put to anſwer: But otherwiſe it would have been, if it had been without Deed, as it is there put; [c] and 14. *Ed.* 4. and alſo 17. *Ed.* 4. are, that if it be without Deed the Action does not lie, becauſe the Marriage, which is the Conſideration, is a Thing ſpiritual; which Books are contrary to the Opinion of *Thorp* in the ſaid Caſe in [d] 22. *Aſſ. Ante fol.* 305. So that where it is by Deed, the Cauſe or Conſideration is not enquirable, nor is it to be weighed, but the Party ought only to anſwer to the Deed, and if he confeſſes it to be his Deed, he ſhall be bound, [e] for every Deed imports in itſelf a Conſideration, *viz.* the Will of him that made it, and therefore where the Agreement is by Deed, it ſhall never be called a *nudum Pactum*. And in an Action of Debt upon an Obligation, the Conſideration upon which the Party made the Deed is not to be enquired, for it is ſufficient to ſay that it was his Will to make the Deed. And ſo inaſmuch as in the principal Caſe it is agreed that the Uſes might be raiſed by the Deed, if there had been a Conſideration in it, and here there is a Conſideration contained in the Deed, *viz.* the Will of *Andrew Baynton*, which is ſufficient of itſelf, for this Reaſon the Uſes ſhall be raiſed thereby; and if this ſhould not be ſufficient to raiſe them, yet they ſhould have been raiſed by other Conſiderations, if they had been without Deed, whereas here they are by Deed, and ſo they ſhall be raiſed *a fortiore*. For which Reaſons they prayed Judgment that the Plaintiffs might be barred. And many other Things were ſaid, and Caſes put to enforce theſe Arguments.

[a] M. 11. H. 4. 33. a. Bro. Action ſur le Caſe 40. H. 3. H. 6. 37. a. *Per Rolf.* Ld. Raym. 909. *Per Gould* J.

[b] M. 45. Ed. 3. 24. pl. 30. Fitz. Debt 131. Bro. Juriſdiction 11. 1 Freem. 97. *Per Vaugh.* C. J.

[c] T. 14. Ed. 4. 6. pl. 3. Bro. Debt 160. Juriſdiction 93. T. 17. Ed. 4. 4. b. Bro. Debt 161. T. 15. Ed. 4. 32. pl. 14. Bro. Contract 14. Debt 104. H. 19. Ed. 4. 10. P. 20. Ed. 4. 3. pl. 17. in all which Books nothing is ſpoken of a Deed.

[d] See 1 Freem. 97. the Opinion of *Thorp* in the 22. *Aſſ. pl.* 70. made reconcileable with the Argument here.

[e] Vin. Abr. tit. Nudum Pactum A. pl. 7.

And after theſe Arguments the Court took Time to deliberate until *Hillary* Term, and from thence until *Eaſter* Term, and from thence until this preſent *Trinity* Term in the eighth Year of the Reign of the preſent Queen, and the Defendants now prayed Judgment. And *Corbet* Juſtice ſaid that he and all his Companions had reſolved that Judgment ſhould be given againſt the Plaintiffs. For it ſeemed to them that the Conſiderations of the Continuance of the Land in the Name and Blood, and of brotherly Love, were ſufficient to raiſe the Uſes limited. But, he ſaid, as my Lord Chief Juſtice is not now preſent, you muſt move it again when he is preſent, and you ſhall have Judgment. And afterwards at another Day, *Catline* Chief Juſtice being preſent, the Apprentice prayed Judgment. And *Catline* and the Court were agreed that Judgment ſhould be entered againſt the Plaintiffs, and he ordered *Haywood* the Prothonotary to enter it. And the Apprentice ſaid, may it pleaſe your Lordſhip to ſhew us, for our Learning, the Cauſes of your Judgment. And *Catline* ſaid, it ſeems to us that the [f] Affection of the ſaid *Andrew* for the Proviſion of the Heirs Males which he ſhould beget, and his Deſire that the Land ſhould [g] continue in the Blood and Name of *Baynton*, and the [h] brotherly Love which he bore to his Brothers, are ſufficient Conſiderations to raiſe the Uſes in the Land. And where you ſaid in your Argument *Naturæ vis maxima*, I ſay, *Natura bis maxima*, and it is the greateſt Conſideration that can be to raiſe a Uſe. [i] But as to the other Conſideration moved in the Argument, *viz.* of the Marriage had between *Edward Baynton* and *Agnes*, the Record does not prove this, nor is it ſo averred, and it ſhall not be ſo intended, and therefore I don't regard it, but the other Cauſes and Conſiderations are effectual, and thoſe which moved us to our Judgment. Wherefore Judgment was given as follows.

Trin. Term 8 *Eliz. Curia.*

[f] 7 Co. 13. b. 2 Rol. Abr. 785. pl. 6. 1 Finch 18. 2 Finch 25. Wing. Max. reg. 78. pl. 15.

[g] 2 Rol. Abr. 785 pl. 8. Davis 30. a. Cart. 141. 2 And. 77.

[h] 2 Rol. Abr. 785. pl. 3. Moor 505. 1 Finch 18. 2 Finch 25.

[i] 1 Moor 505. it is ſaid *arguendo*, that if the Juſtices had here entered into the Conſideration of the Marriage, it would have been ſufficient to raiſe a Uſe to *Agnes*, without any Averment or expreſs Conſideration.

At which Day before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Henry Sharington* and *Gabriel Pledall* as the aforeſaid *Thomas Strotton*, *Walter Gale*, *Edward Wetherhead*, *Richard Aldridge*, *Robert Prater*, *Henry Maſſey*, and *John Gilden* by their Attornies aforeſaid; whereupon as well the Plea aforeſaid as all other and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Queen here more fully underſtood, for that it ſeems to the Court of the Lady the Queen here that the Plea aforeſaid in Manner and Form aforeſaid above pleaded is good and ſufficient in Law to preclude the aforeſaid *Henry Sharington* and *Gabriel Pledall* from having, maintaining, and proſecuting their Action aforeſaid againſt the aforeſaid *Thomas Strotton*, *Walter Gale*, *Edward Wetherhead*, *Richard Aldridge*, *Robert Prater*, *Henry Maſſey*, and *John Gilden*, therefore it is conſidered that the aforeſaid *Henry Sharington* and *Gabriel* take nothing by their Bill aforeſaid, but for their falſe Claim thereof be in Mercy. And that the aforeſaid *Thomas*, *Walter*, *Edward Wetherhead*, *Richard*, *Robert*, *Henry Maſſey*, and *John Gilden* go thereof without Day.

The reſt of the Record.

Judgment.

Note that by the civil Law *Nudum Pactum* is defined thus, * *Nudum Pactum eſt ubi nulla ſubeſt cauſa præter conventionem; ſed ubi ſubeſt cauſa, fit obligatio, et parit actionem.* Alſo *Nuda Pactio eſt tenuis et deſtituta tam nomine proprio, quam mutatione rerum et factorum, manens in ſimplici paciſcentium colloquio.*

Nota bene by the Reporter.

* Cart. 141. Vin. Abr. tit. Nudum Pactum A. pl. 1.

A Report of a Judgment given by the Court of Exchequer *in* Hillary *Term in the* tenth *Year of the Reign of Queen* Elizabeth, *by the Aſſent of all the Juſtices of* England, *in a Caſe depending in the ſaid Court between the* Queen *and the Earl of* Northumberland, *upon an* Information *exhibited by the Queen's Attorney againſt the ſaid Earl touching a Mine of Copper containing Gold or Silver, claimed by the Queen in the Lands of the ſaid Earl. Which Caſe was argued in the* Exchequer Chamber *before all the Juſtices of* England, *and the Barons of the* Exchequer *in* Michaelmas *Term next before the Judgment given. And the Record thereof appears among the Records of the* Exchequer *in the Remembrancer's Office in* Michaelmas *Term in which the 8th Year of the Reign of the ſaid Queen ended. Rot.* 239.

Information. Same Precedent Raſt. Entr. 410. pl. 3.

BE it remembered, that *Gilbert Gerard* Eſquire Attorney General of the Lady the Queen now, who proſecutes for the ſame Lady the Queen, being preſent here in Court the 28th Day of *November* in this Term in his proper Perſon for the ſame Lady the Queen, gave the Court here to underſtand and be informed, that whereas the Lady the Queen now, by Reaſon of her Prerogative royal, is intitled to have and enjoy, and ought to have and enjoy to her own proper Uſe all and ſingular Mines and Ores of Gold and Silver, and of other Metals whatſoever containing in themſelves Gold or Silver, with all Things concerning them, which may or can be found in any Lands, Tenements, or Hereditaments within this Realm of *England*, or other the Dominions thereof, as well in the proper Lands and Soil of the ſame Queen, as in the Lands and Soil of any of her Subjects; And whereas alſo the ſaid Lady the Queen now the *firſt* Day of *March* in the 8th Year of her Reign was and yet is ſeized in her Demeſn as of Fee, in Right of her Crown of *England*, of and in * certain waſt or mountainous † Lands called *Newlands* in the County of *Cumberland*, in which there are certain Veins or Mines and Ores or Metal of Copper containing in themſelves Gold or Silver, which to the ſaid Lady the Queen appertain and belong, as in many Records, Rolls, and Remembrances of this Exchequer more fully of Record appear; and whereas alſo the ſaid Lady the Queen the aforeſaid *firſt* Day of *March* in the Year aforeſaid at her Palace at *Weſtminſter* in the County of *Middleſex* commanded and aſſigned one *Thomas Thurland* Clerk and *Daniel Howſeter* to cauſe and procure certain Lands to be ſearched and dug for ſuch Ore and Metal called Ore of Copper containing in itſelf Gold or Silver, within the ſaid waſt or mountainous Lands called *Newlands*, or in any Lands or Tenements in the ſaid County of *Cumberland*, to the Uſe of the ſaid Lady the Queen, and ſuch ſearching and digging to be continued there with all Diligence for a certain Time yet enduring, and alſo to procure ſuch Ore or Metal there from Time to Time found and dug up to be taken and carried away from thence, and to the Uſe of the ſaid Lady the Queen to be melted, fined, or otherwiſe converted. By Reaſon whereof the aforeſaid *Thomas Thurland* Clerk and *Daniel Howſeter* cauſed the Quantity of ſix hundred thouſand Pounds Weight of Ore and Metal of Copper containing in itſelf Gold or Silver to be dug up in the ſaid waſt or mountainous Lands called *Newlands*, and there to be laid ready upon the Land to be carried away from thence, endeavouring and intending to continue the ſaid Search and Digging there, as they were commanded by the aforeſaid Lady the Queen, until *Thomas* Earl of *Northumberland* the 8th Day of *October* laſt paſt, and divers other Days and Times afterwards, in and upon the Poſſeſſion of the ſaid Lady the Queen of the aforeſaid waſt or mountainous Lands called *Newlands* entered, intruded, and made Ingreſs, and the aforeſaid *Thomas Thurland* Clerk and *Daniel Howſeter* and other Labourers in the Mines and Ores aforeſaid as well from and in the making and continuing the Search and digging of the aforeſaid Lands and Mines for the Ore and Metal aforeſaid within the aforeſaid waſt Lands called *Newlands*, as from and in the taking and carrying away the aforeſaid ſix hundred thouſand Pounds Weight of Ore and Metal of Copper aforeſaid there in Form aforeſaid dug up and laid upon the Land, hindered and diſturbed, and them yet to hinder and diſturb does not deſiſt, to the ‡ Damage of the ſaid Lady the Queen 1000 *l.* Wherefore the aforeſaid Attorney of the Lady the Queen for the ſame Lady the Queen prays the Advice of the Court in the Premiſſes.

* Note the Generality of the Information, which does not ſpecify the certain Quantity of the Acres, no more than in Treſpaſs *Quare clauſum fregit.* which is brought for a Treſpaſs at the common Law. Savil 48, *Per Manwood.*

† See 2 Rol. R. 166.

‡ See 2 Hawk. P. C. 243, 244.

Anſwer.

And now, *viz. &c.* comes the aforeſaid Earl of *Northumberland* by *Thomas Fanſhaw* his Attorney, and prays *Oyer* of the Information aforeſaid, and it is read to him. Which being read, heard, and by him underſtood, he complains that he ſhall be vexed and diſquieted by Colour of the Premiſſes in the aforeſaid Information ſpecified, and that by no Means juſtly, becauſe by proteſting that the Information aforeſaid, and the Matter therein contained, are inſufficient in Law, to which he has no Neceſſity, nor is by the Law of the Land bound to anſwer, by proteſting alſo that the Lady the Queen now ought not to have or enjoy, by Reaſon of her Prerogative royal, all and ſingular Mines and Ores of Gold and Silver, and of other Metals whatſoever containing in themſelves Gold or Silver, with all Things concerning them, in the Lands or Soil of any of her Subjects, for Plea as to the Entry and Ingreſs into the aforeſaid waſt or mountainous Lands called *Newlands*, and as to the Interruption and Diſturbance as well from and in the making and continuing the Search and Digging of five hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, Parcel of the aforeſaid ſix hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, as from and in the taking and carrying away of the ſame five hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, the ſame Earl ſays that the ſame five hundred thouſand Pounds Weight of Metal of Copper called Copper Ore were dug in one Vein or Mine

Mine of the aforeſaid Veins or Mines for Ore and Metal within the aforeſaid waſt or mountainous Lands called *Newlands* in the Information aforeſaid ſpecified. And that the aforeſaid waſt or mountainous Lands called *Newlands*, in which are the aforeſaid Veins or Mines of Ore or Metal of Copper, are, and from Time whereof the Memory of Man is not to the contrary have been, Parcel of 10,000 Acres of a certain great Waſt-land called *Derwentfels* in the ſaid County of *Cumberland*. And further the ſame Earl of *Northumberland* ſays, that Lord *Philip* and Lady *Mary* late King and Queen of *England*, long before the Interruption and Diſturbance aforeſaid, were ſeized of and in the aforeſaid 10,000 Acres of the aforeſaid great Waſt-land called *Derwentfels* whereof, *&c.* in their Demeſn as of Fee, as in Right of the Crown of the ſaid late Queen of *England*. And the ſame late King and Queen being ſo ſeized thereof, by their Letters-patent under their Great Seal of *England*, bearing Date at *Richmond* in the County of *Surry* the 16th Day of *Auguſt* in the 4th and 5th Years of their Reigns, here ſhewn to the Court, gave, and of their ſpecial Grace, and certain Knowledge, and meer Motion for themſelves, the Heirs and Succeſſors of the ſaid late Queen, granted to the aforeſaid *Thomas* Earl of *Northumberland* the aforeſaid 10,000 Acres of the aforeſaid great Waſt-land called *Derwentfels* whereof, *&c.* amongſt other Things, by the Name of all the Honour of the ſame late King and Queen of *Cockermouth*, and of their Caſtle of *Cockermouth* and *Egremond*, and of their Lordſhip and Manor of *Cockermouth*, and of their Park of *Cockermouth*, and of their Foreſt of *Cockermouth*, and of all other their Lordſhips, Manors, Lands, Tenements, and Villages of *five Villages*, *Aſpater*, *Newlandraw*, *Allardale*, *Sarmorthy*, *Lorton*, *Coledale*, *Rogerſet*, *Molkarkin*, *Braythaite*, *Buttermire*, *Derwentfels*, *Wilton*, *Kirkland*, *Roſſawen* otherwiſe *Roſſington*, *Aikhead*, *Woodſide* otherwiſe *Woodſend*, *Dundraw*, *Waverton*, and *Weſtward*, *Egremond*, *Wilton*, *Drege*, *Carlton*, *Aſhdale*, *Waſhdale*, *Netherwaſhdale*, *Egremond*, *Bondage*, *Drege*, *Ravenglaſh*, *Keneſide*, *Dene*, *Wineſield*, *Birkley*, *Broughton-Parva*, *Broughton-Magna*, and *Calbeck Underfield*, and of their Foreſts of *Derwentfels*, *Weſtward*, *Aſhdale* and *Waſhdale*, with all their Rights, Members, and Appurtenances in their County of *Cumberland*, late Parcel of the Lands, Poſſeſſions, and Hereditaments of *Henry* late Earl of *Northumberland*; to have, hold, and enjoy all and ſingular the Premiſſes with all their Appurtenances to the aforeſaid *Thomas* Earl of *Northumberland*, and to the Heirs Males of his Body lawfully begotten and to be begotten, and for Default of ſuch Iſſue, the Remainder to *Henry Percy* Eſquire, Brother of the aforeſaid Earl, and to the Heirs Males of the Body of the aforeſaid *Henry* lawfully begotten and to be begotten. And further the aforeſaid late King and Queen of their more abundant ſpecial Grace willed, and of their certain Knowledge and meer Motion by their aforeſaid Letters-patent for themſelves and the Heirs and Succeſſors of the aforeſaid Queen granted, that the aforeſaid *Thomas* Earl of *Northumberland*, and the Heirs Males of his Body lawfully begotten and to be begotten, and for Default of ſuch Iſſue, the aforeſaid *Henry Percy*, and the Heirs Males of the Body of the ſaid *Henry* lawfully begotten and to be begotten, ſhould have, hold, and enjoy, and be able to have, hold, and enjoy all and ſingular the aforeſaid Honours, Caſtles, Lordſhips, Parks, Boroughs, Meſſuages, Lands, Meadows, Leaſows, Paſtures, Rents, Reverſions, and Services, and all other and ſingular the Premiſſes above expreſſed and ſpecified, and to them by the ſame Letters-patent before granted, with their Appurtenances, according to the Tenor and Effect of their aforeſaid Letters-patent, notwithſtanding any Omiſſion and Non-recital, or ill and Miſ-recital in the ſame Letters-patent of any Grants, Demiſes or letting to Farm of any Parcel of the Premiſſes by the ſame late King and Queen, or by the Father and Brother of the ſame late Queen, or any of them, or by the aforeſaid late Earl of *Northumberland*, to any Perſons before then made and granted, any Statute, Act, Ordinance, Proviſion to the contrary thereof had, made, enacted, or provided in any wiſe notwithſtanding; or for that expreſs Mention of the yearly Value and Certainty of the Premiſſes, or of any of them, or of other Gifts or Grants by the aforeſaid late King and Queen *Philip* and *Mary*, or by any of the Progenitors of the aforeſaid late Queen, to the aforeſaid *Thomas* Earl of *Northumberland* before that Time made, in the ſame Letters-patent is not made, any Statute, Act, Ordinance, Proviſion, or Reſtraint to the contrary thereof before then had, made, enacted, ordained, provided, or any other Thing, Cauſe, or Matter whatſoever in any wiſe notwithſtanding; as by the aforeſaid Letters-patent amongſt other Things more fully appears. By Reaſon whereof he the ſame *Thomas* Earl of *Northumberland*, the laſt Day of *Auguſt* in the ſaid 4th and 5th Years of the ſaid late King and Queen *Philip* and *Mary*, into the aforeſaid 10,000 Acres of the aforeſaid great Waſt-land called *Derwentfels* whereof, *&c.* entered, and was thereof ſeized in his Demeſn as of Fee-tail, *viz.* to him and to the Heirs Males of his Body lawfully begotten, the Remainder thereof to the aforeſaid *Henry Percy* in Form aforeſaid, by the Form of the Gift aforeſaid. And the ſame Earl being ſo ſeized thereof, he the aforeſaid 8th Day of *October* in the Information aforeſaid ſpecified, the aforeſaid *Thomas Thurland* and *Daniel Howſeter* and other Labourers in the Mines aforeſaid as well from and in the making and continuing the Search and digging of the aforeſaid five hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, Parcel of the aforeſaid ſix hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, in the aforeſaid one Vein or Mine for the Ore and Metal aforeſaid within the aforeſaid waſt or mountainous Lands called *Newlands*, as from and in the taking and carrying away of the ſame five hundred thouſand Pounds Weight of Metal of Copper called Copper Ore there in Form aforeſaid dug up and laid upon the Land, hindered and diſturbed, as it was and is lawful for him to do. With this that the aforeſaid *Thomas* Earl of *Northumberland* will aver that the aforeſaid 10,000 Acres of the aforeſaid great Waſt-land called *Derwentfels* whereof, *&c.* and the aforeſaid Mine in the aforeſaid waſt or mountainous Lands called *Newlands*, were Parcel

of

of the Lands, Poſſeſſions, and Hereditaments of the aforeſaid *Henry* late Earl of *Northumberland*. And with this that the aforeſaid Earl will aver, that the aforeſaid one Vein or Mine of Ore or Metal of Copper was firſt opened after the aforeſaid 16th Day of *Auguſt* in the aboveſaid 4th and 5th Years of the Reign of the aforeſaid late King and Queen, *viz.* the firſt Day of *April* in the 7th Year of the Reign of the ſaid Lady the Queen now, without that that the aforeſaid Lady the Queen now the aforeſaid *firſt* Day of *March* in the Information aforeſaid ſpecified was or is ſeized of or in the aforeſaid waſt or mountainous Lands called *Newlands* in the Information aforeſaid ſpecified, or of any Parcel thereof, in Manner and Form as by the Information aforeſaid above is ſuppoſed; and without that that he the aforeſaid *Thomas* Earl of *Northumberland* in or upon the Poſſeſſion of the ſaid Lady the Queen of the aforeſaid waſt or mountainous Lands in the Information aforeſaid ſpecified, or of any Parcel thereof, intruded in Manner and Form as by the Information aforeſaid above is ſuppoſed. All and ſingular whereof he the ſame *Thomas* Earl of *Northumberland* is ready to verify, as the Court, *&c.* Wherefore he prays Judgment, and that as to the Premiſſes he may be diſmiſſed from this Court. And as to the Interruption and Diſturbance as well from and in the making and continuing the Search and digging of one hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, being the Reſidue of the aforeſaid ſix hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, as from and in the taking and carrying away of the ſame one hundred thouſand Pounds Weight of Metal of Copper called Copper Ore, he the ſame Earl ſays that the ſame one hundred thouſand Pounds Weight of Metal of Copper called Copper Ore being the Reſidue were dug up in the Reſidue of the aforeſaid Veins or Mines for Ore and Metal within the aforeſaid waſt or mountainous Lands called *Newlands* in the Information aforeſaid ſpecified. And that Lord *Philip* and Lady *Mary* late King and Queen of *England*, long before the Interruption and Diſturbance aforeſaid, were ſeized of and in the aforeſaid Reſidue of the Veins or Mines in which the ſame one hundred thouſand Pounds Weight of Metal of Copper called Copper Ore being the Reſidue were dug up, in their Demeſn as of Fee, as in Right of the Crown of the ſaid Lady Queen of *England*. Which ſaid Reſidue of the Veins or Mines were opened the ſaid 16th Day of *Auguſt* in the aboveſaid 4th and 5th Years of the Reign of the ſaid late King and Queen, and long before. And the ſame late King and Queen being ſo ſeized thereof, by their Letters-patent under their Great Seal of *England*, bearing Date at *Richmond* in the County of *Surry* the ſame 16th Day of *Auguſt* in the 4th and 5th Years of their Reign, here ſhewn to the Court, gave, and of their ſpecial Grace, and certain Knowledge, and meer Motion for themſelves, the Heirs and Succeſſors of the ſaid late Queen, granted to the aforeſaid *Thomas* Earl of *Northumberland* the aforeſaid Veins or Mines being the Reſidue in which, *&c.* amongſt other Things, by the Name of all the Honour of the ſame late King and Queen of *Cockermouth*, and of their Caſtle of *Cockermouth* and *Egremond*, and of their Lordſhip and Manor of *Cockermouth*, and of their Foreſt of *Cockermouth*, and of all other their Lorſhips, Manors, Lands, Tenements and Villages of *five Villages*, *Aſpater*, *Newlandraw*, *Allardale*, *Sarmorthy*, *Lorton*, *Coledale*, *Rogerſet*, *Molkarkin*, *Braythaite*, *Buttermire*, *Derwentfels*, *Wigdon*, *Kirkland*, *Roſſawen* otherwiſe *Roſſington*, *Aikhead*, *Woodſide* otherwiſe *Woodſend*, *Dundraw*, *Waverton*, and *Weſtward*, *Egremond*, *Wilton*, *Drege*, *Carleton*, *Aſhdale*, *Waſhdale*, *Netherwaſhdale*, *Egremond*, *Bondage*, *Drege*, *Ravenglaſh*, *Keneſide*, *Dene*, *Wineſield*, *Birkley*, *Broughton parva*, *Broughton magna*, and *Calbeck Underſield*, and of their Foreſts of *Derwentfels*, *Weſtward*, *Aſhdale*, and *Waſhdale*, with all their Rights, Members, and Appurtenances in their County of *Cumberland*, late Parcel of the Lands, Poſſeſſions, and Hereditaments of *Henry* late Earl of *Northumberland*, and by the Name of all and ſingular their Meſſuages, Mills, Lands, Tenements, Meadows, Leaſows, Paſtures, Commons, Waſts, Furzes, Heaths, Moors, Marſhes, Woods, Underwoods, Waters, Piſcaries, Rents, Reverſions, and Services, and Advowſons and Rights of Patronages of Churches whatſoever, and alſo Courts Leet, Views of Frankpledge, Turns, Hundred Courts, Chattles waived, Eſtrays, Liberties, Warrens, Parks, Chaces, Fairs, Markets, Tolls, Cuſtoms, Annuities, annual Rents, Farms, Fee-Farms, Knights-Fees, Wards, Marriages, Eſcheats, Reliefs, Heriots, Hereditaments, Fines, Amercements, Wrecks of Sea, Mines, Quarries, and all other their Rights, Privileges, Profits, Commodities, Emoluments, and Hereditaments whatſoever, ſituate, lying, and being, and iſſuing, growing, and renewing in the Towns, Fields, Pariſhes, or Hamlets of *Cockermouth*, *five Villages*, *Aſpater*, *Newlandraw*, *Allardale*, *Sarmorthy*, *Lorton*, *Coledale*, *Rogerſet*, *Brakinthwait*, *Molkarkin*, *Braythaite*, *Buttermire*, *Derwentfels*, *Wigdon*, *Kirkland*, *Roſſawen*, *Aikhead*, *Woodſide*, *Dundraw*, *Waverton*, *Weſtward*, *Egremond*, *Wilton*, *Drege*, *Carlton*, *Aſhdale*, *Waſhdale*, *Eive*, and *Darwent*, *Netherwaſhdale*, *Egremond*, *Bondage*, *Egremont*, *Ballivate*, *Dedge*, *Ravenglaſh*, *Keneſide*, *Calbeck*, *Upton*, *Uldale*, *Bromeholme*, *Dene*, *Wineſield*, *Birkley*, *Broughton parva*, *Broughton magna*, and *Calbeck Underfield*, to the ſaid Honours, Caſtles, Lordſhips, Manors, Baronies, Boroughs, Parks, and Foreſts, or to any of them in any wiſe belonging or appertaining, or as Member, Part, or Parcel of the ſame Honours, Caſtles, Lordſhips, Manors, Baronies, Boroughs, Parks, Foreſts, or any of them before then had, known, accepted, uſed, or reputed, and which were formerly Parcel of the Lands, Poſſeſſions, and Hereditaments of the ſaid *Henry* late Earl of *Northumberland*: To have, hold, and enjoy all and ſingular the Premiſſes with all their Appurtenances to the aforeſaid *Thomas* Earl of *Northumberland*, and to the Heirs Males of his Body begotten and to be begotten, and for Default of ſuch Iſſue, the Remainder to *Henry Percy* Eſquire, Brother of the aforeſaid Earl, and to the Heirs Males of the Body of the ſaid *Henry* lawfully begotten and to be begotten. And further the aforeſaid late King and Queen of their

more abundant ſpecial Grace willed, and of their certain Knowledge, and meer Motion granted by their aforeſaid Letters-patent for themſelves and the Heirs and Succeſſors of the aforeſaid Queen, that the aforeſaid *Thomas* Earl of *Northumberland*, and the Heirs Males of his Body lawfully begotten and to be begotten, and for Default of ſuch Iſſue the aforeſaid *Henry Percy* and the Heirs Males of the Body of the ſaid *Henry* lawfully begotten and to be begotten, ſhould have, hold, and enjoy, and ſhould be able to have, hold, and enjoy all and ſingular the aforeſaid Honours, Caſtles, Lordſhips, Parks, Offices, Boroughs, Meſſuages, Lands, Tenements, Meadows, Paſtures, Rents, Reverſions, and Services, and all and ſingular other the Premiſſes above expreſſed and ſpecified, and to them by the ſame Letters-patent before granted, with all their Appurtenances, according to the Tenor and Effect of the aforeſaid Letters-patent, notwithſtanding any Omiſſion and Non recital, or ill and Miſ-recital in the ſame Letters-patent of any Grants, Demiſes, and letting to Farm of any Parcel of the Premiſſes by the ſame late King and Queen, or by the Father and Brother of the ſaid late Queen, or by any of them, or by the aforeſaid late Earl of *Northumberland* to any Perſons before then made and granted, any Statute, Act, Ordinance, Proviſion to the contrary thereof had, made, enacted, or provided in any wiſe notwithſtanding; or for that expreſs Mention of the true yearly Value or Certainty of the Premiſſes, or of any of them, or of other Gifts or Grants before that Time made by the aforeſaid late King and Queen *Philip* and *Mary*, or by any of the Progenitors of the aforeſaid Queen to the aforeſaid *Thomas* Earl of *Northumberland*, in the ſame Letters-patent is not made, any Statute, Act, Ordinance, Proviſion, or Reſtraint to the contrary thereof before then had, made, enacted, ordained, provided, or any Thing, Cauſe, or Matter whatſoever in any wiſe notwithſtanding, as by the aforeſaid Letters-patent among other Things more fully appears. By Reaſon whereof the aforeſaid Earl was of the aforeſaid Reſidue of the Veins or Mines ſeized in his Demeſn as of Fee-tail, viz. to him and to the Heirs Males of his Body lawfully begotten, the Remainder thereof to the aforeſaid *Henry Percy* in Form aforeſaid, by the Form of the Gift aforeſaid. And the aforeſaid Earl being ſo ſeized thereof, he the aforeſaid 8th Day of *October* in the Information aforeſaid ſpecified, the aforeſaid *Thomas Thurland* and *Daniel Howſeter*, and other Labourers in the Mines aforeſaid, as well from and in the making and continuing the Search and digging of the aforeſaid one Hundred Thouſand Pounds Weight of Metal of Copper called Copper-Ore, being the Reſidue of the aforeſaid ſix Hundred Thouſand Pounds Weight of Metal of Copper called Copper Ore, in the aforeſaid Reſidue of the Veins or Mines for the Ore and Metal aforeſaid in the aforeſaid waſt or mountainous Lands called *Newlands*, as from and in the taking and carrying away of the aforeſaid one Hundred Thouſand Pounds Weight of Metal of Copper called Copper Ore, being the Reſidue of the aforeſaid ſix Hundred Thouſand Pounds Weight of Metal of Copper called Copper Ore, there in Form aforeſaid dug up, and laid upon the Land, hindred and diſturbed, as it was and is lawful for him to do. With this that the aforeſaid *Thomas* Earl of *Northumberland* will aver, that the aforeſaid Reſidue of the Veins or Mines in which, &c. were Parcel of the Poſſeſſions and Hereditaments of the aforeſaid *Henry* late Earl of *Northumberland*; all and ſingular whereof the ſame *Thomas* Earl of *Northumberland* is ready to verify, as the Court, &c. Wherefore he prays Judgment, and that as to the Premiſſes he may be diſmiſſed from this Court.

And upon theſe Pleas the Queen's Attorney demurred in Law.

The CASE. *Mich. Term* 9 & 10 *Eliz.* All Mines of Gold or Silver throughout the Realm, or of baſe Metal, wherein there is any Ore of Gold or Silver of however ſmall Value, belong to the King by Prerogative, with Liberty to dig, and lay the ſame upon the Land of the Subject, and carry it away from thence, by all the Judges of *England* except three, which three took a Diverſity as to Mines of baſe Metal, where the Gold or Silver in the ſame exceeds the Value of the baſe Metal, and where not, for in the latter Caſe as well the Gold or Silver as the baſe Metal belongs of Right to the Proprietor of the Soil, otherwiſe in the former Caſe, for there all ſhall go to the Crown by Prerogative. But foraſmuch as the Information charged that the Mines of Copper in Queſtion contained Gold or Silver, and the Defendant did not deny it, nor averred (as he ſhould have done) that the Gold or Silver contained in them was not of the greater Value, nor ſufficient to defray the Charges of getting it, therefore the ſaid three Juſtices agreed that the beſt ſhould be intended for the King, viz. that the Gold or Silver was of the greater Value, and ſo that Judgment ſhould be given againſt the Defendant. Vide 2 Inſt. 577. 3 Inſt. 132. Davis 19. a. 1 Finch 16, 146. 2 Finch 23, 132. Crompt. J. C. 111, b. 112. a. 4 Bac. Abr. 160, 162. Stat. 1 W. & M. cap. 30. 5 W. & M. cap. 6.

But ſee now 1 Vict. 1. W. & M. 30. 2. 5. W. & M. 4 & 5. Ann. c. 3.

The Caſe was recited in this Manner. The Queen's Attorney has informed the Court, that whereas the Queen by Reaſon of her Prerogative Royal is entitled to have and enjoy, and ought to have and enjoy, to her proper Uſe, all and ſingular Mines and Ores of Gold and Silver, and of all other Metals containing Gold or Silver, and all Things concerning them, which may be found in any Lands, Tenements, or Hereditaments within the Realm of *England*, as well in the proper Land and Soil of the ſame Queen, as in the Land and Soil of any of her Subjects; and whereas the ſaid Queen the *firſt* Day of *March* in the 8th Year of her Reign was and yet is ſeized in her Demeſn as of Fee, in Right of her Crown, of and in certain waſt or mountainous Lands called *Newlands* in the County of *Cumberland*, in which are certain Veins or Mines, and Ore or Metal of Copper containing in themſelves Gold or Silver, which to the ſaid Lady the Queen belong, as in many Records, Rolls, and Remembrances of the Court of Exchequer more fully appear. And whereas alſo the ſaid Lady the Queen the ſaid *firſt* Day of *March* in the Year aforeſaid at *Weſtminſter* commanded and aſſigned *Thomas Thurland* and *Daniel Howſeter* to cauſe and procure certain Lands and Mines for ſuch Metal called Ore of Copper containing in itſelf Gold or Silver within the ſaid waſt or mountainous Lands called *Newlands*, for the Uſe of the ſaid Queen, to be ſearched and dug, and ſuch ſearching and digging to be continued there during a certain Time to come, and to procure ſuch Metal from Time to Time found and dug up there to be carried away, and for the Uſe of the Queen to be melted, fined, or otherwiſe converted. By Force whereof the ſaid *Thomas Thurland* and *Daniel* cauſed the Quantity of ſix Hundred Thouſand Pounds Weight of Ore of Copper containing in itſelf Gold or Silver to be dug up in the ſaid Lands called *Newlands*, and to be there laid ready to be taken and carried away from thence, intending to continue the ſame Search and digging as they were commanded by the Lady the Queen, until *Thomas* Earl of *Northumberland* the 8th Day of *October* laſt paſt, and divers other Times into the ſaid Lands called *Newlands* entered and intruded, and interrupted and diſturbed the ſaid *Thomas Thurland* and *Daniel*, and other Labourers in the ſaid Mines, as well from ſearching and

digging, as from carrying away the ſaid ſix Hundred Thouſand Pounds Weight of the ſaid Ore of Copper dug up and put upon the Land, as is aforeſaid, to the Damage of the Lady the Queen 1000 l. Againſt which the Earl, proteſting that the Queen ought not to have or enjoy by Reaſon of her Prerogative all and ſingular Mines and Ores of Gold and Silver, and of all other Metals containing in them Gold or Silver, with all Things concerning them, in the Land or Soil of any of her Subjects, for Plea as to the Entry into the ſaid Lands called *Newlands*, and as to the Interruption and Diſturbance from and in the ſearching and digging of five Hundred Thouſand Pounds Weight of Ore of Copper, Parcel of the ſaid ſix Hundred Thouſand Pounds Weight, and from and in the carrying away of the ſame five Hundred Thouſand Pounds Weight of Copper Ore, he ſays that the ſame five Hundred Thouſand Pounds Weight of Copper Ore were dug in one Vein or Mine of the ſaid Veins or Mines for Ore within the ſaid waſt or mountainous Lands called *Newlands*. And that the ſame Lands, in which are the Veins or Mines, are, and from Time immemorial have been, parcel of 10,000 Acres of a great Waſt called *Derwentfels* in the ſaid County of *Cumberland*. And further he ſays, that the late King and Queen *Philip* and *Mary* were ſeized of the ſaid 10,000 Acres called *Derwentfels* whereof, &c. in their Demeſn as of Fee, in Right of the Crown of *England*, and being ſo ſeized, by their Letters-patent bearing Date at *Richmond* the 16th Day of *Auguſt* in the 4th and 5th Years of their Reign, ſhewn to the Court, of their ſpecial Grace, certain Knowledge, and meer Motion granted to the ſaid Earl of *Northumberland* the ſaid 10,000 Acres called *Derwentfels* whereof, &c. amongſt other Things, by the Name of all their Honour of *Cockermouth*, and of their Caſtle of *Cockermouth* and *Egremond*, &c. and of all their Manors, Lands, Tenements, and Villages of *five Villages*, *Aſpater*, *Newlandraw*, &c. *Derwenfels*, &c. with their Appurtenances in the County of *Cumberland*, late parcel of the Poſſeſſions and Hereditaments of *Henry* late Earl of *Northumberland*; to have and to hold the ſame to the ſaid *Thomas* Earl of *Northumberland*, and to his Heirs Males of his Body lawfully begotten, the Remainder to *Henry Percy* his Brother, and to the Heirs Males of his Body begotten. By Force whereof the ſaid *Thomas* Earl of *Northumberland* the laſt Day of *Auguſt* in the ſaid 4th & 5th Years of the Reign of the ſaid King and Queen, into the ſaid 10,000 Acres called *Derwentfels* whereof, &c. entered, and was thereof ſeized in Tail by Force of the Gift aforeſaid. And being ſo ſeized, the ſaid 8th Day of *October* in the Information ſpecified he diſturbed and interrupted the ſaid *Thomas Thurland* and *Daniel Howſeter* and other Labourers in the ſaid Mines as well from and in the making and continuing the Search and digging of the ſaid five Hundred Thouſand Pounds Weight of Copper Ore, parcel of the ſaid ſix Hundred Thouſand Pounds Weight, in the ſaid one Vein or Mine within the ſaid Lands called *Newlands*, as from and in the taking and carrying away of the ſame five Hundred Thouſand Pounds Weight of Copper Ore there in Form aforeſaid dug up, and laid upon the Land, as it was lawful for him to do. With this that the ſaid *Thomas* Earl of *Northumberland* will aver that the ſaid 10,000 Acres called *Derwentfels*, &c. whereof, &c. and the ſaid Mine in the ſaid Lands called *Newlands*, were Parcel of the Lands, Poſſeſſions, and Hereditaments of the ſaid *Henry* late Earl of *Northumberland*. And with this that the ſaid Earl will aver, that the ſaid one Vein or Mine of Ore or Metal of Copper was firſt opened after the ſaid 16th Day of *Auguſt* in the ſaid 4th & 5th Years of the Reign of the ſaid late King and Queen, that is to ſay, the *firſt* Day of *April* in the 7th Year of the Reign of the Queen that now is. And he traverſes the Seizin of the Queen the ſaid *firſt* Day of *March*, and the Intruſion, &c. which Things he is ready to aver, and demands Judgment, and prays to be diſmiſſed. And as to the Interruption and Diſturbance as well from and in the making and continuing the Search and digging of one Hundred Thouſand Pounds Weight of Copper Ore, being the Reſidue of the ſaid ſix Hundred Thouſand Pounds Weight of Copper Ore, as from and in the taking and carrying away of the ſame one Hundred Thouſand Pounds Weight of Copper Ore, the ſame Earl ſays, that the ſame one Hundred Thouſand Pounds Weight of Copper Ore being the Reſidue were dug in the Reſidue of the ſaid Veins or Mines of Ore and Metal within the ſaid Lands called *Newlands*. And that the ſaid late King and Queen were ſeized of and in the ſaid Veins or Mines being the Reſidue, in which the ſaid one Hundred Thouſand Pounds Weight of Copper Ore being the Reſidue were dug, in their Demeſn as of Fee, in Right of the Crown of *England*, which Veins or Mines being the Reſidue were opened the ſaid 16th Day of *Auguſt* in the ſaid 4th & 5th Years, and long before. And the ſame King and Queen being ſo ſeized, by the ſaid Letters-patent here ſhewn to the Court gave, and of their ſpecial Grace, certain Knowledge, and meer Motion granted to the ſaid *Thomas* Earl of *Northumberland* the ſaid Veins or Mines being the Reſidue in which, &c. by the Name of all their Honour of *Cockermouth*, *ut ſupra*; and alſo by the Name of all and ſingular their Meſſuages, Mills, Lands, &c. Wrecks of Sea, Mines, Quarries, and all other their Rights, Privileges, Profits, Commodities, Emoluments, and Hereditaments whatſoever, ſituate, lying, and being in the ſaid Towns, Fields, Pariſhes, and Hamlets of *Cockermouth*, *&c. Derwentfels*, *&c.* to the ſaid Honours, Manors, &c. appertaining, or as Member, Part, or Parcel of the ſame Honours, Manors, &c. then before known, accepted, uſed, or reputed, and which before Time were Parcel of the Lands, Poſſeſſions, and Hereditaments of the ſaid *Henry* late Earl of *Northumberland*: To have and to hold the ſame to the ſaid *Thomas* Earl of *Northumberland*, and to the Heirs Males of his Body lawfully begotten, the Remainder to *Henry Percy* his Brother, and to the Heirs Males of his Body begotten, whereby the ſaid *Thomas* Earl of *Northumberland* was of the ſaid Veins or Mines being the Reſidue ſeized in his Demeſn as of Fee-tail, with the ſaid Remainder over, by the Form of the Gift aforeſaid. And the ſaid Earl being ſo ſeized, he the ſaid 8th Day of *October* the ſaid *Thomas Thurland* and *Daniel*, and the other Labourers in the ſaid Mine interrupted and diſturbed from and in the making and continuing the Search and digging of the ſaid one Hundred Thouſand Pounds Weight of Copper Ore, being the Reſidue of the ſaid ſix Hundred Thouſand Pounds Weight of Copper Ore, in the ſaid Veins or Mines being the Reſidue for the Ore and Metal aforeſaid in the ſaid Lands called *Newlands*,

lands, and alſo from and in the taking and carrying away of the ſame one Hundred Thouſand Pounds Weight of Copper Ore, being the Reſidue, there in Form aforeſaid dug up, and laid upon the Land, as it was well lawful for him to do. With this that the ſaid Earl will aver that the Veins or Mines being the Reſidue in which, &c. were Parcel of the Poſſeſſions and Hereditaments of the ſaid late *Henry* Earl of *Northumberland*. All which the ſaid *Thomas* Earl is ready to verify &c. and demands Judgment, and prays to be diſmiſſed, &c. Upon which two Pleas the Queen's Attorney has demurred in Law.

And the Matter was argued in the Exchequer-chamber in the ſaid Term of *St. Michael* before all the Juſtices of *England*, and the Barons of the Exchequer, by *Onſlow* Apprentice the Queen's Sollicitor, *Gerard* the Queen's Attorney, and *Wray* and *Barham* Queen's Serjeants; and on the Part of the Earl, by *Shirborn* and *Bell* Apprentices, and *Mead* Serjeant. And the Matter was divided into three Points. The firſt was, if all Mines and Ores of Gold or Silver, which are in the Lands of Subjects, with Power to dig the Land, and carry away the Ore, and other Incidents thereto, belong of Right to the King of this Realm by Prerogative, or not, inaſmuch as this is not recited in the Treatiſe *de Prerogativa Regis*, and inaſmuch alſo as the digging for it in another's Land touches the Freehold and Inheritance of another. And upon this the two other Points depend, for if the King ſhall not have them, then in the two other Points the Law is againſt the Queen; and if the Law be that the King ſhall have them, from this Foundation the Counſel for the Queen ſaid it would follow that in the two other Points the Law is with the Queen. So that they took this to be the principal Point. The ſecond Point was, whether or no Mines and Ores of Copper containing in them Gold or Silver, which are in the Lands of Subjects, with Power to dig, and carry away, and other Incidents, belong alſo to the King of this Realm by Prerogative. The third was, if ſo be that Mines and Ores of Copper containing Gold or Silver belong to the King by Prerogative, nevertheleſs if the ſaid Grant of King *Philip* and Queen *Mary* of the Land in the firſt Caſe, and of all and ſingular Mines in the other Caſe, made by the ſaid Charter being *de gratia ſua ſpeciali, certa ſcientia, et mero motu ſuis*, be ſufficient to make the Ores and Mines paſs from them to the ſaid Earl of *Northumberland*, or not.

The Points of the Caſe.

Note this.

3

As to the firſt of theſe three Points, *Onſlow* alledged three Reaſons why the King ſhall have Mines and Ores of Gold or Silver within the Realm, in whatſoever Land they are found. The firſt was, in Reſpect of the [a] Excellency of the Thing, for of all Things which the Soil within this Realm produces or yields, Gold and Silver is the moſt excellent; and of all Perſons in the Realm, the King is in the Eye of the Law moſt excellent. And the Common Law, which is founded upon Reaſon, appropriates every Thing to the Perſons whom it beſt ſuits, as common and trivial Things to the common People, Things of more Worth to Perſons in a higher and ſuperior Claſs, and Things moſt excellent to thoſe Perſons who excell all other; and becauſe Gold and Silver are the moſt excellent Things which the Soil contains, the Law has appointed them (as in Reaſon it ought) to the Perſon who is moſt excellent, and that is, the King. And ſo does it likewiſe in Regard to the Water, as well as the Earth. For the Things of Value, which the Sea or Water yields, are the Fiſhes therein, and of Fiſhes which are in the Sea in *England*, that is, in the Arms of the Sea or Water within the Land, two are more excellent than others, viz. Sturgeons and Whales. [b] And in Reſpect of their Excellency the Common Law has appropriated them to the King, who is the moſt excellent Perſon in the Realm, as appears by the Treatiſe *de Prerogativa Regis cap.* 11. which ſays, *the King ſhall have Whales and Sturgeons taken in the Sea, or elſewhere within the Realm*, which is not a new Law, but a Declaration of the Common Law before. And *Barham* ſaid that [c] *Britton*, who wrote a long Time before the making of the Treatiſe *de Prerogativa Regis*, ſhews in his Chapter *of Trovers*, that in his Time the King by his Prerogative ſhould have thoſe Fiſhes by the Common Law. So that the Excellency of the King's Perſon draws to it Things of an excellent Nature. The ſecond Reaſon was, in Reſpect of the [d] Neceſſity of the Thing. For the King is the Head of the Weal-public, and the Subjects are his Members, and the [e] Office of the King, to which the Law has appointed him, is to preſerve his Subjects; and their Preſervation conſiſts in two Things, viz. in an Army to defend them againſt Hoſtilities, and in good Laws. And an Army cannot be had and maintained without Treaſure, for which Reaſon ſome Authors in their Books call Treaſure the [f] Sinews of War; ſo that the Want of Treaſure is the Want of an Army and of Force to defend us againſt Hoſtilities, from whence would enſue the Ruin of the Realm, and the Confuſion of the People. And if the Gold and Silver, whereby the Treaſure is to be made, ſhould belong to the Subject who is the Proprietor of the Land in which it is found, then ſhould it belong to another than to him whom the Law appoints to defend the People, and to prepare an Army and Force, and he who is appointed by the Law to be their Defender would be deſtitute of Power or Means to defend them, which would be very inconvenient. And therefore inaſmuch as God has created Mines within this Realm, as a natural Proviſion of Treaſure for the Defence of the Realm, it is reaſonable that he who has the Government and Care of the People, whom he cannot defend without Treaſure, ſhould have the Treaſure wherewith to defend them; ſo that the Law has for Neceſſity's Sake appropriated the Mines of Gold and Silver to the King. The third Reaſon was, in Reſpect of it's [g] Convenience to the Subjects in the Way of mutual Commerce and Traffick. For the Subjects of the Realm muſt of Neceſſity have Intercourſe or Dealing with one another, for no Individual is furniſhed with all neceſſary Commodities, but one has Need of the Things which another has, and they cannot ſell or buy together without Coin, for perhaps one who wants that which another has, has no other Commodity or Thing to give in Exchange for it, and if he has, yet perhaps the other has no Occaſion for it, and even admitting that he has Occaſion for it, it may be that the one Commodity is worth more than the other, and they have no Means to make the Price equal but by Money; ſo that the Inequality in the Value of Things, and the

1 Point. For the Queen. If the King ſhall by Prerogative have all Mines of Gold or Silver in the Lands of Subjects. S. P. 2 Inſt. 577. 3 Inſt. 132. Davis 19. a. 1 Finch 146. 2 Finch 132. 4 Bac. Abr. 160.

[a] Lane 26.

[b] Stamf. Prerog. 37. b. 38. a. 5 Co. 108. b. 7 Co. 16. a. Davis 56. a. 6 Mod. 73. 1 Finch 146.

[c] Britton 26. a.

[d] Lane 26. 4 Bac. Abr. 161.

[e] F. N. B. 232. a. 1 Mod. 129.

[f] Co. Litt. 90. b. 106. a.

[g] Lane 26.

Want of Means to reduce them to an Equality, would greatly interrupt the Courſe of Dealing between Man and Man, if God had not provided a Remedy for it, which he has done by Gold and Silver dug out of Mines. And if the Subject ſhould have it, the Law would not permit him to coin it, nor put a Print or [a] Value upon it, for it belongs to the King only to fix the Value of Coin, and to aſcertain the Price of the Quantity, and to put the Print upon it, which being done, the Coin becomes current for ſo much as the King has limited. But if the Subject ſhould have the Ore of Gold and Silver which is found in his Land, he could not convert it into Coin, nor put any Print or Value on it. [b] For if he makes Coin, it was High-Treaſon by the Common Law before the Statute of 25. *Ed.* 3. *cap.* 2. as it appears by 23 *Aſs.* where a Woman was burnt for forging or counterfeiting Money, and it was High-Treaſon to the King, becauſe he has the ſole Power to make Money. So that the Body of the Realm would receive no Benefit or Advantage if the Subject ſhould have the Gold and Silver found in Mines in his Land; but on the other Hand by appropriating it to the King, it tends to the univerſal Benefit of all the Subjects, in making their King able to defend them with an Army againſt all Hoſtilities, and when he has put the Print and Value upon it, and has diſperſed it among his Subjects, they are thereby enabled to carry on mutual Commerce with one another, and to buy and ſell as they have Occaſion, and to traffick at their Pleaſure. Wherefore for theſe Reaſons, viz. for the Excellency of the Thing, and for the Neceſſity of it, and the Convenience that will accrue to the Subjects, the Common Law, which is no other than pure and tried Reaſon, has appropriated the Ore of Gold and Silver to the King, in whatever Land it be found. [c] And *Gerard* ſaid that it would be inconvenient for a Subject to have Gold and Silver found in Mines in his Land, becauſe Mines of Gold and Silver are the Fountains out of which the Treaſure is drawn, and they ſerve to provide an Army and Force againſt foreign Hoſtilities, and to make Money and Coin for the carrying on of Commerce and Traffick among the Subjects, and if the Law ſhould ſuffer the Subject to have it, theſe Conveniences would be totally loſt, and the Public would never ſhare of them. And another Inconvenience would alſo follow, which is, [d] that thereby the Subject would ſurpaſs the King in Treaſure and Subſtance, which would make the Subject honourable and powerful, and the King contemptible, and liable to be depoſed or rebelled againſt: For a Subject who is ſuperior to the King in Subſtance and Treaſure will ſeldom obey, and for the Servant to be greater than the Maſter, or the Subject greater than the King, is very diſproportionable, and ſubverſive of all Order and Rule. And ſuch would be our Law here, if it ſhould make Subjects Poſſeſſors of Mines of Gold and Silver. But the Law of *England* is not ſo unreaſonable nor irregular, but it obſerves a due Proportion and Symmetry in the Members of the public Weal, and therefore it makes the King Poſſeſſor of all Mines of Gold and Silver in whatever Lands they are found within the Realm. And upon the three Reaſons above mentioned, and eſpecially upon this fourth Point concerning the Inconvenience of it, they and all the reſt of the Counſel for the Queen relied. And to prove that the Law of the Realm is and always has been accordingly, they produced divers Precedents and Matters of Record out of the Exchequer in the Times of ſeveral Kings, whereof one was in the Time of King *Edward* 3. and was as follows.

[a] Poph. 149. 1 H. H. P. C. 188. Davis 19. a. b.

[b] 23 Aſs. pl. 2. Fitz. Corone 188. Bro. 97. Treaſon 26. Fleta lib. 1. cap. 20, 22. 3 Inſt. 16, 17. 18. Notes on 1 Finch 82. and therefore T. 3. H. 7. 10. pl. 2, which ſays it was only Felony before the Statute of 25 *Ed.* 3. is not Law.

[c] Lane 26.

[d] 4 Bac. Abr. 161.

Precedents relied upon for the Queen.

Anno 32. Ed. 3. Rot. 4.

Devons: This Indenture made between our Lord the King of the one Part, and John Balancer *and* Walter Golbeter *of the other Part, witneſſeth, that our ſaid Lord hath committed and let to the ſaid* John *and* Walter *his Mines of Gold and Silver and of Copper in the County of* Devon, *which may be found in Mountains, and in wild and deſart Places hereafter by two Years next to come, ſo that the ſaid* John *and* Walter *may dig to find the Mines in all Places where they ſhall ſee beſt for the Profit of our ſaid Lord the King, in the ſame Mountains, wild and deſart Places, and not in Gardens, nor under the Houſes of any, and in caſe it ſhall be neceſſary for them to fell Trees in Order to make the ſaid Mine, they ſhall preſently pay for the Trees which they ſhall ſo fell to thoſe to whom they belong, according as it ſhall be agreed. And they ſhall render for the ſame Mines to our ſaid Lord the King* 20 *Marks for the Year next to come, that is to ſay,* 10 *Marks at the Feaſt of* Eaſter, *and* 10 *Marks at the Feaſt of* St. Peter *in the Gule of* Auguſt. *And for the ſecond Year our ſaid Lord the King ſhall have the fifth Part of the Gold, and of the Silver, and of the Copper, which ſhall come from the ſame Mines. And that none ſhall meddle in the digging to find ſuch Mine, but the ſaid* John *and* Walter *and their Servants during their Term, &c. Given at* London *the* 11*th Day of* July *in the Year of the Reign of our ſaid Lord the King, of* England *the* 32. *and of* France *the* 19. In 32. Ed. 3. Rot. 4.

By which Leaſe made of his Mines of Gold and Silver (it was ſaid) it appears that he called them *his* Mines of Gold and Silver which are in another's Soil, for the Words are that *they might dig to find the ſaid Mines in all Places where they ſhould ſee beſt for the Profit of the King*, and if in all Places without Exception, *ergo* it is in the Lands of Subjects; and the Words of Reſtraint, viz. *and not in Gardens, nor under the Houſes of any*, imply that they ſhall not be reſtrained to dig in other Places of others than in Gardens and under Houſes; and by the Limitation of the Payment for the Trees felled to them to whom they belong, it is implied that they might fell the Trees of Subjects, and they ſhall be intended Trees growing where the Mines are, and not elſewhere; for if by Force of the Leaſe they could not have felled the Trees of any others than of the King himſelf, then he would not have reſerved any Payment, or at leaſt he would have reſerved the Payment to himſelf only, and not to others. And if any one will ſay that the King demiſed the Mines of Copper alſo, which ought to be intended in his own Soil, and not in the Soil of another, and therefore that the ſame ſhall be intended of the Gold and Silver Mines, Sir, if this ſhould be granted as to the Copper Mines, yet it cannot be granted as to the Mines of Gold and Silver, for it is proved that the Leſſees have Power given them by the Leaſe to dig in the Land of another, and if they could not do ſo by Law, it cannot be ſo intended of another's Soil for Copper, *ergo* this Power muſt neceſſarily be referred to the digging in the Land of another for Gold and Silver. And from this Precedent it may be ſeen how

the Law was taken at that Time, for it is to be preſumed that ſuch Leaſe was made by the good Advice of Sages of the Law, and that the Law was ſo, or elſe the Leaſe had not been made. Another Charter was alledged made by King *Richard* 2. in this Manner.

Devon. Richardus ſecundus per literas ſuas patentes apud Weſtmonaſterium 15° die Junii anno regni ſui octavo, conceſſit Nicholao Wake clerico, et licentiam dedit pro ſe et hæredibus ſuis quantum in ſe fuit, quod ipſe omnes mineras auri et argenti in comitatu Devon, ubicunque eas invenire poterit, tàm infra libertates quàm extra (habita licentia fodendi in terra illa ubi hujuſmodi mineræ fuerint) per ſe et deputatos ſuos ſcrutari, fodere, et in operationibus ponere, et metalla ibidem inventa triare et purgare poſſit, a datu præſentium uſque ad finem decem annorum proximè ſequentium et plenarie complendorum. Nolens quod idem Nicholaus ſeu deputati ſui interim amoveantur de commodo ſuo in hac parte faciendo, ſeu quod aliquis alius de hujuſmodi mineris ibidem ſe medio tempore intromittat. Ità ſemper quòd idem Nicholaus de decima parte proficui provenientis de minera prædicta ſacroſanctæ eccleſiæ fideliter reſpondeat: Et præfato regi apud Scaccarium ſuum ſingulis annis in tribus ſeptimanis ſancti Michaelis de nona parte ejuſdem proficui, poſt triationem et purgationem hujuſmodi auri et argenti in mineris illis inventorum, fidelem compotum reddat. Et pro magnis laboribus, diligentiis, et expenſis, quæ ipſum Nicholaum et dictos deputatos ſuos in hac parte neceſſario apponere oportabit, præfatus rex vult, et tenore præſentium concedit pro ſe et hæredibus ſuis, quòd prædictus Nicholaus et dicti deputati ſui reſiduum dicti proficui ultra decimam et nonam partes ad opus ſuum proprium, habeant, et inde liberè diſponere poſſent, prout pro commodo ſuo melius viderint faciendum, &c. In cujus, &c. Teſte rege apud Weſtmonaſterium 15° die Junii anno regni ſui Octavo. In 8. R. 2. Rot. 22. Anno 8. R. 2. Rot. 22.

Which Charter made to ſearch for all Mines of Gold and Silver in the ſaid County *ubicunque eas invenire poterit, tam infra libertates quam extra*, (it was ſaid) implies that the King took himſelf to be the Poſſeſſor of all Mines, for the Words *omnes mineras* admit of no Exception, whether the Mine be in the Land of a Subject or not. And the Words, *habita licentia fodendi in terris illis ubi hujuſmodi mineræ fuerint*, imply that the King intended Mines in the Soil of others, and not only in his own Soil, for theſe Words of Licence are to be taken to have Licence of the Subject, where the Subject is the Proprietor of the Land, and not where the King is ſeized of the Land, for there the Charter is ſufficient without ſuch Licence. And the Clauſe, *nolens quod aliquis alius de hujuſmodi mineris ibidem ſe medio tempore intromittat*, implies that the King underſtood that he had Power to reſtrain all Men from meddling in ſuch Mines, *viz.* in any Mine whatever within the ſaid County without Exception, be the ſame in the Soil of a Subject, or not. And it is to be preſumed that ſuch Charters were made by the Advice of Men learned in the Law, and agreeable to the Law rather than otherwiſe. And although the Charter contains that Licence ſhall be had of the Subject to dig where the Mine is in his Land, yet it cannot properly be intended hereby that he could not dig there without ſuch Licence, but it is rather a Matter of Curteſy in the Prince, than of Neceſſity, for if he had Licence of the Poſſeſſor of the Soil to dig, yet if he had not the King's Charter, neither he nor the Poſſeſſor of the Soil could have taken and carried away the Ore of Gold and Silver, without the King's Licence, for if he might, then the Charter and Licence was in vain, and it is not a good Expoſition nor Implication which tends to make void the whole Force of the Patent. And ſuch Expoſition cannot be maintained, for the Ore of Gold and Silver is the King's, and if it is, the Law * gives him Means to come to it, and that is, by digging; ſo that the Power of digging is incident to the Thing itſelf, and the Clauſe of Licence is but Matter of Curteſy, and ſerves only to give Notice to the Poſſeſſor of the Soil, and is not of Neceſſity to be had.

* S. P. 12 Co. 13. 1 Finch 45. 2 Finch 63. Manw. Foreſt Laws 148.

Another Charter was alledged which was made by King *Henry* 4. in this Form, *Eſſex. Rex Henricus quartus dilecto et fideli ſuo Waltero Fitzwater ſalutem. Quia datum eſt nobis intelligi, quod diverſæ perſonæ quandam mineram auri infra regnum noſtrum Angliæ invenerunt, et mineram illam a nobis concelaverunt, et commodum ſuum inde fecerunt, et indies facere non deſiſtunt, in noſtri prejudicium, damnum non modicum, et gravamen; nos indemnitati noſtræ in hac parte proſpicere volentes, aſſignavimus vos omnes et ſingulas perſonas, quas vobis juxta ſanas diſcretiones veſtras conſtare poterit notitiam de minera hujuſmodi habere, et eam a nobis concelare, ut ſupradictum eſt, ubicunque inveniri poterint, tàm infra libertates quam extra, ad arreſtandum et capiendum, et ipſos ſtatim, cum ſic capti fuerint, coram nobis et concilio noſtro, ubicunque dictum concilium noſtrum fuerit, ſalvò et ſecurè et modo honeſto ducendum, ad informandum nos et dictum concilium ſuper præmiſſis, et ad faciendum ulterius et recipiendum quod per nos et dictum concilium noſtrum ordinari contigerit in hac parte. Et ideo vobis mandamus quòd circa præmiſſa diligentèr intendatis, &c. In cujus rei, &c. Teſte Rege apud Weſtmonaſterium 10° die Maii anno regni ſui ſecundo.* In 2. H. 4. Rot. 34. Anno 2. H. 4. Rot. 34.

By which Letters-patent it appears that the King took himſelf to be the Proprietor of the Mine of Gold, in whatever Place it was found within the Realm. For the Rehearſal is general *infra regnum Angliæ*, without expreſſing in the Land of the King; and the not diſcloſing it was a Concealment from the King, and the Profit which the Finders had taken was to the Prejudice and Damage of the King, although it was not expreſſed that the Soil, wherein the Mine was, belonged to the King.

Further, as a great Proof of this Matter a Patent made by King *Henry* 6. was alledged, which was as follows, *Devon. Henricus ſextus per literas patentes, datas apud Weſtmonaſterium 24° die Februarii anno regni ſui quinto, commiſit chariſſimo ſuo avunculo Johanni regenti regni ſui Franciæ, Protectori et Defenſori regni ſui Angliæ, Duci Bedfordiæ, omnes mineras auri et argenti in regno ſuo Angliæ: Habendum, &c. per ſe et deputatos ſuos per decem annos proximo futuros; ſolvendo eccleſiæ ſanctæ Dei* Anno 5. H. 6. Rot. 16.

decimam partem auri et argenti ſicut creſcunt, et præfato regi quindecimam partem puri auri, et quindecimam partem puri argenti, et domino ſoli ſive terræ, in quo ſeu qua hujuſmodi aurum et argentum erunt foſſa, viceſimam partem ſicut creſcunt, et faciendo per ſe et deputatos ſuos omnimodos cuſtus et expenſas, ratione minerarum auri et argenti prædicti, per ſuperviſum et contrarotulationem eſcheatorum Devon. et Cornub. pro tempore exiſtentium. Nolens quod idem avunculus vel deputati ſui ſubtus domos, ſive in terris arabilibus vel pratis alicujus fodeant vel fodiat, abſque licentia domini hujuſmodi ſoli. Et ſi forte damnum vel malum aliquod alicui domino vel cuicunque alii, per foſſuram minerarum dictarum, aut per carriagium quod ipſis ex hac cauſa facere opportebit, inferant, emendas rationabiles damnificatis, prout per probos et legales homines pertin. fuerint adjudicat. faciant, &c. with Clauſe to make Proviſion, *&c.* In 5. H. 6. Rot. 16.

By which Limitation of Payment of the 20th Part to the Lord of the Soil in which ſuch Gold and Silver ſhould be dug up, (which Lord is no other than the Perſon who is ſeized of the Soil) it evidently appears that the King and the Protector alſo took it, (and it is to be preſumed that the Law was ſo, and that they were informed thereof by thoſe who knew it well) that the Mines in the Soil of another belonged to the King; and that the Duke by force of the Charter might dig in the Soil of any Subject for Gold and Silver. And this is proved by the Prohibition, *viz.* that the Duke ſhall not dig under Houſes, or in arable Land, or in Meadows without the Aſſent of the Proprietor of the Soil, for otherwiſe he might have digged in arable Land or in Meadows. And although the King expreſſed that the 20th Part ſhould be paid to the Owner of the Soil, and that Amends ſhould be made for the digging and Carriage of it away, this is but a Matter of Curteſy in the King, and not of Right, and therein he, of his ſpecial Grace, abates of the Rigour of his Prerogative for the Benefit of his Subjects, for the Law does not force him to make any Allowance for ſuch Things. And upon the Surrender of this Patent a like Patent was made to the ſame Protector by the ſame King on the 16th Day of *Auguſt* in the 11th Year of his Reign, for 12 Years thence next enſuing, of all ſuch Mines *ut ſupra* in the Counties of *Devon* and *Cornwall*, by which the 15th Part of pure Gold, and the 15th Part of pure Silver was reſerved to the King.

Anno 15. Ed. 4, Rot. 20. Another Charter was alledged which was made by King *Edward* 4. in this Form, *Northumbr. Edwardus quartus per literas ſuas patentes, datas apud Weſtmonaſterium 23° die Martii anno regni ſui 15° conceſſit prædicto fratri ſuo Richardo Duci Glouceſtriæ, Henrico comiti Northumbriæ, et aliis mineram de Blanchland vocatam Shildane in comitatu Northumbriæ, mineram de Alſton-Moore vocatam Fechers, mineram de Keſwick in comitatu Cumbriæ, et mineram de Cupro juxta Richmond in comitatu Eborum: habendum et occupandum mineras illas dictis duci, comiti, et aliis prædictis per ſe et deputatos ac ſervientes ſuos ſufficientes a feſto annunciationis beatæ Mariæ virginis proximè futuro, uſque ad finem quindecim annorum proxime ſequentium et plenarie complendorum. Solvendo inde præfato regi et hæredibus ſuis octavam partem puri et mundi argenti et cupri, et dominis ſoli ſive terræ, in quo mineræ illæ fodientur, nonam partem, et curato ejuſdem loci decimam partem* of the Ores *prout creſcunt, ac faciendo per ſe et deputatos et ſervientes ſuos prædictos omnimodos cuſtus et expenſas circa mineras prædictas durante termino prædicto. Et quod prædictus dux, comes, et alii, &c. in omnibus locis infra partes prædictas per ſe et deputatos ac ſervientes ſuos prædictos eaſdem mineras libere ſcrutari et fodere, quotiens neceſſe fuerit, poſſint, et operare in eiſdem et earum qualibet abſque impedimento præfati regis, aut hæredum ſuorum, epiſcoporum, abbatum, priorum, comitatum, baronum, ſeu aliorum officiariorum ſeu miniſtrorum præfati regis, aut aliorum quorumcunque, ubicunque mineræ illæ infra partes prædictas inveniri poterint,* with Clauſe to make Proviſion for the Overage, and to hold Plea of all Treſpaſſes, Plaints, and Contracts made in Places where the Mines are, and with Authority to make a Steward of the Court there, with *mandamus univerſis et ſingulis quorum intereſt in hac parte, quod eiſdem duci, comiti, &c. intendentes ſint, &c.* In 15. Ed. 4. Rot. 20.

By which Record (it was ſaid) it appears that the Mine which contained Silver, whereof the King reſerved the 8th Part, was in the Land of another, for the King limited to the Proprietor of the Soil the 9th Part of the Ores. And if ſo be that the King may not have a Mine of Copper in another's Soil, but that it ſhall be intended that the Soil, out of which the Copper was dug, belonged to the King, yet ſhall it be taken that the Soil, out of which the Silver ſhould be dug, belonged to others, for if it had belonged to the King, no Ore ſhould have been yielded of it to another; *ex quo ſequitur* that he who is of Opinion that the King ſhall not have a Mine of Copper in another's Land, muſt confeſs by this Precedent that the King ſhall have a Mine of Silver in another's Land, inaſmuch as the Precedent limits to the Lord of the Soil the 9th Part of the Ore, which muſt be of the Ore of Silver only by his own Confeſſion. And the Power given to ſearch and to dig in the Land of another is worthy of great Obſervation, for here the King does not expreſs that the Patentees ſhall have Licence of the Lord of the Soil to dig, as the other Precedent before expreſſes, but he gives them full Power to dig, for the Words are *poſſint fodere quotiens neceſſe fuerit*, ſo that the King uſes his * Prerogative fully in this Point, as the Law has given it him.

* See Manw. Foreſt Laws 148.

Anno 18. Ed. 4. Rot. 31. Another Patent of the ſame King was alſo alledged in this Manner. *Northumbr. Edwardus quartus per literas ſuas patentes, datas apud Weſtmonaſterium 11° die Martii anno regni ſui 18° ſuper ſurſumredditionem prædictarum literarum patentium præfato Richardo duci Glouceſtriæ, et aliis factarum, commodum ſuum, nec non emendationem et tranquillitatem regni ſui Angliæ ſpiritualem conſiderans, de gratia ſua ſpeciali, ac de adviſamento et aſſenſu concilii ſui, conceſſit et ad firmam dimiſit Willielmo Goderſwike, et aliis mercatoribus de colonia, ac cuidam Dederico Vaverſwike de regno Angliæ auri-*

aurifabio, omnes et ſingulas mineras aurum, argentum, cuprum vel plumbum portantes in comitatu Northumbriæ, Cumbriæ, et Weſtmariæ, præfato regi quoviſmodo pertinentes ſive ſpectantes: Habendum, &c. mineras illas dicto Willielmo et aliis prædictis per ſe et deputatos ac ſervientes ſuos ſufficientes a feſto annunciationis beatæ Mariæ virginis proximè futuro, uſque ad finem decem annorum extunc proximè ſequentium et plenariè complendorum. Solvendo inde præfato regi et hæredibus ſuis, quindecimam partem puri et mundi auri et argenti, ac cupri, prout creſcunt, per ſuperviſum talis perſonæ aut talium perſonarum quales per præfatum regem ex parte ſua, et per ſe in ea parte ordinarentur et aſſignarentur, abſque aliquo alio compoto inde præfato regi et hæredibus ſuis in ſcaccario ſuo, vel alibi, reddendo ſive faciendo durante termino prædicto; ac faciendo per ſe et deputatos ac ſervientes et aſſignatos ſuos prædictos omnimodos cuſtus et expenſas circa mineras prædictas; necnon ſolvendo dominis ſoli ſive terræ, in quo mineræ illæ fodientur, et curato ejuſdem loci, prout cum iiſdem dominis et curato commodè concordare poterint termino prædicto durante, with like Liberties as before. In 18. Ed. 4. Rot. 31.

By which Charter it appears that the King took the Mines of Gold and Silver in the Lands of others to be his Mines, and to belong to him. And that Mines of Gold and Silver are or may be by the Intent of the King in the Soil of another, is proved by the Payment limited to the Lord of the Soil, as with him might be agreed. Which Allowance to him is but of the King's Clemency, as is ſaid before, and is not a Duty to him.

Alſo the Letters patent of King *Henry* 7. were alledged to the like Purpoſe, which were as follows; *Anglia. Wallia. Henricus ſeptimus per literas ſuas patentes, gerentes datum apud Weſtmonaſterium 27° die Februarii anno regni ſui primo, fecit commiſſionarios ſuarum minerarum Angliæ et Walliæ tàm tinnei, plumbi, et cupri, quam auri et argenti, dilectum avunculum ſuum Jaſperum Ducem Bedfordiæ, Thomam Archiepiſcopum Eborum, et diverſos comites, dominos, milites, et alios, gubernatores ſuarum minerarum prædictarum, ad reſpondendum omnimoda proficua eidem regi concernantia; et fecit Willielmum Taylor militem contrarotulatorem minerarum ſupradictarum; habendum mineras prædictas prædicto jaſpero avunculo et aliis prediſtis per ſeipſos, deputatos ſuos, ſeu ſervientes ſufficientes, a feſto purificationis beatæ Mariæ virginis ultimo præterito, uſque finem et terminum viginti annorum extunc proxime ſequentium. Reddendo inde eidem regi et hæredibus ſuis quindecimam partem mundi auri, et argenti puri; ac etiam ſolvendo capitalibus dominis ſoli et terræ, in quibus mineræ fodientur, undecimam partem prout valent et creſcunt. Et quod prædicti commiſſionarii, gubernatores, et contrarotulatores in omnibus locis infra partes prædictas per ſe, &c. eaſdem mineras liberè ſcrutari et fodere poſſint in eiſdem, et in earum qualibet, abſque impedimento prædicti regis, aut hæredem ſuorum, aut aliorum priorum, comitum, baronum, ſeu aliorum officiariorum ſuorum, aut aliorum quorumcunque, ubicunque mineræ prædictæ infra partes prædictas inveniri poterint. Proviſo ſemper quod commiſſionarii prædicti, &c. non fodient ſubtus domus ſive caſtra alicujus ligeorum regis prædictorum, &c. cum diverſis libertatibus cur. et auctoritate providendi omnia neceſſaria mineras prædictas concernentia.* In 1. H. 7. Rot. 92. Anno 1. H. 7. Rot. 92.

Which Record purſues the others. And the Clauſes of the Reſervation to the King of the 15th Part of the neat Gold and pure Silver, and to the Lord of the Soil (which is the Proprietor of the Soil in which the Mines ſhall be dug) the 11th Part, as alſo the Clauſe that the Commiſſioners may ſearch and dig for the Mines wherever they may be found, without Impediment of any, are worthy of Obſervation. And if the Mines of Gold and Silver belonged to the Proprietor of the Land, then the King did ill to take the 15th Part himſelf, or any Part of it, and to limit to the Lord of the Land the 11th Part only, for in that Caſe the Lord ſhould have had the whole, and the King nothing. But from this, as well as from the Clauſe of digging it appears that the King ſhall have the Mines of Gold or Silver in the Soil of another, and that he took himſelf to be the Poſſeſſor of them, and not the Tenant of the Soil. For the Appointment of the 11th Part to the Lord of the Soil is not as a Duty, but done out of the Kings's Benevolence to him, as it is proved by ſome of the Precedents before, where nothing is allowed to the Tenant of the Soil. And if the Law gives to the King a Mine of Gold and Silver, it is reaſonable that he ſhould have Means to come to it. And upon theſe Precedents cited, ſome by one, and ſome by another of the Counſel for the Queen, and upon divers others not here recited, as well as upon ſeveral hereafter cited under the ſecond Point, it was ſaid and relied by them on Behalf of the Queen, that Mines of Gold and Silver in the Lands of Subjects belong to the King by Prerogative, which is conſonant to Reaſon, and has been uſed from Time to Time by one King after another, which continual Uſage cannot be called wrongful, for the Law is not known but by Uſage, and it is Uſage which proves what the Law is. And it is to be preſumed that theſe Charters or Things were not made or done without the Advice of the Judges and other Sages of the Law, and they are all enrolled in the Exchequer, as Things of Effect, and as Foundations to Accounts. And as another great Proof that the Law is ſo, divers Accounts were alledged, by which it appears that the Kings of this Realm were anſwered for divers Profits and Revenues upon the ſaid Leaſes and Charters extending to Mines of Gold and Silver in the Land of another. One Account was given into the Exchequer upon the ſaid Charter firſt cited, *viz.* upon the Leaſe of Mines of Gold and Silver and Copper made by King *Edward* 3. to * *John Balancer* and *Walter Goldbeter*; by which it appears that the King was anſwered for the 20 Marks for the firſt Year, and nothing for the ſecond Year, becauſe the Leſſees died, and the King had granted the Mines to others, as by the Record of the ſaid Account (which was recited in certain) it appears. Another Account (it was ſaid) appears in the Exchequer to be made by *Henry Biſhop* of *Wincheſter* Cardinal of *England*, one of the Executors of the ſaid *John* Duke of *Bedford* Farmer of the ſaid Mines of Gold and Silver in the ſaid Counties of *Devon* and *Cornwal*, for the laſt of the ſaid 12 Years, whereby he rendered an Account of the 15th Part of the pure Silver reſerved upon the ſaid Grant, *viz.* from the 15th Day

* Ante 316.

ſee Bellum's Regalia 2. upon 326. & 328. 328.

Day of *December*, *anno* 21. *H.* 6. unto the 16th Day of *Auguſt*, *anno* 23. *H.* 6. and upon this Account he paid 36 Pounds Weight and two Ounces of pure Silver ariſing from the ſame 15th Part. And by this Account it alſo appears, that former Accounts had been made thereof for the former Years. By which Accounts, and by divers others hereafter recited under the ſecond Point, as well as by others not here recited, it appears that the King has been anſwered for the Revenue of Mines of Gold and Silver, as well ſuch as were in the Lands of others as in his own Lands; which prove that the Grants were executed, and the Ores dug up in the Lands of others, becauſe the Charters, upon which the Accounts were founded, gave Power to dig for Ore of Gold and Silver as well in the Lands of others as in the Lands of the King. And the Barons of the Exchequer, who took the Accounts, would not have charged the Accountants, nor have taken the Accounts for the King of Things which belonged to others, if they had not been well aſſured that by the Law the King ought to have the Mines of Gold and Silver although they were in the Soil of another, but they would rather have made it to appear that the Ores were had out of the Land of the King only, and not out of the Land of others. So that theſe Accounts do effectually prove that Mines of Gold and Silver in the Soil of another belong to the King.

P. 36. H. 6. Rot. 28.

Another Precedent out of the Exchequer was alledged as a third Proof that the King ſhall have Mines of Gold and Silver found in the Soil of another. And this was an Information and the Anſwer to it which appear in the Remembrances of the Exchequer among the Records of *Eaſter* Term *anno* 36. *H.* 6. *Rot.* 28. *in dorſo*, on the Part of the Kings Remembrancer, where among other Things it is thus contained. *Devon. Memorandum quod Johannes Botright clericus, præpoſitus ac gubernator minerarum domini regis de Berferrers in comitatu Devon, venit coram baronibus hujus ſcaccarii 23° die Aprilis hoc termino, et dedit curiæ intelligi, quod Robertus Glover receptor minerarum domini regis in comitatu Devon. et Cornub. 15° die Maii anno regni domini regis nunc triceſimo ſecundo, apud Berferrers prædict.* 144 *Bolls de glance ore domini regis valoris* 15 *l.* 6 *s.* 8 *d. per præceptum Rogeri Chambernoun de comitatu Devon Armigeri, cepit et aſportavit, et illud uſque quoddam molendinum juxta Bockland in dicta parochia de Berferrers cariavit, et illud ibidem liquefecit et finavit, et proficuum ſuum inde fecit, domino rege inde in aliquo minime reſponſo, ad damnum domini regis* 100 *l. unde petit adviſamentum curiæ in præmiſſis.* And upon this Proceſs went out againſt the ſaid *Glover* and *Chambernoun*, which hung a long Time, and afterwards *Chambernoun* pleaded in his Diſcharge a Pardon made to him by the Name of *Cambernoun* of *Berferrers*, in the County of *Devon*, Eſquire, in the 36th Year of the Reign of the ſame King. And *Wray* cited an Office found before the Eſcheator, proving that the Manor of *Berferrers* at that Time belonged to a Subject, and that the Lord *Brook* had married the Heir of *Ferrers*, and was ſeized of the ſaid Manor at that Time, in which (as he took it) the Mine was. And upon this it was inferred that for Glance-ore taken in a Mine in the Land of a Subject, the King might have puniſhed any one. And for his Diſcharge he was forced to ſue to the King for Pardon, knowing by his Counſel that he could not defend the Matter by the common Law.

Result of the precedents for the Queen

Wherefore the Precedents being in three Manners, *viz.* ſome being Charters and Grants of Mines of Gold and Silver in the Lands of others, and ſome being Accounts of the Revenue of ſuch Mines in the Lands of others which have been paid to the King, and the third Sort ſhewing that the King has impleaded Pernors of Ore of Gold and Silver in the Lands of others, prove ſtrongly and effectually that ſuch Mines of Gold and Silver found in the Lands of Subjects belong to the King by virtue of his Prerogative. For as touching the King's Revenue, there is no Proof in Law ſo ſtrong as the Records of the Court in which the Revenue is paid. [a] For *Onſlow* and *Gerard* ſaid that the Records of every Court are the moſt effectual Proofs of the Law in Relation to the Things treated of in the ſame Court; [b] and that which is uſed in one Court is Law in all Courts, and throughout all the Realm. And therefore in Matters of the Crown, as in Appeals of Felony, and Indictments of Murder and Treaſon, and ſuch like, if a Queſtion ariſes what is the Law in ſuch Things, and what not, the Records of the King's Bench are the moſt effectual Proofs of it, and that which is uſed there ought to be taken as a Proof of the Law throughout the Realm; [c] for that Court treats of ſuch Things, and has Juriſdiction of them, and the Records there are Teſtimonies of the Law in thoſe Points. And if a Queſtion ariſes upon the Law concerning the Property of Goods or Chattles real or perſonal, or concerning Rights or Titles to Lands or Tenements, the Precedents of the Common Bench are the moſt effectual Proofs of it, [d] becauſe that Court treats of ſuch Matters, and that which is uſed and practiſed there ought to be taken for Law in the King's Bench, if the Record is removed there by Error, and throughout the whole Realm alſo. [e] And if a Queſtion ariſes touching the King's Revenue, and what Thing belongs to the King, which brings Revenue to him, and what not, and what is the Law touching the ſame, and what not, the Records of the Exchequer are the moſt effectual Proofs of the Law therein, [f] for ſuch Things are treated of in that Court, and that which is uſed in that Court is Law not only there but in every other Court, and throughout the Realm. And hereupon *Onſlow* ſaid, that *Littleton* has ſhewn us that an Action of [g] Account does not lie againſt Executors for any but the King only, and (as it ſeems to him) the King ſhall have an Action of Account, and ſo is the Law. But, Sir, where did *Littleton* learn this? or of whom? Certainly of the Exchequer, and no where elſe; for there ſuch Matters are treated of, and Accounts for the King's Duties are there cleared up and anſwered, and who ſhall account, and who not, appears there, and there are Records to warrant the ſame. And becauſe it is ſo, *Littleton* affirms

[a] Bridgm. 21. Lane. 23.

[b] L. 5. Ed. 4. 1. a. 2 Co. 16. b. 4 Co. 93. b. Hardr. 98. 2 Sid. 164. 5 Mod. 48. 12 Mod. 569.

[c] 1 Finch 213. 2 Finch 240. Crompt. J. C. 67. b. Godb. 295.

[d] 1 Finch 234. 2 Finch 240. Godb. 295.

[e] Crompt. J. C. 111. a.

[f] 1 Finch 240. 2 Finch 240. Crompt. J. C. 105. a. Godb. 295.

[g] Litt. § 125. Bro. Account 85. Prerog. 126. Dy. 23. pl. 145. 11 Co. 89. b. 1 Finch 324. 2 Finch 303. Crompt. J. C. 106. a. Comyns 437. But now by the Statute of 4 *Ann. cap.* 16. Action of Account is given againſt Executors in the Caſe of common Perſons.

firms the Law to be ſo, and not to be ſo in that Court only, but throughout the Realm, for the Uſage of any one Court, in a Matter whereof it has proper Conuſance, ought to be affirmed for Law in all Courts, and the Records of ſuch Court are Patterns whereby the whole Realm may know the Law in ſuch Caſes. [a] And ſo (he ſaid) in the Caſe vouched by *Littleton* out of 11. *H.* 4. where *Cockain* Chief Baron demanded of the Juſtices of the Common Bench, if one held of the King to find him a Man to war within the four Seas, whether or no this was Grand-Serjeanty, to which it was anſwered, that it was, and then he demanded whether or no the King ſhould have Relief according to the Value of the Land, *ad quod non fuit reſponſum*; for they did not need to give him any Anſwer to that Point, becauſe if it was Grand-Serjeanty, he might know by the Uſage in the Exchequer what Sum he ſhould pay, for from thence came the Knowledge of the Law in this Point to the Judges of the other Courts, and therefore their Silence to that Queſtion was more proper than an Anſwer, and by their Silence they attributed the Knowledge of it to the Exchequer. And from thence alſo *Littleton* obtained the Knowledge of the Law in this Point, viz. [b] that if the King's Villain purchaſes Goods, and aliens them before Seizure, yet the King may ſeize them afterwards; for ſuch was the Uſage of the Exchequer, in which Court ſuch Goods were anſwered for to the King. And there he learned [c] *quod nullum tempus occurrit Regi.* And upon this *Gerard* put a Caſe which was debated in the Exchequer in the Time of the preſent Queen, in which he himſelf argued, and it was thus: [d] Sir *William Candiſh* who was Treaſurer of the Chamber to King *Henry* 8. and to King *Edward* 6. and to Queen *Mary*, was indebted to the ſaid King *Edward* and Queen *Mary*, and being ſo indebted he purchaſed divers Lands, and alien'd them, and of Part took an Eſtate to him and to his Wife, and Part remained in the Hands of others, and he died without rendering an Account, and it was debated whether or no theſe Lands could be ſeized into the Hands of the preſent Queen, and be retained by the Courſe of the Common Law until an Account was made by *Candiſh*; for *Candiſh* was not bound to the King in any Recognizance or Obligation, but the Matter of the Seizure reſted entirely upon the Common Law: And there it was well debated at the Bar by the Counſel for the Queen, and by the Counſel for Sir *William Sentlow*, Captain of the Guard, and his Wife late the Wife of Sir *William Candiſh*, upon Demurrer in Law on this Point, and after full Argument thereof, all the Barons of the Exchequer agreed that the Seizure of the ſaid Land for the Queen was lawful. For there were almoſt an infinite Number of Writs and Proceſſes of this Sort in the Court of Exchequer, a great many whereof were alledged and ſhewn to the Court, by which it appeared, [e] that if any one is Accountant to the King, or if any Money, or Goods or Chattles perſonal of the King come to the Hands of any Subject by Matter of Record, or by Matter *in fait*, the Land of ſuch Subject is charged therewith, and liable to the Seizure of the King, into whatſoever Hands it comes afterwards, be it by Deſcent or Purchaſe, or otherwiſe: For the King might there have ſeized the Land in the Hands of Sir *William Candiſh*, and by the ſame Reaſon in the Hands of every one that came in under him, for *nullum tempus occurrit Regi.* [f] And the Exchequer has a Chancellor and a Seal, and the Writs uſual in the Chancery of the Exchequer to ſeize the Land in ſuch Caſe are more ancient than the *Regiſter*, or the Treatiſe *de Prerogativa Regis:* And upon this Sir *William Sentlow*, having Intelligence that the Law was againſt him and his Wife in the Caſe, compounded with the Queen, and after his Compoſition had a Releaſe and Pardon of the Queen for the Reſidue. *And note that in this Pardon it was recited, for the Maintenance of the Prerogative, that the Law was with the Queen in the Caſe.* And ſo (he ſaid) the Precedents and Records of the Exchequer were taken as a full Proof of the Law in that Caſe, and not as the Law of the Exchequer only, and in no other Courts, but as the Law throughout the whole Realm. [g] And upon the like Reaſon (he ſaid) the Caſe is ruled in 50 *Aſs.* where one *R.* had received certain Money of Sir *Hugh Spencer* who was attainted, whereby the Money belonged to the King, and *R.* who had a Leaſe jointly with his Wife died, and by the Award of all the Juſtices the Term in the Hands of the Wife [h] Survivor was charged with the Execution of the King for the Money; for the King might have had Execution of it in the Life of the Huſband, and Laches of Time in his Suit ſhall not hurt the King, but that he ſhall have the Term in the Hands of the Wife. And this agrees with the Reaſon of *Candiſh*'s Caſe, which was warranted by many Records in the Exchequer, as is ſaid before. And, Sir, it is reaſonable that the Records of Courts ſhould be taken for the moſt ſubſtantial Proofs of the Law. For the Reports of our Law are for the moſt Part made up of the Words and Sayings of Judges, and that wherein they aſſent is taken to be Law; *a fortiore* then their Judgments entered of Record in Courts ought to be eſteemed of as great or greater Weight than their bare Words or Sayings. And hereupon they concluded that in the principal Caſe here, inaſmuch as the Records and Precedents of the Court of Exchequer being in three Manners, viz. ſome being Precedents of Grants of Mines of Gold and Silver in the Lands of others, and ſome of Accounts for the Revenue of ſuch Mines, and the third being Precedents of Suits for carrying away Ores of Gold or Silver out of ſuch Mines in the Lands of others, prove that the Kings of this Realm have continually from Time to Time meddled with ſuch Mines in the Lands of others, and have had the whole Profit of them, and not the Lord of the Soil, nor any other without the King's Charter, from hence they concluded that the Prerogative of the King, and the Continuance of it is fully proved, and more fully than by the Books of Reports, or the Opinions of private Perſons. [i] Nevertheleſs it was ſaid by *Gerard* that in the Book called *Expoſitiones vocabulorum*, which was put in Print 40 Years ago, it is declared that Mines of Gold and Silver, in whatever Lands they are, belong to the Kings of this Realm. So *Wray* ſaid that *Heſket* an Apprentice who was well learned in the Law, in his Reading extant upon the Statute *de Charta Foreſtæ* affirmed that if there were Mines of Gold or Silver in the Lands of Subjects within the Foreſt, they belong to the King. So he ſaid that he had ſeen the Laws of *St. Edward* the Conteſſor, in which it was contained *quod Theſauri de terra pertinent domino Regi.* And ſo, *Barham* ſaid, the Laws of *William* the Conqueror, which he had ſeen, had the like

[a] Littlet. § 157. T. 11. H. 4. 72. pl. 9 Fitz. Bar 184. Bro. Tenures 13. Reliefs.

[b] T. 12. H. 20. b. *per Keble.* Litt. § 178. 2 Rol. Abr. 734. F. pl. 3. Hardr. 25. Litt. R. 91. Godb. 287. 4 Bac. Abr 201. Ante 243 (k). Poſt 322 (b).

[c] Britton 88. a.

[d] P. 2. Eliz. in Scacc. Rot. 111. Dy. 224. pl. 32. O. Bendl. 118. 3 Co. 12. b. Godb. 292, 297. Vide Crompt. J.C. 106. b. 111. a.

[e] 1 Finch 319. 2 Finch 298. Crompt. J. C. 106. a. b.

[f] 4 Inſt. 119. Crompt. J. C. 53. a. 106. b.

Nota bene

[g] 50 Aſs. pl. 5. Fitz. Execution 113. Bro. 148. Charge 74. Jointenants 30. Prerogative 54. Ante 261 (a). and ſee the Books there cited.

[h] But ſee Co. Litt. 185. a. that if one Jointenant in Fee-ſimple be indebted to the King, and dies, after his Death no Extent ſhall be made upon the Land in the Hands of the Survivor.

[i] Expoſitiones Vocabulorum 108. Bro Corone 175. Prerog. 134. Vin. Abr. tit. Prerogative K. a. pl. 13.

like Words, which Laws were recited to the Conqueror by the Sages of the Realm, who were ſworn that they would truly recite before him the Laws of the Land, *nihil prætermittentes*. Which Words, *Theſauri de terra*, the ſaid Serjeants took to be Ores of Gold and Silver, and not Treaſure-trove, which, they ſaid, are called *Theſauri* * *in terra*, and not *de terra*. So that theſe Authorities, and the above Precedents, and the Reaſons before given at the Beginning in Regard to the Excellency of the Metal, and the Neceſſity of it, and it's Tendency to the public Utility, do all agree in one, that the King ſhall have all Mines and Ores of Gold or Silver in the Lands of Subjects.

And as to what may be ſaid, that they ſhall not belong to the King, becauſe they are not recited as Prerogatives in the Treatiſe *de Prerogativa Regis*, to this all of them who argued on the Part of the Queen ſaid, that almoſt all the Preroga ives there recited belonged to the King before that Treatiſe was writ en. And *Barham* ſaid that the greateſt Part of them is recited by *Britton* in his Book in the Chapters of *Trovers*, and *of the Rights of the King*, which Book was written before the Treatiſe *de Prerogativa Regis*; † and that Treatiſe does not contain all the Prerogatives of the King, but Part of them. For they ſaid that the Prerogatives before recited, viz. [a] that the King ſhall have an Action of Account againſt Executors, [b] and that the King ſhall have the Goods of his Villain ſold before Seizure, [c] and that the King ſhall ſeize the Land which belonged to him who ought to render an Account to him, [d] or who had received any Goods or Chattles of the King, into whatſoever Hands the ſame Land comes afterwards, are not recited in the ſaid Treatiſe *de Prerogativa Regis*, and yet they are Prerogatives allowed to the King by Law. [e] And ſo *Onſlow* ſaid that the King by his Prerogative may wave Iſſue, and demur in Law, or *e contra* may wave Demurrer, and plead to Iſſue, and yet this Prerogative is not recited in the ſaid Treatiſe. And ſo *Gerard* ſaid that the King ſhall have [f] Treaſure-trove, and Eſcheats [g] of thoſe who are attainted of Treaſon, [h] and before the Statute of 1 *Edw.* 3. the King ſhould have had in Fee the Land holden of him and aliened without Licenſe, and yet theſe Points are not recited in the Treatiſe *de Prerogativa Regis*. [i] And he alſo ſaid that in 45. *Ed.* 3. it appears that one attainted at the Suit of the Party in a *Decies tantum* came into the Bench to agree with the King and the Party, and after he had agreed with the King he delivered the Money due to the Plaintiff to the Plaintiff's Attorney, and the King's Serjeant ſhewed to the Court that the Plaintiff was indebted to the King in great Sums, and prayed that the Money might be ſtaid until he had diſcharged himſelf, *et ſic fuerunt*; and afterwards he went into the Chancery and diſcharged himſelf, and the Money was delivered to the Attorney back again. By the Rule of which Book it appears that the King has a Prerogative to have in Satisfaction of his Debt that which is delivered in Court in Execution to the King's Debtor, and yet ſuch Prerogative is not found amongſt the Prerogatives recited in the ſaid Treatiſe *de Prerogativa Regis*. [k] And ſo *Wray* ſaid that if the Patron does not preſent within 6 Months, and the Biſhop and after him the Metropolitan ſuffer Lapſe, or if the Biſhop, Patron, and Metropolitan ſuffer Lapſe, the King ſhall have the Preſentment by his Prerogative, as it may be collected by 27. *Ed.* 3. and yet this is not recited in the Treatiſe *de Prerogativa Regis*. So that it is no good Argument to ſay that the King has not a Prerogative, becauſe it is not recited in the Treatiſe *de Prerogativa Regis*, for the King has by the Common Law more Prerogatives than are there recited, and if they are proved by Uſage, or by other ſubſtantial Proof, it is ſufficient. So in our Caſe, inaſmuch as it is proved by ſufficient Matter before recited that the King has a Prerogative in ſuch Mines of Gold or Silver in the Lands of others, it ought to be received and allowed.

And as to what may be ſaid, that the digging of the Land, and carrying away the Ore which is a Part of the Soil, cannot be claimed by Prerogative, becauſe it touches the Freehold and Inheritance of the Subject; to this it was ſaid that this is no Obſtacle to the Claim of Prerogative, for every Prerogative contains in it a Preſcription, and reſts in Uſage. And as Preſcription and Uſage may give Title or Intereſt to the Subject in the Freehold or Inheritance of the King, [l] as in Common, Way, or Eſtovers claimed by Preſcription in the Land of the King, or in Waifs, Eſtrays, Wreck, or ſuch like, of Right belonging to the King and yet claimed by Preſcription by Subjects, ſo and by the ſame Reaſon (*Barham* ſaid) Preſcription and Uſage may give to the King a Title or Intereſt in the Freehold of a Subject. For he ſhall not be in a worſe Condition than a Subject is, and a Subject by Preſcription againſt another Subject, and againſt the King alſo, ſhall have Things which touch the Freehold or Inheritance of another Subject or of the King, and to ſay that the King cannot have the like againſt another Subject would be abſurd, eſpecially in the Caſe here where the Preſcription and Uſage ſtands with ſuch Reaſon as it does. And that the Records prove a Preſcription or Uſage in the Prerogative, none can deny. And the King had and has many Prerogatives which affect the Freehold of another. And hereupon *Gerard* ſaid that before the Statute of *Magna Charta* the King by his Prerogative might take Trees out of the Woods of others for the Repairs of his Caſtles, and by the Statute of *Magna Charta cap.* 21. he has reſtrained himſelf from ſo doing, for the Words of the Statute are, *Neither we, nor our Bailiffs, nor others ſhall take any Man's Wood for our Caſtles, or other our Neceſſaries to be done, but by the Licenſe of him whoſe the Wood is*; by which Act it is implied that before the King might have done it: And this Prerogative extended to the Freehold of another. So (he ſaid) the Statute *de Charta Foreſtæ cap.* 1. ordains, *That all Foreſts which King* Henry *our Grandfather afforeſted ſhall be viewed by good and lawful Men, and if he has made Foreſt of any other Wood more than of his own Demeſn, whereby the Owner of the Wood hath Hurt, forthwith it ſhall be diſafforeſted*; by which (he ſaid) it appears that the King might afforreſt the Woods of others, and thereby the Subject was reſtrained from cutting down his own Woods without Licenſe. So that the King's Prerogative may touch the Freehold of another. And from theſe Acts he took it that the Things, which the King is reſtrained by them from doing, were lawful before, and not that they were unlawful to be done before, and were reformed by thoſe Acts. [m] Alſo he put the Caſe in *P.* 7. *H.* 3. in Attachment for Waſt againſt Tenant in Dower, *quere vivarium fractum eſt et ſiccatum*; and the Feme ſaid

* For if it be upon the Earth, and not within the Earth, it does not belong to the King, but to the Finder, Britt. 26. b. S. P. C. 40. a. 1 Finch 146. 2 Finch 177. Cowel's Inſt. 67.

Anſ. to obj. being mard. in the Treatiſe de Prerogativa Regis

† Vin. Abr. tit. Prerogative T. 2. pl. 18.

[a] Ante 320 (g). and the Books there cited.

[b] Ante 243 (k). 321 (b).

[c] Ante 321 (d). Sir *William Cardiff's* Caſe.

[d] Ante 261 (a). 321 (g).

[e] See Ante 85 (d) and the Books there cited.

[f] See Ante 242 (a) and the Books there cited.

[g] See Ante 212 (b) and the Books there cited.

[h] T. 9 Ed. 3. 26. a. *per Trew.* Bro. Alienation 34. P. 24. Ed. 3. Fitz. Quare Impedit 54. *per Wilby.* Stamf. Prerog. 29. a.

[i] H. 45. Ed. 3. Fitz. Decies tantum 12.

Anſ. to obj. of Diſturbance with the Subject's Freehold & Inheritance

[k] M. 27. Ed. 3. 8. pl. 25. Fitz. Quare Impedit 18. Dr. & Stud. lib. 2. cap 36. Bro. Preſent. al Egliſe 58. Watſ. Compl. Incumb. 116. Poſt 408. (e). and (t).

[l] Co. Litt. 114. b.

[m] P. 7. H. 3. Fitz. Waſt 241. *Quære* if it lay in this Caſe, becauſe the Waſt was done by the Huſband before his Death.

ſaid that *M. quondam vir ſuus per præceptum Regis fregit vivarium, et cepit totum piſcem ad opus Regis, et ipſa poſtea refecit prout potuit*, and it was adjudged a good Plea: By which it appears that the King, or any other by his Command, may break a Stew, which is another's Freehold, and take the Fiſh for his Proviſion by Force of his Prerogative. * And *Wray* ſaid, if a Villain, who is the Freehold and Inheritance of another, comes into the King's Preſence, the Lord of the Villain cannot take him in the Preſence of the King, as it is adjudged in 27. *Aſs.* for the King's Preſence is a Protection to him for the Time: So that the Prerogative of the King takes away from the Lord his Uſe of and Power over his Villain, who is his Freehold and Inheritance. † And *Onſlow* ſaid that if the King has a Rent-charge in Fee out of any Land, he may diſtrain for it by his Prerogative in all the other Lands of him who ought to pay it, by 13. *Ed.* 4. So that the other Freeholds of the Party ſhall be liable to the Diſtreſs of the King by Reaſon of his Prerogative. And ſeveral other Caſes were put by the Counſel for the Queen, to prove that ſhe had as well divers other Prerogatives which are not recited in the Treatiſe *de Prerogativa Regis*, as Prerogatives which tend to charge the Freehold and Inheritance of another, which I have here omitted for Brevity's Sake, having mentioned the moſt material of them. And hereupon they concluded that for theſe Reaſons, Precedents, and other Things ab veſaid, all Mines of Gold and Silver in the Lands of Subjects, if they are open, and all Ores of Gold and Silver in the Lands of Subjects, altho' the Mines thereof are not open, (which Caſes are all one, and ſtand upon the ſame Reaſon with Regard to the Prerogative of the Queen) with Power to dig in the Lands of Subjects for the ſame, and to carry them away, with all other Incidents thereto, belong of Right to the Queen.

* 27 Aſs. pl. 49. Fitz. Villenage 18. Bro. 38. Dy. 60. pl. 23. 2 Rol. Abr. 737. P. pl. 1. Co. Litt. 137. b. 1 Finch 125. 2 Finch 160. Kitch. 332.

† 8 H. 13. Ed. 4. 6. pl. 1. Fitz. Prerog. 7. Bro. 68. Diſtreſs 48. 5 Co. 56. a. 3 Leon. 125. Gouldſb. 17. Godb. 295. 2 Rol. R. 300. 4 Inſt. 119. 1 P. Wms. 307. Wentw. Off. of Exec. 134. 1 Finch 100. 2 Finch 156. 4 Bac. Abr. 192, 214. Ante 243 (u).

And againſt this nothing was ſaid on the other Side, upon this Point, by any of thoſe who argued for the Earl, but by *Shirborn* only, who alledged the Opinions of ſome by Implication to be to the contrary. ‡ As the Opinion of *Newton* in 19. *H.* 6. where he ſays that if a Man gives Land in Fee which is not worth 40 *d. per ann.* and by ſome Accident, as by a Mine of Gold or Silver found in it, it becomes worth 100 *l. per ann.* and he is impleaded, and vouches the Feoffor to Warranty, the Feoffor may ſhew that the Land was but worth 40 *d. per ann.* at the Time of the Feoffment, and for ſo much he is ready to enter into the Warranty, and this Plea ſhall be good, and he ſhall not warrant more than it was worth at the Time of the Feoffment; but if he enters generally into the Warranty, he ſhall render in Value as much as it is worth now. By which Saying *Newton* meant that the Mine of Gold and Silver ſhould be recovered with the Land, and ſhould not belong to the King. And other Things *Shirborn* ſaid, which were not maintained by his Companions. For *Bell* ſaid that he would not ſpeak to this Point either one Way or other. And *Mead* expreſly affirmed that the Queen by her Prerogative ſhould have all Mines and Ores of Gold and Silver in the Lands of Subjects; and therefore I omit the reſt of *Shirborn*'s Argument on this Point.

E contra for the Earl.

‡ M. 19. H. 6. 46. a. Fitz. Recov. in Value 17. Bro. 10. Proteſtation 30. Voucher 69. 2 Rol. Abr. 772. T. pl. 2, 3.

As to the ſecond Point, it was inferred for the Queen, that if the Queen ſhall have by her Prerogative all Ores, and alſo all Mines of Gold and Silver in the Lands of Subjects, from thence it will follow in a Manner conſequentially that ſhe ought to have theſe Ores and Mines of Copper now in Queſtion, that is, as well the five Hundred Thouſand Pounds Weight contained in the firſt Plea in Bar, as the other one Hundred Thouſand Pounds Weight contained in the ſecond Bar. For it is confeſſed that theſe ſix Hundred Thouſand Pounds Weight of Copper contain Gold or Silver, ſo that two Metals are mixed together, the one Copper, and the other Gold or Silver, and the Gold and Silver belongs to the Queen, and ſhe cannot draw it out without melting the Copper; for in one ſame Maſs or Parcel there may be Copper and Gold, or Copper and Silver, and in the melting of it it is diſcerned and divided, and not otherwiſe; and if the Queen cannot have the Gold and Silver which belongs to her without melting the Copper, then ſhe ought to have the Copper to melt, for elſe ſhe would loſe her own, and if ſhe ſhall have it to melt, ſhe ſhall keep it to her own Uſe, for ſhe is not bound by the Law to melt it, and to deliver the Copper to the Poſſeſſor of the Land, for the Charge of purging and melting it is greater perhaps than that of the digging. And if the Queen ſhould be at ſuch Charge, and the Law ſhould make her deliver it to the Poſſeſſor of the Soil, therein the Law would lay a heavy Burden and Expence upon her, who ought rather to abound in Riches for the Safeguard of her Subjects, than to want them. And alſo by this Means the Law would make the Queen a Servant to the Subject to melt his Copper for him, which would be a very unwiſe and unreaſonable Law. But our Law is more conſonant to Reaſon in all it's Proviſions, and therefore it ſays in this Caſe as in others, that becauſe the Gold or Silver and the Copper are together and indiviſible in the Soil, and are ſo incorporated that they are as one entire Thing, therefore the Gold and the Silver being more worthy ſhall draw to it the Copper, which is leſs worthy, for *omne magis dignum trahit ad ſe minus dignum.* So that the Queen being Poſſeſſor of the one ſhall be Poſſeſſor of the other. And *Wray* reſembled this Caſe to the Caſe of Charters of Inheritance being in a Cheſt or Box ſealed, § if the Poſſeſſor thereof dies, the Charters ſhall go to the Heir, and the Box, if it was open, to the Executors, but inaſmuch as it is ſealed, whereby the Charters and the Box are become one entire Thing, and inaſmuch as the Charters are more precious than the Box, therefore the Heir who has the Property of the Charters, ſhall have the Box alſo, and not the Executors, *cauſa qua ſupra.* ‖ So, he ſaid, if a Chariot which is drawn with ſix Horſes falls upon a Man, and kills him, the Horſes ſhall be forfeited to the King as a Deodand, as well as the Chariot which killed the Man, becauſe they were faſtened to the Chariot, ſo that they were altogether as one entire Thing which occaſioned his Death. ¶ And ſo, *Gerard* ſaid, if an Obligation is made to two,

2 Point. For the Queen.

Whether the King ſhall by Prerogative have Mines of Copper containing in them *any* Gold or Silver, which are in the Lands of Subjects. S. P. 1 Finch 16 2 Finch 23. Wing. Max. reg. 62. pl. 18. 4 Bac. Abr. 162. But now ſee the Statutes of 1 *W. & M. cap.* 30. and 5 *W & M. cap* 6 Poſt 339.

§ H. 41. Ed. 3. 2. a. Bro. Charter de terres 13. 36. H. 6. 27. a. *per Priſot.* Bro. ibid. 40. M. 3. H. 7. 15. pl. 29. Fitz. Bar 128. Bro. Charter de terres 52. Chattles 18. 1 Finch 16, 2 Finch 22. Wing. Max. reg. 62. pl. 17. Po 328 (b). See much Matter hereupon in Cowel's Inſt. 62, 63.

‖ Anno 8. Ed. 2. Fitz. Corone 388, 397. S. P. C. 20. a. 1 H. H. P. C. 420.

¶ H. 8 Ed. 4. 24. b. *per Danby.* M. 19. H. 6. 47. pl. 100. Fitz. Dette 38. Bro. Forfeit. 16. Jointenants 32. Prerog. 23. Hale on F. N. B. 32. g. 1 Rol. R. 7. Litt. R. 91. Gouldſb. 20. Hardr. 26, 490. T. Raym. 7, 121, 122. Crompt. Juſt. 31. a. 3 Inſt. 55. H. P. C. 29. 1 Hawk. P. C. 68, § 7. 1 Finch 145. 2 Finch 178. Vin. Abr. tit. Prerogative T. 2. pl. 11. tit. Utlawry J. pl. 1. Ante 243 (f). Sed Contra Ante 259 (g).

or if two are poſſeſſed of a Horſe, and the one is attainted, the King ſhall have the Obligation and the whole Duty, or the Horſe, becauſe it is a Thing entire.

And to prove and fortify this Argument, viz. that where Gold or Silver is mixed with baſe Metal, the King ſhall have the whole Ore or Mine, a Record was alledged, which appears in the Remembrances of the Exchequer, among the Commiſſions and Letters-patent of *Eaſter* Term 7 *Ed.* 3. *ex parte Rememor.* which was as follows.

Anno 7. Ed. 3. *Salop. Rex dilectis et fidelibus ſuis Johanni de Jugg et Henrico de Wiſhbury ſalutem. Cum ex oſtentione dilecti et fidelis noſtri Galfridi de Scropo accepimus, quod quædam minera cupri auro et plumbo mixta ſub ſolo Roberti Brown in comitatu Salop jam inveniatur, et volentes quod Theſaur. et Barones de Scaccario noſtro certiorentur ſuper modo et forma inventionis mineræ prædictæ, et per quem, vel per quos, et in quibus locis inventa fuerit, et qualiter commodum noſtrum melius inde facere poterimus, ac etiam ſi aliquid inde aſportatum ſit ſeu elongatum a prima inventione ejuſdem, necne. Et ſi ſic, tunc quantum, per quos, et qualiter, aſſignavimus vos ad ſupervidendum mineram prædictam, et ad inquirendum per ſacramentum proborum et legalium hominum de vicineto partium illarum ubi eadem minera exiſtit, ac de præmiſſis et ſingulis premiſſorum plenius veritatem. Et ideo vobis mandamus quod ad partes prædictas accedatis, et omnia et ſingula præmiſſa exequamini et compleatis in forma predicta. Et de toto veſtro facto in hac parte Theſaur. et Baronibus de dicto Scaccario noſtro apud Weſtmonaſterium, circa craſtinum Sancti Andreæ proxime futurum, vel tunc ad ultimum, diſtincte et aperte conſtare faciatis. Ita quòd tunc ulterius ordinare valeamus in hac parte, prout pro commodo noſtro melius ſore viderimus faciendum, inquiſitionem inde per vos captam ſub ſigillis veſtris et ſigillis eorum, per quos facta fuerit, tunc ibidem remittentes, et hoc breve. Mandavimus enim vicecomiti noſtro comitatus prædicti, quod ad certos dies et loca, quos eis ſcire facietis ex parte noſtra, faciat venire coram vobis tot et tales de balliva ſua de vicineto mineræ prædictæ, per quos rei veritas melius ſciri poterit et inquiri. In cujus, &c. Teſte Theſ. 30° die Octobris, &c. Per breve de privato ſigillo inter communia de anno 7.*

By which Record it appears that the King took the Law to be that the Mine of Copper being intermixed with Gold and Lead, and found in the Soil of another, viz. in the Soil of *Robert Brown*, belonged to him, and he would be certified how he might make his Profit of it. And if it ſhould be taken to belong to another, then he could not make any Profit of it.

Anno 17. R. 2. The like Commiſſion to the like Purpoſe made by King *Richard* 2. was alledged as follows. *Salop. Rex Richardus ſecundus dilectis et fidelibus ſuis Hugoni de Burnel militi ac vicecomiti noſtro Salop. ſalutem. Sciatis quòd cum dilectus ligeus noſter Jacobus Minor de comitatu Derby nobis dederit intelligi, quòd eſt quædam minera de cupro et argento infra dominium prioratus de Wenlock alienig. ſive ibidem circa eundem prioratum in dicto comitatu Salop. de qua quidem minera proficuum non modicum, ſi nos tales operarios ſuper eandem mineram, qui ibidem pro commodo noſtro operari valeant et ſcirent, ordinare vellemus, nobis poſſit evenire, nos indemnitati noſtræ in hac parte proſpicere volentes, ac pro eo quòd idem Jacobus ad magnum proficuum nobis in hac parte ſe obtulit faciendum, aſſignavimus vos et alterum veſtrum ad ordinandum quòd prædictus Jacobus ibidem in minera prædicta, in quantum hoc abſque prejudicio alicui contra leges regni noſtri Angliæ, et abſque abſtractione, demolitione, aut deſtructione aliquarum domorum ſivè gardinorum cujuſcunque occaſione operis predicti faciendi fieri poſſit, abſque perturbatione ſive impedimento aliquali operari poſſit, &c. In cujus, &c. Teſte Rege apud Weſtmonaſterium 4° die Junii anno regni ſui 17°.* In 17. Rich. 2. Rot. 12.

Which Commiſſion giving Power to the Sheriff to cauſe the ſaid *Minor* to work for the King in the ſaid Mine, which conſiſted of Copper and Silver together, being in the Soil of another, viz. of the Prior of *Wenlock* or thereabouts, proves that the King underſtood (and it is to be preſumed that his Acts are done with good Counſel, and according to Law) that the Mine was his own, and that it did not belong to the Lord of the Soil.

Anno 7. H. 4. To the like Purpoſe a Charter made by King *Henry* 4. in the Form following was alledged. *Devon. Rex Henricus quartus dilecto ſibi in exemplo Willielmo Charleton priori de Pylton, ſalutem. Sciatis quòd cum commiſerimus quantum in nobis eſt Henrico Darby et Johanni Darby filio ſuo Minatoribus mineras plumbi quæ portant et habent de argento in comitatu Devon. pro termino* 10 *annorum, reddendo inde nonam libram de puro argento inde proveniente, et ſolvendo nobis et aliis quibus convenit omnia alia proficua et denarios ad nos et alios prædictos inde pertin. per ſuperviſum et contrarotulationem veſtram, prout in literis noſtris patentibus inde confectis plenius continetur: Aſſignavimus vos ad dictas mineras in Comitatu prædicto ſupervidendas, et ad hujuſmodi nonam libram et alia proficua et denarios prædictos benè et fideliter contrarotuland. Et ideo vobis mandamus quòd circa præmiſſa diligenter intendatis, et ea faciatis et exequamini in forma prædicta. In cujus rei, &c. quam diu nobis placuerit duratur. Teſte Rege apud Weſtm. 9° die Februarii anno regni ſui 7°.* In 7. H. 4. Rot. 20.

Altho' this Charter does not mention ſo expreſly as the former that the Mines were in the Lands of others, yet by the Words *ſolvendo nobis et aliis quibus convenit omnia alia proficua et denarios ad nos et alios inde pertinentia per ſuperviſum et contrarotulationem veſtram, &c.* it is to be intended that the Charter ſhall extend to Mines in the Lands of others, for *(the others)* may be the Lords of the Land, to whom the King of his Grace and not of Duty was willing that Amends ſhould be made. And ſo the Reaſon holds Place as well for Mines of Lead or other baſe Metal, as for Copper, if ſo be Gold or Silver be in it.

Anno 17. H. 6. And many Charters made by King *Henry* 6. were alledged to this Purpoſe, whereof one was as follows. *Devon. et Cornub. Henricus ſextus per literas ſuas patentes datas apud Manerium de Shene* 11° *die Junii anno regni ſui* 17° *conceſſit Johanni Sollers omnes et ſingulas mineras auri et argenti cum omnibus eas tangentibus infra comitatus Devon. et Cornub. ubicunque inveniri contigerint, ac etiam omnes mineras plumbi quæ portant et habent de auro et argento infra comitatus prædictos*

ubicunque

ubicunque ſimiliter infra eoſdem Comitatus inveniri contingerint: Habendum et occupandum omnes et ſingulas mineras prædictas, &c. a tempore expirationis termini duodecim annorum Duci Bedfordiæ conceſſi aſque ad finem 20 *annorum ex tunc proximè et plenariè complendorum. Solvendo indè præfato regi et hæredibus ſuis quindecimam partem puri auri, et quindecimam partem puri argenti, et faciendo per ſe et deputatos ſuos omnimodos cuſtus et expenſas circa mineram prædictam debite apponenda. Et quòd idem Johannes Sollers durante termino ſuo infra comitatus prædictos per ſe et deputatos ſuos ac ſervientes ſuos quoſcunque hujuſmodi mineras quærere, inveſtigare, et fodere in eiſdem mineris et inibi operare valeat, abſque impedimento præfati regis vel hæredum ſuorum, aut aliorum officiariorum, miniſtrorum, vel ligeorum ſuorum quorumcunque, ubicunque hujuſmodi mineræ inveniri contigerint*; with a Clauſe that he ſhall not dig *ſubtus domos ſeu caſtra aliquorum ligeorum præfati regis pro mineris prædictis*, and with a Clauſe to make Proviſion for Woods and Labourers, *&c.* In 17. H. 6. Rot. 45.

By which Charter (it was ſaid) the King demiſed not only the Mines of Gold and Silver, but alſo the Mines of Lead which contained Gold or Silver, in whatever Place they ſhould be found within the ſaid Counties, in which Caſe he underſtood that he had an Intereſt in them, and a Power to demiſe them. And further the King gave him Power to ſearch and dig without Impediment of any of his Lieges, in whatever Place ſuch Mines might be found, which is as much as if he had ſaid, whether they be in the Lands of Subjects, or in our own Lands. And the Clauſe of Reſtraint from digging under the Houſes or Caſtles of the Lieges of the King implies that he might dig in other Places of the Lieges of the King, as in their Lands and Waſts.

Another Patent was alledged made by the ſame King in Form following, *Devon. et Cornub. Henricus ſextus per literas ſuas patentes datas apud Weſtm.* 16° *die Septembris anno regni ſui* 30° *conſtituit dilectum capellanum ſuum Johannem Botright ſacræ Theologiæ profeſſorem contrarotulatorem omnium minerarum ſuarum auri et argenti, cupri, auricalci, et plumbi, infra comitatus Cornub. et Devon. ac omnium aliarum minerarum ſuarum in quibus aliquod metallum in quo aliquid auri vel argenti habetur, continetur, ſeu aliquo modo haberi ſeu finari poterit in comitatibus prædictis.* In 30. H. 6. 20. 25. Anno 30. H. 6.

Which Patent being general (it was ſaid) ought to be taken to extend generally to all baſe Mines, in which *aliquid auri vel argenti habetur.* And theſe Words *aliquid auri vel argenti* are to be noted (as *Wray* ſaid) in Reſpect of the Quantity, for be the Quantity of Gold or Silver in the baſe Mine great or ſmall, it is all one, as he ſaid, and the Word *(aliquid)* warrants this Senſe and Acceptation.

Another Patent was alledged of the ſame King's in Form following. *Cornub. et Devon. Henricus ſextus per literas ſuas patentes datas apud Weſtmonaſt.* 20° *die Junii anno regni ſui* 31° *conſtituit Johannem Botright clericum præpoſitum et gubernatorem omnium et ſingularum minerarum ſuarum, de quibus aliquid aurum vel argentum haberi ſeu finari poterit, in comitatibus Cornub. et Devon. ubicunque inveniri poterint. Ac etiam conceſſit dicto Johanni omnes mineras cupri, ſtanni, et plumbi, de quibus aliquid aurum vel argentum haberi ſeu finari contigerit, in comitatibus prædictis. Habendum et occupandum prædicto præpoſito et gubernatori ad uſum ejuſdem prædictas mineras per ſeipſum, vel per ſufficientes deputatos ſuos, pro quibus præfato regi reſpondere tenebitur, quamdiu præfatus Johannes erga eundem regem in officio præpoſituræ et gubernationis prædictæ ſe benè geſſerit. Reddendo et ſolvendo indè præfato regi et hæredibus ſuis decimam partem puri auri et puri argenti, ac etiam decimam partem cupri, ſtanni, et plumbi, de quibus aliquod aurum vel argentum inveniri ſeu finari contigerit in mineris prædictis, ſumptibus ſuis propriis perquirendis pariter et expenſis. Dedit inſuper præfato Johanni plenam poteſtatem vice et nomine præfati regis committendi et ad firmam locandi præfatas mineras, et quamlibet parcellam earundem, quibuſcunque firmariis dicti regis ad terminum duodecim annorum a datu præſentium: Reddendo et ſolvendo præfato nuper regi et hæredibus ſuis quamlibet decimam bollam* of the Ore, *videlicet cupri, ſtanni, et plumbi, in quibus aliquod aurum vel argentum exiſtit, ut prædictum eſt*; with a Clauſe to dig, *abſque impedimento præfati regis, vel hæredum ſuorum, aut aliorum officiariorum, miniſtrorum, vel ligeorum ſuorum quorumcunque, ubicunque hujuſmodi mineræ inveniri contigerint*, with a Clauſe to make Proviſion for Woods and Labourers, *&c. Feodo eccleſiæ duntaxat excepto.* In 31. H. 6. 20. 25. Anno 31. H. 6.

By which Patent the King made the Patentee Provoſt and Governor of all his Mines, wherein any Gold or Silver might be had or found in the ſaid Counties; and it has alſo expreſs Words of all Mines of Copper, Tin, and Lead, wherein any Gold or Silver might be had, with Clauſe to dig without Interruption of any of his Lieges, in whatever Place ſuch Mines ſhould happen to be found, which Words *(ubicunque, &c.)* contain Liberty of digging in all Places of other Men. And the Words *(de quibus aliquod aurum vel argentum habere contigerit)* are to be obſerved (as it was ſaid) in Reſpect of the Quantity of the Gold or Silver in the Copper, Tin, or Lead, for they are as much as to ſay, be the Quantity of the Gold or Silver great or ſmall. And the Reſervation of the tenth Part of the Copper, Tin, and Lead, in which any Gold or Silver might be found, is to be noted, for thereby it may be ſeen that the King had not only the Gold and Silver, but alſo the baſe Metal, and the Poſſeſſor of the Soil had nothing of it, *quia magis dignum trahit ad ſe minus dignum*, as it is ſaid before, and the Poſſeſſor of the valuable Thing ſhall be alſo the Poſſeſſor of the baſe Thing.

And divers other Charters of the ſame King *Henry* 6. were alſo alledged to the ſame Purpoſe. As one which appears in 33. *H.* 6. *Rot.* 23. made to *Alvared Cornborough* whereby he was conſtituted Comptroller *omnium minerarum ſuarum, in quibus aliquod metallum, in quo aliquid auri vel argenti habetur, continetur, ſeu aliquo modo haberi ſeu finari poterit in comitatu Cornubiæ.* Anno 33. H. 6.

Anno 34. H. 6. And another was alledged which appears in 34 *H.* 6. *Rot.* 24. by which the ſame King *Henry* 6. *commiſit et conceſſit duci Eborum omnes et ſingulas mineras auri et argenti, et quorumcunque aliorum metallorum aurum vel argentum in ſe continentium in comitatibus Devon. et Cornub. Habendum ad placitum regis pro termino viginti et unius annorum, &c.* with Clauſe that he ſhall not dig *ſubtus domos vel prata alicujus perſonæ, &c.* and with the Clauſe *quod inibi operari liberè valeat abſque impedimen'o præfati regis, &c. vel ligeorum ſuorum quorumcunque, ubi hujuſmodi mineræ infra comitatus prædictos inveniri contigerint:* with the Clauſe to make Proviſion within Liberties and without, except within the Fee of holy Church, as before; with Proviſion *ſi quis plus dare voluerit*, that the Duke ſhall give as much.

From which Charters and others of the ſame King alledged, the Counſel for the Queen inferred as before. Another Charter made by King *Edward* 4. was recited, which was in *Engliſh* in Manner following. *Somerſet and Glouceſter. Edward the fourth by his Letters patent dated at Weſtminſter the 30th Day of July in the ſecond Year of his Reign, granted unto Gallias de Luine, William Mariner, and Simon Spirt, and to every of them, full Power and Authority to ſearch, break Ground, and dig, and to make Mines within the Counties of Somerſet and Glouceſter, or in any Part of the ſaid Counties, or in what Ground, or in whoſe Ground that it be, as well within the Franchiſes as without, within the ſame Counties, where that they think that any Manner of Ore ſhould be of Lead, Tin, or Copper, that ſhould bear either Silver or Gold, or any may be had or fined out of it, for the Term of five Years next enſuing after the Date of theſe preſent Writings, unto the ſaid Term be fully accompliſhed. And the ſaid King willeth that the ſaid Gallias, William, and Simon accord and agree with the Parties that own the Soil where any ſuch Ground ſhould be broken and digged for the ſaid Mines, as Right ſhall require: Yielding unto the ſaid King and his Heirs every eighth Boll of Ore; that is to ſay, of Lead, Tin, and Copper in which any Gold or Silver is*; with a Clauſe to make Proviſion, and to make their Mills to fine and to melt in as many and any Places and Place where it is or ſhall be moſt expedient for them, as the Owner of the Ground and they can agree; and with a Clauſe to all Officers and Liege-men to aſſiſt them, *&c. Rotu'o Paten. 2. Ed. 4. in Turri London.*

Anno 2. Ed. 4.

By which Record the King took upon him to give Power to the three to dig in any Land whatever, or to whomſoever the Land belonged (which is as much as to ſay, whether it belong to the King, or to a Subject) where they thought there was any Manner of Ore of Lead, Tin, or Copper, which contained Silver or Gold, or where any might be had out of it. Which Words *(whoſe Ground ſoever it be)* and the other Words afterwards, *viz.* that they ſhould *agree with the Parties that owned the Soil which ſhould be dug up*, purport that they ſhould meddle with Mines in the Lands of others. And by the Reſervation of the Lead, Tin, and Copper in which any Gold or Silver was contained, it appears that the King apprehended he ought to have the whole baſe Metal, and not the Lord of the Soil. And the Agreement which is expreſſed to be made with the Lord of the Soil is but a Matter of Curteſy in the King, and not due of Right. And the Words (where *any* Gold or Silver may be had out of it) imply that be the Quantity of it ever ſo ſmall, yet the King ſhall have the whole baſe Metal.

Anno 8. Ed. 4. To the like Purpoſe another Charter of the ſame King was alledged in this Manner. *Anglia. Edwardus quartus per literas ſuas patentes, datas apud Weſtm. 20° die Decembris anno regni ſui 8° conceſſit Richardo comiti Warw. Johanni comiti Northumbr. et aliis, omnes mineras auri et argenti, cum omnibus rebus eaſdem tangentibus infra regnum ſuum Angliæ, a Trenta verſus partes boreales ubicunque inveniri poterint, ac etiam omnes mineras plumbi portantes, habentes, et continentes aurum vel argentum infra partes prædictas, concordantes tamen cum poſſeſſore ſoli ubicunque inveniri poterint infra partes illas: Habendum mineras prædictas per præfatos comites, et alios, et deputatos, et ſervientes ſuos, a feſto purificationis beatæ Mariæ virginis proximè futuro, uſque ad finem quadraginta annorum extunc proximè ſequentium et plenariè complendorum. Reddendo præfato Regi et hæredibus ſuis duodecimam partem puri et mundi auri et argenti, ac dominis ſoli ſive terræ, in qua mineræ illæ fodientur, decimam ſextam partem prout creſcunt; ac faciendo per ſe et deputatos ſuos omnimodos cuſtus et expenſas circa mineras prædictas durante termino prædicto ſupportanda et expendenda. Et quòd dicti comites et alii in omnibus locis infra partes prædictas per ſe, deputatos, et ſervientes ſuos eaſdem mineras liberè ſcrutari et foderè poſſint, et operari in eiſdem et earum qualibet abſque impedimento prædicti regis aut hæredum ſuorum, aut officiariorum ſeu miniſtrorum quorumcunque, ubicunque mineræ prædictæ infra partes prædictas inveniri poterint. Proviſo ſemper quòd prædicti comites, &c. non fodiant ſubtus domus ſive caſtra alicujus ligeorum præfati regis ad mineras prædictas ſcrutandas, abſque licentia domini ſoli.*

Which Charter is to the like Effect with the other, *viz.* that the King took upon him to grant Mines of Lead containing Gold or Silver, being in the Lands of others, and limited that the Patentees ſhould agree with the Owners of the Soil, who ſhould alſo have the 16th Part of the Gold or Silver, which is not due to them of Right, but given to them out of the King's Benevolence. Which Record, as well as all the others here before alledged for the Proof of this Point (which it is to be preſumed were made according to Law, and by great Advice) continuing in Succeſſion from one King's Reign to another, corroborate and fortify the Reaſon aforeſaid, *viz. quod omne magis dignum trahit ad ſe minus dignum*, and that the King ſhall have all the baſe Metal, be the Quantity of Gold or Silver in it ever ſo ſmall, and conſequently that the Queen ſhall have all the Ore in the principal Caſe.

Beſides theſe Matters divers Accounts were alledged, by which the Silver and the baſe Metal remaining from it were anſwered for to the King. One Account was made by *William Wimondham* of the Profits of Mines in the Counties of *Devon* and *Cornwal*, from the 12th Day of *Auguſt anno* 22. *Ed.* 1. unto the 23d Day of *September anno* 25. *Ed.* 1. by which the Profits of the Silver, and of the Lead remaining from it were anſwered for. Another Account was made by *William de Aulton* Clerk for the Profits of Mines, *viz.* as well of the Lead as of the Silver therein, in the Counties of *Devon* and *Cornwal*, from the 4th Day of *March anno* 26. *Ed.* 1. unto the 18th Day of *April anno* 27. *Ed.* 1. Alſo an Account was made by *Matthew Crawthorn* of the Silver, and of the Lead which remained from it, out of Mines in *Devon* and *Cornwal*, between the 2d and the 15th Years of King *Edward* 3. And *John Maneron*, who ſucceeded *Crawthorn*, rendered the like Account of Silver, and of the Lead remaining from it, from *Michaelmas anno* 19. *Ed.* 3. unto the 2d Day of *November anno* 23. *Ed.* 3. Another Account was alledged to be made of the Profits of Mines in the Counties of *Devon* and *Cornwal*, which were demiſed after the Act of Reſumption to *Adrian Sprinker* by *Robert Glover*, which *Robert* rendered an Account of the Silver, and of the Lead remaining from it. And divers others of the like Sort were alledged, which (although the ſame is not fully expreſſed in the Records) ſhall be intended of Mines as well in the Soil of Subjects as of the King, for they are generally of all Mines in the ſaid Counties, in which Generality ſuch Mines in the Soil of others are comprehended, becauſe the King ſhall have them, as it is ſaid before. Upon which Reaſons, Records, and Accounts they concluded that the King ſhall have all Mines and Ores bearing Gold or Silver and baſe Metal together, which are in the Soil of Subjects; and inaſmuch as the Information here ſpecifies that theſe Mines and Ores of Copper, which are in the Soil of the Earl, contain in them Gold or Silver, and it is not denied by the Anſwer, but fully confeſſed, the Counſel for the Queen prayed Judgment againſt the Earl.

And it was ſaid by ſome of them, that all Mines of Copper in the Lands of Subjects belong to the King, becauſe there is none of them free from Gold or Silver; and this is warranted (as it ſeemed to them) by the Precedents alledged under the firſt Point, which concern as well Mines of Copper as Mines of Gold or Silver. And upon the ſame Reaſon *Gerard* ſaid that Mines of Tin belong of Right to the King, becauſe there is no Mine of Tin without Silver. And therefore the Power which the Subjects of the King in the Counties of *Devon* and *Cornwal* have to dig in their own Land, and in the Land of others for Tin, and to have it to their own Uſe, is derived from Charters made to them by the Kings of this Realm, whereby ſuch Liberty has been given them. And hereupon he mentioned the Charter of King *Edward* 1. made to his Subjects of the County of *Cornwal*, bearing Date the 10th Day of *April* in the 33d Year of his Reign, which is confirmed by the Charter of King *Richard* 2. bearing Date the 8th Year of his Reign. And the Charter of King *Edward* 1. was as follows.

Vide 12. Co. 9. the case of Stannaries.

Edwardus Dei gratia, &c. ſalutem. Sciatis quòd nos ad emendationem ſtannariarum noſtrarum in comitatu Cornubiæ, et ad tranquillitatem et utilitatem ſtannatorum noſtrorum earundem, conceſſiſſe pro nobis et hæredibus noſtris, quod omnes ſtannatores prædicti operantes in ſtannariis illis quæ ſunt dominica noſtra, dum operantur in eiſdem ſtannariis, ſint liberi et quieti de placitis nativorum, et de omnibus placitis et querelis curiam noſtram et hæredum noſtrorum quoquo modo tangentibus. Ita quod non reſpondeant coram aliquibus juſticiariis vel miniſtris noſtris ſeu hæredum noſtrorum de aliquo placito ſeu querela infra prædictas ſtannarias emergentibus, niſi coram cuſtode noſtro ſtannariarum noſtrarum prædictarum qui pro tempore fuerit, (exceptis placitis terræ, vitæ, et membrorum) nec receaant ab operationibus ſuis per ſummonitionem alicujus miniſtrorum noſtrorum ſeu hæredum noſtrorum, niſi per ſummonitionem dicti cuſtodis noſtri: Et quòd quieti ſint de omnibus tallagiis, theoloniis, ſtallagiis, auxiliis, et aliis cuſtumis quibuſcunque in villis, portubus, feriis, et mercatis infra comitatum prædictum de bonis ſuis propriis. Conceſſimus etiam eiſdem ſtannatoribus, quòd fodere poſſint ſtannum, et turbas ad ſtannum fundendum, ubique in terris, moris, et vaſtis noſtris, et aliorum quorumcunque in comitatu prædicto, et aquas et curſus aquarum ad operationes ſtannariarum prædictarum divertere, ubi et quotiens opus fuerit, et emere buſcam et functuram ſtanni, ſicut antiquitus fieri conſuevit, ſine impedimento noſtri vel hæredum noſtrorum, epiſcoporum, abbatum, priorum, comitum, baronum, ſeu aliorum quorumcunque. Et quòd cuſtos noſter prædictus, vel ejus locum tenens teneat omnia placita inter ſtannatores prædictos emergentia, et etiam inter ipſos et alios forinſecos, de omnibus tranſgreſſionibus, querelis, et contractibus factis in locis in quibus operantur infra ſtannarias prædictas ſimiliter emergentia. Et quod idem cuſtos habeat plenam poteſtatem ad ſtannarios prædictos et alios forinſecos in hujuſmodi placitis juſticiand. et partibus juſticiam faciendum, prout juſtum et hactenus in ſtannariis illis fuerit uſitatum. Et ſi qui ſtannatorum prædictorum in aliquo deliquerint, per quod incarcerari debent, per cuſtodem prædictum arreſtentur, et in priſona noſtra de Leſtwithiel et non alibi cuſtodiantur et detineantur, quouſque ſecundum legem et conſuetudinem regni noſtri deliberentur. Et ſi aliqui ſtannatorum prædictorum ſuper aliquo facto infra curiam prædictam non tangente ſtannarias prædictas ſe poſuerint in inquiſitionem patriæ, una medietas juratorum inquiſitionis hujuſmodi ſit de ſtannatoribus prædictis, et alia medietas de forenſecis; ſi de facto totaliter tangente ſtannarias prædictas, fiant inquiſitiones ſicut hactenus fieri conſueverunt. Et ſi quis eorundem ſtannatorum fugitivus fuerit, vel utlagatus, vel aliquid delictum fecerit, pro quo catalla ſua amittere debeat, catalla illa per cuſtodem prædictum et coronatorem noſtrum comitatus prædicti apprecientur, et per ipſos proximis villatis liberentur ad reſpondendum inde nobis et hæredibus noſtris,

coram

coram juſticiariis itinerantibus in comitatu prædicto. Volumus inſuper et firmiter præcipimus, quod totum ſtannum tam album quam nigrum, ubicunque inventum et operatum fuerit in comitatu prædicto, ponderetur apud Leſtwithiel, Bodminian, Liſkiriel, Threnirn, vel Heleſton per pondera noſtra ad hoc ordinata et ſignata, ſub forisfactura totius ſtanni prædicti. Et quod totum illud ſtannum coignetur in eiſdem villis ſingulis coram cuſtode prædicto ante diem ſancti Michaelis in Septembri, ſub forisfactura prædicta. Et conceſſimus pro nobis et hæredibus noſtris, quod omnes ſtannatores noſtri prædicti totum ſtannum ſuum, ſi ſit ponderatum, licitè vendere poſſint cuicunque voluerint in villis prædictis, faciendo inde nobis et hæredibus noſtris coignagium et alias conſuetudines debitas et uſitatas, niſi nos vel hæredes noſtri ſtannum illud emere voluerimus.

So that the ſaid Clauſe in the above Charter, *quod fodere poſſint ſtannum, et turbas ad ſtannum fundendum, ubique in terris, moris, et vaſtis noſtris, et aliorum quorumcunque in comitatu prædicto, et aquas et curſus aquarum ad operationes ſtannariarum prædictarum divertere, ubi et quotiens opus fuerit,* gives them that Power which the King only had before by Prerogative, and which they had not before, *viz.* to dig for Tin in their own Lands, and in the Lands of others, and to dig for Turves in the Lands of others in order to melt the Tin, and to divert Water-courſes in the Lands of others. And by this Charter they might dig in the Meadows of others, and might pull down the Houſes of others, in Reſtraint whereof (he ſaid) the Act of Parliament was made in 50. *Ed.* 3. which recites the ſaid Charter, and explains the Words and Articles thereof, and the Senſe of them, and touching the ſaid Clauſe laſt recited Word by Word, the Words of the Act thereupon are, *It ſeems neceſſary in this Caſe that their Cuſtoms and Uſages be diligently enquired, and that the Warden of the Stannery be charged that he do not ſuffer any Work-man of the ſaid Stannery to dig in Meadows, nor to abate the Woods nor Houſes of others, nor to turn the Water nor the Courſe of Water by Malice.* And the like Charter was made by the ſame King *Edward* 1. bearing the ſame Date, to them of the County of *Devon*, and the like Act of Expoſition upon this Charter was alſo made the ſame *anno* 50 *Ed.* 3. which Words of the Acts reſtrained the Liberty which the Charter gave them as to thoſe Points. So that, he ſaid, by theſe Charters and Acts it is evident that their Power and Authority in *Cornwal* and *Devonſhire* to dig for and have Tin was derived from the Crown; and a certain Quantity of Tin is payable to the Crown for ſuch Liberty at this Day. And the Reaſon why the Subjects might not have the Tin before in their own Lands, was, becauſe in Tin there is Silver, which being the more worthy drew to it the leſs worthy, and ſo made the Crown which was the Proprietor of the Silver to be the Proprietor of the whole. And as the Crown has by way of Reſervation a certain Quantity and Profit of the Ore of Tin out of *Cornwal* and *Devonſhire*, as an Acknowledgment of the Benefit which they enjoy, ſo in ſome Places in the County of *Derby* the Crown has a certain Quantity of Lead upon Conſideration that there is Silver in it, and to abſtain from proceeding to the Rigour of the Prerogative. And he ſaid that there is a Difference in Mines of Lead, for ſome are fertile, that is, containing Gold or Silver, and ſome are barren, *viz.* without Gold or Silver. And *Wray* ſaid that in *Derbyſhire* and other Places where barren Mines of Lead have always been, and the Crown has never had any Profit of them, the Subjects may there preſcribe for it againſt the Crown, and the digging and taking the Lead without Payment is a Preſcription for the Country. And he ſaid that *Heſket* beforementioned held the Preſcription in ſuch Caſe good.

3 *E contra* for the Earl.

On the contrary *Shirborn*, *Bell*, and *Mead* argued to this ſecond Point on behalf of the Earl. And they ſaid that one Thing is affirmed by the Information, and that is, that the Ore and Mine in Queſtion is of Copper containing in it Gold or Silver, which is not denied by the Defendant, but fully confeſſed. [a] And if the Copper is of the greater Value, it ſeemed to them that the Queen ſhould have nothing, for the greater Value ſhall be preferred, and ſhall draw to it the leſſer. And hereupon they put the ſaid Caſe of a [b] Box and Charters, where the Heir ſhall have the Box ſealed along with the Charters; ſo that, they ſaid, this Caſe proves for them. And although Gold or Silver is more precious than Copper, yet if the Quantity of the Copper is ſo great that it exceeds the Value of the Gold or Silver, the Gold or Silver ſhall give Place to it; for the Thing of more Value ſhall be accounted more worthy, although the Thing of leſs Value is more precious, Quantity for Quantity. And foraſmuch as the Queen's Attorney has not ſhewn that the Gold and Silver in the Mine or in the Ores was of greater Value than the Copper, he has not ſhewn a ſufficient Title for the Queen. And *Bell* ſaid that at leaſt he ought to have ſhewn that the Gold or Silver was of greater Value, for, as it is, it does not appear to be of any Value above the Charge of getting it. For the Copper might contain in it Gold or Silver, and yet the Gold or Silver not counterballance the Charge of getting it, as for every 1000 *l.* Value of Copper, there might not be above 12 *d.* Value of Gold or Silver, or in 20 Yards Length in the Vein of Copper there might not be more than a Quilful of Gold or Silver, ſo that the Gold or Silver, which ſhould be had, would not pay the Charge of getting it. And if it be ſo, the Queen ought not to have it by Prerogative. And the Precedents which have been ſhewn, as well as the Law touching the Prerogative in this Point, ought to be underſtood with this reaſonable Limitation, *viz.* where the Gold or Silver which is in the baſe Metal exceeds the Value of the baſe Metal, or at leaſt is ſufficient to defray all the Expences of getting it. [c] For otherwiſe the Crown would have all the Mines of baſe Metal in the Realm, for (as I have been informed by thoſe who are experienced in the Art) there is no Mine of Tin, or Copper, or Lead, or Iron, but ſome Gold or Silver may be drawn out of it, the Value of which when gotten is not equal to that of the baſe Metal, or to the Expence of getting it, in which it would be very abſurd to affirm that the King

[a] Poſt 338, 339. by the Reporter.

[b] Ante 323 (c).

[c] Poſt 339. by the Reporter.

ſhall have the whole Mine. And yet the bare Words of the Information here, and of the Precedents recited, tend in ſuch Caſe to give the Mines to the Queen, for the Words are, that the baſe Metals contain in them, or bear or have in them, Gold or Silver. And ſome of the Precedents, *viz.* three in the Time of King *Henry* 6. and one in the Time of *Edward* 4. are of Mines of baſe Metal in which *aliquid auri vel argenti habetur*; ſo that it might be ſaid that an Ounce of Gold or Silver is within the Words of the Precedents. But, Sir, all Words admit of Senſe, and he that recites the Words, and knows not the Senſe, does not well underſtand the Effect of the Words, for the Life of Words conſiſts in the Senſe of them. And the Words, *aliquid auri vel argenti habetur*, are to be underſtood where there is ſuch a Quantity of Gold or Silver as will countervail the Charges of ſearching and digging, and all the neceſſary Expences that attend the getting of it. But if a Man ſhould be at the Charge of 5 *d.* to get Gold or Silver of the Value of 4 *d.* or if the baſe Metal which he ſhould conſume about the getting of Gold or Silver of the Value of 4 *d.* be worth 5 *d.* in theſe Caſes this *aliquid* is not *aliquid*, but this *aliquid* is *nihil*, and leſs than *nihil*, for *ex nihilo* a Man ſhall have nothing, and ſhall loſe nothing; but from this *aliquid* he ſhould have Loſs, which is not the Intent or Meaning of the Precedents, nor agreeable with the Reaſon of the Law in the above Maxim, *quod omne magis dignum trahit ad ſe minus dignum*, for this is to be underſtood where the more worthy Thing is of ſome Value, or of more Value than the Thing of leſs Worth, but it does not hold Place where the Thing is of no Value in itſelf. * And therefore where an Action of Waſt is given for Waſt done to the Diſheriſon, *&c.* yet it has been held that if the Waſt done is but of the Value of 2 *d.* the Plaintiff ſhall not have Judgment, for *de minimis non curat lex*, and this is not within the Words or Intent of the Act. And ſo in the ſaid Commiſſions or Leaſes of baſe Mines in which *aliquid auri vel argenti habetur*, the Intent of the King and of the Words are, where the Gold or Silver is worth more than the baſe Mine, or at leaſt is equivalent to the whole Charge of getting it, for otherwiſe it ſhall not deſtroy the Thing of greater Value. So that they are only to be taken in this Senſe, *viz.* where there is a great Plenty of Gold or Silver in the Mines. And this (he ſaid) manifeſtly appears by the ſaid Charter of King *Henry* 4. where upon his Demiſe made to *Darby* and *Darby de mineris plumbi quæ portant et habent de argento*, the King reſerved to himſelf *nonam libram de puro argento inde proveniente*, in which Caſe the King underſtood that there was a great Quantity of Silver in the Mines, inaſmuch as he did not reſerve any Part of the other Metal, and it is to be preſumed that he would make ſuch Reſervation as was moſt to his Advantage, and ſo he took the Silver to be the greater Profit. And the like Reſervation is in the ſaid Charter to *John Sollers*, and in the ſaid Charter made to the Earls of *Warwick* and *Northumberland*; and although ſome of the Charters reſerve the baſe Metal alſo, this is no Reaſon but that the Gold or Silver ſhall be intended of the greater Value, inaſmuch as the Gold or Silver itſelf is reſerved at the ſame time. So that the Intent of the ſaid Kings in the Words *aliquid auri vel argenti*, as alſo in the other Words *portantes et continentes aurum vel argentum*, are expounded by the other Charters. And he alledged many Caſes upon the Expoſition of the Words of Statutes, proving that the Effect of all Words reſts in a reaſonable Senſe and Conſtruction of them, and that in ſuch Senſe they ought always to be taken. And ſo (he ſaid) the Words in the ſaid Commiſſions and Demiſes made by the ſaid Kings import that the Gold or Silver in ſuch baſe Mines ſhould be of the greater Quantity, or at leaſt that it ſhould be of ſufficient Value to defray the Charges of getting it, excluſive of the baſe Metal, and that the Commiſſioners and Leſſees ought not to meddle with the baſe Mines in the Lands of Subjects, unleſs there be in them ſuch a ſuperior Quantity of Gold or Silver as is aforeſaid, but that they ſhould permit the Subjects, who were the Poſſeſſors of the Soil where ſuch Mines were, to enjoy them, and take the Ore in them as Parcel of their Soil and Freehold, and there is no Reaſon nor Precedent to the contrary.

And it is the Office of you, who are the Judges in this Caſe, to conſider where it is that the Matter reſts, which is to be known by the Information and the Anſwer. And the Information ſeems to be inſufficient, for an Information for the King is the King's Declaration, which ought to contain Certainty, ſo that the Party may perfectly know what he is to anſwer to, and the Court upon what they are to give Judgment. And by the Information and the Anſwer it is here diſcloſed and confeſſed that the Earl has taken ſix hundred thouſand Pounds Weight of Copper-ore containing in it Gold or Silver, which was found and dug up in his own Land, that is to ſay, five hundred thouſand Pounds Weight in a Mine opened after the Earl became Lord of the Soil, and one hundred thouſand Pounds Weight in a Mine in his Soil opened before he was Lord of the Soil; and it does not appear that the Gold or Silver in ſuch Ore was of greater Value than the Copper, or at leaſt that it was of any Value above the Charge of getting it, or above the baſe Metal, that is, the Copper conſumed in the getting of it; and if it be not, then the Act of the Earl is lawful, and if it be of greater Value, then the Act of the Earl is unlawful, if the Queen has a Prerogative in the Point. And inaſmuch as it is incertain whether it is the one Way or the other, the Court does not know how to adjudge upon it; and in order to make it certain, the Queen's Attorney ought to have ſhewn the whole Matter in the Information, *viz.* that the Land belonged to the Earl, and that the Gold or Silver was of greater Value than the Copper, or at leaſt of greater Value than the Copper conſumed, and the Expences laid out about the getting of it, in which Caſe the Queen ſhould have had it. And inaſmuch as it is not ſo averred, no Title is ſhewn for the Queen, for which Reaſon Judgment ought to be given againſt the Queen.

And he ſaid that the Commiſſions and Precedents are not of great Eſtimation or Weight, for they were made at the Requeſt of thoſe who ſued to the Kings for them with an Intent to gain by them. And although the People ſubmitted to them, this is rather to be aſcribed to the Obe-

* H. 9. H. 6. 66. b. *Per Babing.* H. 38 Ed. 3. 7. b. Bro. Waſt 74. 2 Inſt. 306. 2 Finch 29. And Bracton fo. 316. § 12. ſays, Waſt is not injurious, *ſi ita modicum ſit, propter quod non ſit inquiſitio facienda*, as in the Caſe of *Peyjure* T. 15 H. 3. But many petit Waſts ſeem to come within the Intention of the Law, M. 14. H. 4. 11, 12. Fitz. Waſt 64. Bro. 70. Co. Litt. 54. a.

dience of the Subjects, than to be made Uſe of as a Teſtimony of the Law; and the more ſo, becauſe in a great Number of ſuch Commiſſions or Leaſes it was limited that an Agreement ſhould be made with the Owners of the Soil, which being done, took away from the Subjects all Occaſions of Law-ſuits, or of enquiring after the Law in ſuch Caſe, for they reaped an Advantage as well as the King and his Patentees. And he denied that the Power of having Tin, and of digging for it by them of the County of *Cornwal*, commenced by the Charter before recited, for they uſed that Power a long Time before, as appears by theſe Words in the Charter, *ad emendationem ſtannariarum noſtrarum, et utilitatem ſtannatorum noſtrorum earundem*, and by other Words therein, as well as by theſe Words in the Act, *that their Cuſtoms and Uſages ſhall be enquired*, and by divers other Words, which prove that there was a Uſage and Cuſtom in theſe Points before, and that the Charter was only a Confirmation of their Uſages, and a further Grant of divers Liberties and Things for their Direction. And although the King has ſome Profit of Tin or of Lead in ſome Places as a Toll-diſh of Ore, or the like, this is not in Reſpect of any Intereſt which the King had in the Thing itſelf, but it is to bear the Charge of the Officers, as Comptrollers, Triers, and ſuch like, conſtituted by him for the Direction of the Stanners and Labourers. So he has ſome Profit of Merchants upon the like Reaſon, for he appoints Officers, as Searchers, Comptrollers, and ſuch like, for their neceſſary Direction, and in Conſideration thereof he has ſome Part of their Merchandize for the ſearching, Comptrollment, weighing, *&c.* and not in reſpect of any Property which he has in their Merchandize. Wherefore for the Reaſons and Cauſes aforeſaid, it ſeemed to him and to the others that Judgment ſhould be given for the Earl and againſt the Queen. And many other Things were ſaid on this Part.

3 Point. For the Earl. Whether the King's Grant *de gratia ſua ſpeciali, certa ſcientia, et mero motu ſuis* ſhall paſs Mines wherein the King has a Prerogative.

As to the third Point, it was ſaid by the Counſel for the Earl, that ſuppoſing the Law to be that Mines of Copper in the Lands of Subjects belong to the Queen by Prerogative, yet here theſe Mines and Ores in Queſtion ſhall paſs to the Earl by the ſaid Letters-patent of King *Philip* and Queen *Mary*. For as to the firſt Plea, they took it that the Vein, out of which the ſaid five hundred thouſand Pounds Weight of Copper were dug, could not be called a Mine at the Time of the Date of the Patent made to the Earl, nor ſhould paſs by the Name of *Mines*, becauſe then the Vein was cloſe, and not open, and therefore ſuch Vein and the Ore in it ſhall paſs by the Grant of the Soil, as a Thing Parcel of the Soil, and not by the Word *(Mines.)* And in the ſecond Plea, they took it that the Vein and the Ore ſhall paſs by the Words *(omnes et ſingulas mineras, &c.)* becauſe the Vein was open, in which Caſe it might bear the Name of a Mine. Which Words *(omnes et ſingulas mineras)* are to be well obſerved, for, as it ſeemed to them, they are Words of great Extent, and this Word *(ſingulas)* coming after *(omnes)* admits of no Exception, be the Mine of Gold, Silver, or mixed, for they granted all Mines, and every ſingular Mine. And therefore in both Points it cannot be ſuppoſed that the King and Queen were miſconuſant of the Veins and Ores, and eſpecially of that which was open. And if they ſhould be taken to be miſconuſant of the Vein and Ore which was cloſe, and not open, yet it cannot be taken that their Intent was to retain it, but that every Word ſhall be conſtrued favourably for the Patentee, and moſt ſtrongly againſt them, becauſe the Patent is granted by the King and Queen *de gratia ſua ſpeciali, ac ex certa ſcientia, et ex mero motu ſuis.* Which Words [a] *(de gratia ſua ſpeciali)* ſhew the great Favour and Bounty of the King and Queen to the Patentee, [b] *(ex certa ſcientia)* imply a full Knowledge and underſtanding of the Matter, [c] and *(ex mero motu)* teſtify that there was not any Suit nor Suggeſtion of the Patentee, but that the firſt Motion, and all that followed from it to the Perfection of the Patent, proceeded from the King and Queen themſelves, ſo that the Patent ſhall be extended moſt largely for the Benefit of the Patentee. And therefore if it ſhould be ſaid here on Behalf of the Queen, that when they granted the Land, they did not know that ſuch Vein of Ore was in it, or that when they granted *omnes et ſingulas mineras*, they did not know that Gold or Silver was in the Mines, Sir, they themſelves have teſtified the contrary, in that they have ſaid *ex certa ſcientia, &c.* which is as much as to ſay, they have Knowledge of every Thing material; and how have they teſtified it? Under the Great Seal of *England*, which is the Teſtimony of Truth, and whoſe Credit cannot be impugned. So that if any one will contradict this, and ſay that the King and Queen were ignorant that there was any Gold or Silver in the Land and Mines, what elſe does he but contradict the King and Queen in a Point of Credit? [d] And in 43. *Ed.* 3. *Thorp* ſaid that if a Manor to which an Advowſon is appendant be in the Hands of the King by Eſcheat, or Purchaſe, and the King at this Day gives the Manor to a Man as entirely as ſuch a one held it before it came into our Hands by Way of Eſcheat, or as ſuch a one held it who enfeoffed us, the Advowſon ſhall paſs without ſaying *cum feodis et advocationibus*, and the Reaſon is, becauſe the Law preſumes in ſuch Caſe that the King is appriſed of his Right, *quod Curia ibi conceſſit.* And if it ſhall be ſo ſaid in this Caſe, where it is only taken by Implication that the King is appriſed of his Right, *a fortiore* ſhall it be ſo taken in our Caſe, where the King ſays ſo in expreſs Words. And if any one ſhould ſay that the Words ſhall be conſtrued moſt ſtrictly againſt the Patentee, and moſt liberally for the King and Queen, Sir, this Patent was made by them *de gratia ſua ſpeciali*, by which Words they expreſs their Favour and Bounty to the Patentee, and ſignify that they ſhall be favourably interpreted, and taken moſt largely for his Benefit and Advantage, and moſt ſtrictly againſt themſelves. And if it ſhould be ſaid that the Patentee gave Information to the King and Queen, and made Suit to have the Grant, and therefore every word ſhall be taken moſt ſtrongly againſt him, Sir, the King and Queen have teſtified the contrary, for they have ſaid that the Grant is made *ex mero motu ſuo*, whereby they had a Mind that this Deed of their meer Motion ſhould have an ample Conſtruction. And to prove that Patents of the Kings of this Realm, which have the ſaid Words *de gratia ſpeciali, certa ſcien-*

[a] 10 Co. 113. a. 3 Leon. 249.

[b] 10 Co. 312. b. 3 Leon. 249. Poſt 502. Vin. Abr. tit. Prerogative E. c. 3.

[c] 10 Co. 112. b. 3 Leon. 249.

[d] T. 43. Ed. 3. 22. Fitz. Grants 46. Bro. Patents 6. in fine.

ſcientia, et mero motu, or any of them, ſhall be taken as it is ſaid above, [a] the Opinion of *Huſſey* in 9. *H.* 7. was cited by *Mead* and *Bell*, where he ſays that if the King recites a Grant made by his Predeceſſor, and ſays *ex certa ſcientia, et mero motu*, and ratifies it, he ſhall be concluded to ſay that no ſuch Grant was made; for, he ſays, there is a great Difference between a Patent which is *ex certa ſcientia*, and recites a former Grant, and confirms it, and where the King recites that ſuch a one is ſeized *ut informamur*, whoſe Eſtate he confirms and ratifies, for there he ſhall not be concluded, but ſhall be received to ſay that no ſuch Grant was precedent; but where he recites a former Grant, and ſays *ex certa ſcientia*, and confirms it, and further ſays *damus et concedimus* the ſame Franchiſe, there the Patent ſhall enure as a Confirmation, for the King and the Party are concluded to ſay that ſuch former Grant was not made, and therefore the *damus et concedimus* are void. So that by the Opinion of *Huſſey* we ſee that where the King ſays *ex certa ſcientia*, he is concluded to deny it, and is eſtopped to plead Ignorance of it. [b] And, *Shirborn* ſaid, it appears in 1. *H.* 7. that the King *ex mero motu et certa ſcientia pardonavit A. B. omnia debita et compotus, &c.* by the Name of *A. B.* only, and the ſame *A. B.* as Sheriff, was then indebted to the King, and this Pardon was allowed in Diſcharge of ſuch Debt due by him as Sheriff, notwithſtanding that he was not named Sheriff, and that ſuch Debt was not mentioned in the Pardon; and the Reaſon was, becauſe the Juſtices held the Law to be, that where the King *ex certa ſcientia, et mero motu*, pardons any one by his proper Name for all Debts, Accounts, *&c.* ſuch Pardon ſhall be taken generally; but where he makes a Pardon to any upon an untrue Suggeſtion, or by Reaſon of his Office, ſuch Pardon ſhall be taken ſtrictly, and acording to the Letter only. From whence we ſee that where the King does a Thing *ex certa ſcientia*, he ſhall not afterwards aid himſelf by Plea of Ignorance, and where it is *ex certa ſcientia et mero motu*, it ſhall be taken beneficially for the Party, and ſtrongly againſt the King. [c] Alſo he cited the Caſe in 3. *H.* 7. where the King wrote to the Prior of *Norwich* to admit his Preſentee to a Corody which *Gilbert Baniſter* late had, and the Prior returned that the Priory was of the Foundation of the Biſhop of *Norwich*, and not of the Kings Progenitors, and that one *R.* and other Perſons had obtained a Corody at the Requeſt of divers Kings, and ſo had the ſaid *Baniſter* at the Requeſt of King *Edward* 4. and he returned the Letters patent of the ſame King *Edward*, reciting *prout ex lamentabili inſinuatione prioris recitanda totam materiam, ut ſupra, idem rex ob devotionem quam habuit ad Sanctam Trinitatem, ac causâ præmiſſorum, ac pro quadam pecuniæ ſummâ ei ſolutâ, de gratia ſua ſpeciali, ex certa ſcientia, et mero motu ſuis relaxavit eidem priori, &c. et exoneravit de corodio, &c.* And amongſt other Exceptions taken to this Return, one was, for that he had not returned all the Names of thoſe who had had Corodies, and by what Kings, but he only returned that other Perſons had obtained a Corody, *ut ſupra*, and inaſmuch as the Certainty is not expreſſed, and it is upon Suggeſtion, and ſo the King is not fully informed, it was ſaid that the King was deceived, and his Charter ſhould be void; [d] as if three Kings uſurp Preſentations, and the King reciting one of the Uſurpations grants and reſtores the Patronage to him upon whom the Uſurpation was made, the Charter is void, as it ſhould be upon a Petition; ſo, it was ſaid, it ſhould be in the Caſe there: But the Charter was adjudged good, and the Prior was diſcharged by Judgment, as appears in the Roll which is in [e] *M.* 3. *H.* 7. *Roll* 10. but ſo much does not appear in the Book itſelf, as the Counſel ſaid; and the Reaſon of the Judgment, he ſaid, was, becauſe the Charter was *ex certa ſcientia, &c.* in which Caſe the King ſhall not ſay that he was deceived or ignorant. And thus we ſee of what Effect ſuch Charters are, although they are made by Suggeſtion of the Party, as that was, for the Words are that the King knew *ex lamentabili inſinuatione prioris*; and therefore where Suggeſtion is made, and *ex certa ſcientia* is in the Patent, the King is nevertheleſs excluded from aiding himſelf by Ignorance or other Matter. [f] And, he ſaid, it appears in 21. *Ed.* 4. that King *Richard* 2. *de gratia ſua ſpeciali* had granted to the Abbot of *Waltham*, that he and his Succeſſors ſhould be diſcharged of the Collection of Tithe, when any Tithe ſhould be granted to the King *per clerum Angliæ*, and the Province of *Canterbury* only in their Convocation granted a Tithe to the King, and the Queſtion was, if the Succeſſor of the Abbot ſhould be diſcharged from the Collection of it, (the Grant being *de gratia ſua ſpeciali, ut ſupra*) inaſmuch as the Tithe was not granted by the whole Clergy, but by one Province only, which is but a Part of the Clergy, and there it ſeemed to all the Juſtices that the Charter was good, and that the Abbot ſhould be diſcharged. From whence it appears how favourably a Charter granted *ex gratia ſpeciali* ſhall be taken and expounded. [g] And to this Purpoſe he alledged *Quatermain*'s Caſe in 36 & 37 *H.* 6. where it appears that *Quatermains* Sheriff of the County of *Oxford* had returned upon an Exigent, *quarto exactus*, where in Fact the Party was outlawed, as it afterwards appeared to the Court by the Certificate of the Coroners, after which the King, of his ſpecial Grace and meer Motion, pardoned him for all Miſpriſions, Offences, Contempts, and Deceits, and it was there debated whether or no this Pardon was ſufficient to diſcharge him of the Amercement for the falſe Return, inaſmuch as it is a great Offence, and the Words there are obſcure, and don't expreſs the Offence certainly; and it was held by all the Juſtices, that the Pardon was good, and ſhould diſcharge him of the Amercement. For it was there held, that in a ſpecial Pardon the Party ought to have expreſs Words, and not obſcure Words, for the King ought to be fully certified of the Matter; [h] and ſuch Pardon ſhall be conſtrued moſt to the Advantage of the King, and to the Diſadvantage of the Party, becauſe ſuch Suit comes only from the Party: But ſo was it not there, for the Charter came from the King himſelf of his own ſpecial Grace without Suit, and *ex mero motu ſuo*, and ſuch Pardon ſhall be taken moſt beneficially for the Party, becauſe the Law preſumes that the King is appriſed of the Matter as much as if it was by expreſs Words. And ſo is the Diverſity there taken, *quod Markham et alii Juſticiarii ibi conceſſerunt*. From whence it appears how greatly ſuch Words benefit the Party. [i] And he alſo alledged the Caſe in 41 *Aſſ.* where the King by his Charter of Licence granted *de gratia ſua ſpeciali* to one *S.* who was ſeized of a Houſe, that

[a] T. 9. H. 7. 2. a. Fitz. Eſtoppel 84 Bro. Patents 80. Kitch. 303 Vin. Abr. tit. Prerogative E. c. 3. pl. 2.

[b] H. 1. H. 7. 13. a. Bro. Charter de Pardon 36. Patents 42. Releaſes 40. M. 2. R. 3. 7. pl. 12. Dy. 269. pl. 19. 1 Co. 45. b. 49. a. Gouldſb. 11. Kitch. 303.

[c] P. 3. H. 7. 6. b. 1 Co. 51. b. 52. a.

[d] Bro. Petition 21.

[e] 1 Co. 52. a.

[f] M. 21. Ed. 4. 44. b. Fitz. Grants 29. Bro. Exemption 9. Patents 71. 1 Co. 4 c. a. 8 Co. 56. a. Moor 165. 3 Keb. 234.

[g] Anno 36. H. 6. 24. b. P. 37. H. 6. 21. Fitz. Charter 22. Bro. 25. Patents 24. 1 Co. 45. b. 5 Co. 43. b. 1 And. 94. 1 Finch 90. 2 Finch 101.

[h] Hardr. 186. Latch 22.

[i] 41 Aſſ. pl. 19. Fitz. Grant 2. Bro. Patents 38. Alienation 31. Dy. 269. pl. 19. 1 Co. 45. b. See Poſt 3 : 4 (k).

that he might give it in Mortmain to an Abbot, which *S.* accordingly did ſo, and the Houſe was held of the King in Free-burgage, and whether this Charter was ſufficient, inaſmuch as it did not recite the Tenure of the King, was the Queſtion; and becauſe the Charter was made *de gratia ſpeciali* of the King, it was adjudged to be ſufficient; for which Reaſon the Abbot, out of whoſe Seizin the Houſe was taken, had Reſtitution. Whereby it appears how beneficially the King's Charters ſhall be taken for the Party, where theſe Words *(de gratia ſpeciali)* are in them, inſomuch that in a Matter of Incertainty they ſhall operate to the Benefit of the Party, and to the Detriment of the King. And many other Caſes were put on this Point by thoſe who were of Counſel for the Earl. And *Shirborn* ſaid, where the King and Queen have here granted to the Earl *omnes et ſingulas mineras*, if he ſhall not have this Mine here, he ſhall take nothing by theſe Words, for baſe Mines he ſhall † have by the Grant of the Soil; and therefore if theſe Mines belonged to the Crown they ought to paſs, or elſe the Words will be void, which is a hard Expoſition. From whence the Counſel on this Part concluded, that inaſmuch as the King and Queen have here in the one Caſe granted to the Earl the Land in which the Ore was, and in the other Caſe the Mine, by the Name of all and ſingular Mines, and theſe Grants are *de gratia ſua ſpeciali, ac certa ſcientia, et mero motu ſuis*; by which Words the King and Queen took upon them the preciſe Knowledge of the Certainty and Quality of the Ore, and intended that the Charter ſhould be taken favourably for the Earl, and moſt ſtrongly againſt themſelves, for theſe Reaſons it ſeemed to them that the Ores ſhould paſs to the Earl; and eſpecially ſeeing that the Patent was made before the Statute of 4th & 5th of the Reign of the ſame King and Queen, made concerning their Letters-patent, by which all their Letters-patent are made good, notwithſtanding the Want of the true Name of the Natures, Kinds, and Sorts of the Hereditaments contained in ſuch Letters-patent. So that although the Nature of the Mine or Land is not expreſſed, *viz.* that it contains Ore of Copper mixt with Gold or Silver, yet this Defect is redreſſed and made good by the ſaid Act, and alſo the Act is, that the Letters-patent ſhall be expounded, conſtrued, deemed, and adjudged moſt beneficially for the Patentees, which Clauſe alſo aids the Earl; and hereupon they prayed Judgment for the Earl.

† In the Original it is (n'avera) *ſhall not have*; but that is evidently an Error of the Preſs. See Poſt 335 (e).

E contra for the Queen.

On the contrary it was argued by the Counſel for the Queen touching this Point, who ſaid that as to the ſeveral Grants alledged in the ſeveral Bars, they are in two Degrees, and therefore two Things are to be conſidered in them. Firſt, whether or no by the Grant of the Soil in which the Ore was, being made *ex gratia ſpeciali, certa ſcientia, et mero motu*, the Ore of Copper containing in it Gold or Silver (the Vein whereof was not open but cloſe) ſhall paſs to the Patentee. Secondly, whether or no by the Grant of all Mines, with the Words aboveſaid, this Mine of Copper containing Gold or Silver ſhall paſs to the Patentee.

And it ſeemed to them that they ſhall not paſs in the one Caſe or in the other. For as to the firſt, it is to be obſerved that in the Ore, which was in the Soil, there was not Copper only, for if it had been ſo, or if it had been any other baſe Metal, as Tin, Lead, or Iron free from Gold or Silver, it ſhould clearly have paſſed to the Patentee by the Grant of the Soil, inaſmuch as the Vein was cloſe and not open. But here it is Copper mixed with Gold or Silver, which Mixture of the Copper with a Thing of more Value, *viz.* with Gold or Silver, which are Metals royal, makes the whole Ore, being an entire Thing, to become royal, and to be the Property of him to whom the Thing of greater Value belongs, which is, to the King. And this royal Metal is given to him by Reaſon of his Dignity-royal, and is appropriated to the Crown by Prerogative, ſo that the King ſhall have it in his own Land, and in the Land of others in one ſame Degree, for he has it not in his own Land in Reſpect that he is the Poſſeſſor of the Land, but in Reſpect that he is the Poſſeſſor of the Crown, and in that Reſpect he has it alike in his own Soil, and in the Soil of others. So that his own Soil is not the Cauſe of his having ſuch Ore which is therein, but the Prerogative of his Crown; from whence it follows, that if he aliens the Soil, he does not * thereby alien this Point of the Prerogative of his Crown in his Soil, no more than in the Caſe (as *Gerard* put it) where Treaſure is hid in his Land, and he gives the Land to another in Fee, he does not thereby give the Treaſure hid, but when it is found, the King ſhall have it as Treaſure-trove, for this is a Point of Prerogative, which is not given in the Gift of the Land. So for the ſame Reaſon *(Onſlow* ſaid) Waif, Eſtray, Wreck, and the like, which belong to the Crown, ſhall not paſs by a Gift of the Land in Fee, becauſe theſe Things are collateral to the Land. [c] And upon this Ground *Wray* ſaid that if a Manor, which is within a Foreſt of the King, as *Waltham*, eſcheats to the King, who gives this Manor to another in Fee, he has not in the Gift of the Manor given him the Liberty which he had in the Manor touching the Foreſt, for nevertheleſs it is within the Foreſt, and Subject to the Paſture of Deer and Wild-beaſts of the Foreſt, and he cannot cut his Woods there without the Licence of the Juſtice of the Foreſt, for this is a Thing collateral to the Soil. So that by the Gift of the Soil, a Thing collateral to the Soil, as Matters of Prerogative or Liberties are, ſhall not paſs. And if the King's Tenant, who holds in capite, dies, having a Wife, and after Office found the Heir has Livery, in which the Clauſe (of ſaving to the Wife her Dower to be aſſigned by the King) is not contained, yet, *Onſlow* ſaid, the King may aſſign Dower to the Wife, for this belongs to his Prerogative; ſo that though he has diſcharged himſelf of the Land, yet he has not diſcharged himſelf of Things of Prerogative in the Land. And upon this Ground he put the Caſe in 31. *Ed.* 3. which was relied upon as a leading Caſe by all the other Counſel for the Queen that argued after him, and he cited it to this Effect: [d] An Advowſon deſcended to three Coparceners, whereof the youngeſt was within Age, and in Ward of the King, and the King by his Letters-patent granted to Queen *Philippa* his Wife the Wardſhip and Marriage of the youngeſt, and the Fees and Advowſons which belonged to the Wardſhip, and afterwards Partition was made in the Chancery, whereby the firſt Turn

was

*Hill. 29. Geo. 2. B. R. *Tucker v. the Duke of Beauford, Per Moreton, arguendo*, where the Crown transfers its Property to a Subject, it does not at the ſame time transfer any Prerogative belonging to it, for it gives no more than the bare Eſtate it hath. So *note* that nothing of Prerogative can paſs without expreſs and determinate Words, with which agrees Hob. 243. Davis 57. b. Lit. R. 116. Noy 175.

[c] S. P. 43 Aſſ. pl. 10. *Per Thorp* C. J. Bro Extinguiſhment 32. Dy. 268. pl. 18. Bridgm. 26. Palm. 60. Manw. Foreſt Laws 156, 375.

[d] T. 31. Ed. 3. Fitz. Quare Impedit 1. 2 Rol. Abr. 344. pl. 9. Litt. R. 116. Gouldſb. 17.

was aſſigned to the eldeſt, the ſecond to the middle, and the third to the youngeſt, who was the Ward within Age, with a Saving to the King of his Prerogative, the Queen granted over to the Earl of *Arundel* the Ward and all that the King had granted to her, who granted it over to the eldeſt Coparcener, the Advowſon became void, and the eldeſt Coparcener preſented, and the King brought a *Scire facias* upon the ſaid Partition in Nature of a *Quare Impedit*, and by Award he had a Writ to the Biſhop: [a] For before Partition made, if the Coparceners cannot agree, the eldeſt ſhall have the Preſentment, becauſe it is a Thing entire, in which Caſe the eldeſt ſhall have the firſt Preſentment by Prerogative of her Age, and the middle the ſecond, and the third the third Preſentment: [b] But when the third is in Ward of the King, he by his Prerogative ſhall have the Preſentment which the eldeſt and the middle ought to have, becauſe it is a Thing entire, and his Prerogative ſhall take away the Prerogative of the eldeſt and of the middle Coparcener alſo; and when it comes to the third which is in Ward, he ſhall preſent in Right of the third, for this belongs to him of Right, and therefore the King needs not to have a Prerogative for the third Preſentment: And this third Preſentment the Patentee, that is to ſay, Queen *Philippa*, ought to have, which is all that belongs to the Ward, and all that the King had in Reſpect of the Ward: So that the Eſtate which he had in the Advowſon by the Ward paſſed by the Patent; but yet ſuch Right as he had in it under the Title of his Crown by Prerogative ſhall not paſs without expreſs Words thereof. And thus we ſee that the Eſtate which the King has in ſome Poſſeſſions, which he came to by the like Means that others come to them, is one Thing, and the Eſtate which he has in them in Right of his Crown by Prerogative is another Thing, and a Grant of the one is not a Grant of the other. So to come to our principal Caſe, where the King comes to the Land by Purchaſe or other Acquiſition, as other Men do, and beſides that has in it ſome Benefit or Commodity in Right of his Crown, as Ore of Copper containing in it Gold or Silver, there by the Grant of the Land that which he has by Prerogative ſhall not paſs from him, for they are two ſeveral Things, and in ſeveral Degrees. [c] And therefore the Patentee ought to have apt Words to make the one and the other paſs to him, for it is not included in the Grant of the Land that the King intended to paſs the Vein of Metal Royal in it, which is annexed to the Crown, and which he has not in Reſpect of the Land. [d] And true it is that where the Patent is made *ex gratia ſpeciali*, *certa ſcientia*, *et mero motu*, it ſhall be taken favourably for the Patentee: But, Sir, that is to be underſtood with Regard to a Thing expreſſed in the Patent, and which is ſhewn by the Words to be intended to paſs; but it ſhall not make another Thing to paſs, which is not expreſſed nor ſhewn by the Words to be intended. [e] For if the King grants and intends one Thing to paſs, theſe Words cannot make two Things to paſs, viz. that which is expreſſed, and others not expreſſed. And that is the Caſe here. [f] And upon this *Wray* ſaid, it appears that the Priory of *Wenlock* was one of the Priories of the King's Foundation, and yet we ſee that the King preſumed to meddle with a Mine of Copper mixt with Gold and Silver therein, by which it is to be intended that altho' an Anceſtor of the King had given the Land to the Prior with large and ample Words (as they uſed to do to Houſes of Religion), yet the Royal Ore in it, which was not open but cloſe, did not paſs to the Prior.

[a] M. 13. Ed. 1. B. Rot. 3. 17 Ed. 3. 30. 37. b. M. 21. Ed. 3. 37. b. 38. Bro. Preſentation 19. P. 31. H. 6. 4. b. *per Priſot.* Kelw. 1. a. Dy. 55. pl. 6. F. N. B. 34. u. Bro. Preſentation 53. Dr. & Stud. lib. 2. cap. 30. Expoſitiones Vocabulorum 87. Co. Litt. 166. b. 186. b. 2 Rol. Abr. 346. G. pl. 1.

[b] 2 Rol. Abr. 343. pl. 7.

[c] Hob. 243. Davis 17. a. 7. b. Litt. R. 116. 1 Co. 46. b. Jenk. 277. pl. 99.

[d] 1 Co. 46. b. 4 Co. 35. a. 6 Co. 56. a.

[e] 2 Sid. 81.

[f] Vide F. N. B. 232.

And as to the Grant ſpecified in the ſecond Plea, viz, *de omnibus et ſingulis mineris*, this ſhall not make the Mine here to paſs. For it is to be obſerved that there are two Kinds of Mines, viz. Mines Royal, and baſe Mines. [g] Mines Royal are thoſe which conſiſt of Gold or Silver, or of baſe Metals containing Gold or Silver alſo. Baſe Mines are thoſe which conſiſt only of baſe Metals, or baſe Subſtances, as Copper, Tin, Lead, Iron, or Coals, not having in them Gold or Silver. Then here foraſmuch as the King and Queen have granted to the Earl all and ſingular Mines which were parcel of the Poſſeſſions of *Henry* late Earl of *Northumberland*, and there are two Sorts of Mines, the one Royal, annexed to the Crown, the other baſe, not annexed to the Crown, but poſſeſſed in Reſpect of the Land, or by Grant, or by Preſcription, or by other Means out of another's Soil, [h] the baſe Mines only ſhall be comprehended and intended in the Word *(Mines)*, and not the Royal Mines, which ſhall not be taken to be granted. For Words uſed by the King, which contain Things Royal and Things of a baſe Nature, ſhall in Favour of the King be taken in ſuch Senſe as ſerves beſt for the King, and as is agreeable with Order and Convenience, for when the Words ſtand indifferently, and may be conſtrued one Way or other, that which is moſt convenient ſhall be taken, and it is moſt convenient that Things appropriated to the Crown and to the Prerogative Royal ſhould tarry with the Crown, and not be ſevered from it without ſpecial Words, and that Words in Patents to Subjects ſhall make ſuch Things to paſs as are proper for and ſuitable to Subjects. So that Words which ſerve indifferently one Conſtruction as well as another ſhall be taken in their fitteſt Senſe; and here it is not to be preſumed that the King and Queen, who granted to the Patentee all Mines which were parcel of the Poſſeſſions of *Henry* late Earl of *Northumberland*, meant or intended that any Mine Royal, which belonged to the Crown, was parcel of his Poſſeſſions, but that ſuch Mines as were proper and uſual for Subjects to have, were parcel of his Poſſeſſions, and ſuch were intended, and no other. And therefore the Words *(omnes et ſingulas mineras)* ſhall convey to the Earl now Defendant baſe Mines only. And to prove that Words in the King's Patents, which comprehend Things annexed to the Crown, or to the Prerogative Royal, or Things of great Importance, and alſo Things of a baſe Nature, ſhall be taken and conſtrued to convey the baſe Things only to the Patentees, *Onſlow* put the Caſe in 22. *Aſs.* [i] where the King had granted to the Maſter of *St. Leonard*, *omnia catalla tenentium ſuorum felonum qualitercunque damnatorum*, and it was adjudged that thereby he ſhould not have the Goods of one of his Tenants who was attainted *de morte Adæ Walton nuncii domini Regis miſſi in mandatum ejus exequendum*, for altho' the Fact was Felony, the Offender was alſo a Traitor, which is higher than a Felon; ſo that the general Charter

[g] Vide Lit. R. 113.

[h] Litt. R. 114, 116. Palm. 60. Noy 175. 1 Co. 46. b. Jenk. 277. pl. 99. Davis 17. a. 57. b. 1 Show. 483. 4 Bac. Abr. 163, 204, 213.

[i] 22 Aſs. pl. 69. Fitz. Grants 72. Bro. Forfeit. 31. Patents 32. Noy 175. Lit. R. 114. Dy. 268. pl. 18. 2 Rol. Abr. 194. D. pl. 1. Hardr. 442.

Charter could only be intended of common Felonies, for which Reaſon he ought to have had ſpecial Words in it. [a] And there it is put, that if the King grants to a Man Return of all Manner of Writs, yet he ſhall not have Return of Summons of the Exchequer, for this touches the King himſelf, and is not between Party and Party. [b] And there it is alſo put, that if the King grants to me the Iſſues, Profits, Fines, and Amercements of my Tenants, and one who holds of me and of another is amerced, in this Caſe I ſhall not have the Amercement, becauſe he is another Perſon's Tenant as well as mine. So that the King's Charters ſhall be taken only to a common Intent, and other Things which are not within ſuch common Intent ſhall not paſs by them from the King. [c] And upon this Point he put the Caſe in 3. *Ed.* 3. *in Itin. North.* where it was preſented that a Bridge was broken down, whereby the Paſſage of the People was interrupted, and that an Abbot Lord of the Town had always uſed to repair it, upon which the Abbot being put to Anſwer ſaid, that King *Henry*, &c. by his Charter had granted to the Predeceſſor of the Abbot, that he and his Succeſſors ſhould be always quit of the Repairs of Bridges, Cauſways, and Walls, which ſame Charter was confirmed by King *Henry* the Grandfather of the King which then was, and that it was allowed in a *Quo Warranto*, wherein it was awarded that he ſhould go quit, and therefore he demanded Judgment, &c. And to this the Juſtices there ſaid, that this Clauſe which ſpeaks that they ſhall be quit of the Repairs of Bridges and Cauſways, &c. is a general Clauſe, which cannot acquit the Abbot but only of making Contribution to the Days-works, and would ſerve well enough where the King has granted to a Town Murage, Pannage, or Pontage; but here he is charged by a ſpecial Cauſe, wherefore it was ſaid to him that he ought to anſwer, whereupon he traverſed the Preſcription. By which notable Caſe (he ſaid) it appears that the Words in the King's Charter, that he ſhould be quit of Repairs of Bridges, would not diſcharge him from repairing the Bridge there, altho' it was within the Words of the Charter, becauſe it was not the common Intent of the Words. And thus we ſee that a ſpecial Matter appertaining to the Crown, as that was to take Care that the People have their free Paſſage, is not diſcharged by general Words, which are ſufficient [d] only to diſcharge a general Thing, but a ſpecial Matter requires ſpecial Words to diſcharge it. [e] So (he ſaid) it ſeems by 9. *H.* 6. that if the King grants Lands in Fee with Warranty, the Patentee ſhall not recover in Value by this Warranty, if he has not preciſe Words in the Charter expreſſing that he ſhall have in Value; for every Warranty may have two Effects, the one to rebut, which it ſhall do there, and the other to recover in Value, but that it ſhall not do in the Caſe of the King without preciſe Words. [f] And he ſaid that in the Earl of *Northumberland*'s Caſe in 2. *H.* 7. it is held that if the King grants to a Man all Fines and Amercements in ſuch a County, yet if the Sheriff, Coroner, or other great Officer is amerced for a Miſdemeanor, the Patentee ſhall not have ſuch Amercements, for theſe are called Amercements Royal, and it is there ſaid that the Grant ſhall enure to the Grantee for Things of common Intendment, and the King ſhall have the Things ſpecial. [g] And he alſo alledged the Caſe in 43. *Aſs.* where the King had granted to his eldeſt Son the Dutchy of *Cornwal*, *cum omnibus ad eum ſpectantibus*, *ſimiliter cum wardis*, *maritagiis*, *&c. et ſimiliter alibi extra Comitatum prædictum*, *non obſtante prærogativa Regis*; and one who held of the Dutchy by Knights-ſervice, and who held alſo of one that was in Ward of the King *per cauſe de gard* by Knights-ſervice, died, his Heir within Age; and it was adjudged that the Prince ſhould not have the Wardſhip of him, but the King, for it is there ſaid that the Anceſtor held alſo of another, who by a Mean held of the King as of the Dutchy; and the Charter does not make Mention that in ſuch ſpecial Caſe the Prince ſhall have the Ward, and the King cannot and ought not by ſuch general Grant to be ouſted of that which belongs to him in Right of his Crown, without expreſs Mention of the King's Right be made in the Charter. [h] From which Judgment (he ſaid) and from the Reaſon there given, we ſee that general Words in the King's Charter ſhall only enure to a general Intent, and ſhall not take away from the King a ſpecial Right which belongs to his Crown, but for ſuch Matter the Patentee ought to have ſpecial Words. So if the King makes a County-palatine, and grants it to another, with *jura regalia*, and that all Pleas within the County ſhall be there determined, yet he himſelf ſhall ſue in his own Court here at *Weſtminſter* his Actions which ariſe in the County-palatine; for the general Words will not exclude the King from ſuing in his own Court, but the Patentee ought to have ſpecial Words to that Purpoſe. [i] *And note that ſuch Caſe appears in* 5. Ed. 2. *where the King ſued a* Quare Impedit *in the Common Bench for an Advowſon in the County-palatine of* Durham, *and the Defendant pleaded to the Juriſdiction of the Court, and was put to anſwer over.* So that (he ſaid) general Words ſhall enure to a general Intent, and ſhall not convey from the Crown any ſpecial Matter which belongs to the Crown by Prerogative, as that does to ſue in what Court the King pleaſes. And theſe Caſes were confirmed by the reſt of the Counſel for the Queen that argued after him. * And to the like Purpoſe *Gerard* cited the Caſe in 33 *Ed.* 3. where the King had granted to an Abbot that he might amortiſe Lands or Tenements to the Value of 100 s. and he purchaſed an Advowſon which was held of the King *in capite*, and yet by *Ad quod damnum* it was found to be held of another, and at the next Avoidance the King brought a *Quare Impedit*, and it was there held, that if it be holden of the King *in capite*, the Grant was not a ſufficient Grant to purchaſe; and therefore Iſſue was there taken, whether the Advowſon, at the Time of the Purchaſe, was held of the King *in capite*, or not. So that by this Licenſe Things of the Value of 100 s. which were holden of another than of the King were intended. From whence it appears that Words in the King's Grants ſhall be conſtrued to a common Intent, and ſhall not make a Thing to paſs which belongs ſpecially to the Crown, tho' it is within the Words. And *Wray* affirmed this Caſe, and ſaid that it differs from the Caſe in [k] 41. *Aſs.* cited on the other Part, for there the King's Charter named the Houſe, in which Caſe it could

[a] Bro. Patents 32.

[b] Bro. Jointenants 68. M. 2 R. 3 4. b. Bro. Grants 146. M. 2. H. 7, 7. a. Bro. Patents 109. Lit. R. 114. 2 Sid. 81. 2 Rol. Abr. 193. B. pl. 1. Jenk. 103.

[c] 3 Ed. 3. *Itin. North.* Fitz. Aſſize 445. 12 Co. 30. See Poſt 487 (d).

[d] Vin. Abr. tit. Grants H. 13. pl. 34.

[e] H. 9 H. 6. 56. b. Fitz. Prerog. 1. Bro. Garranty 3. Recov. in Value 22. Ante 243 (r).

[f] M. 2. H. 7. 7. a. *per Fineux et Huſſey.* Fitz. Grants 33. Bro. Patents 109. T. 9. H. 6. 28. Lit. R. 114. Dy. 269. pl. 18. *per Saunders* Ch. B. 2 Rol. Abr. 196 pl. 7. Jenk. 103. 2 Rol. R. 278. 1 Show. 482, 483.

[g] 43 Aſs. pl. 15. Bro. Gard. 83. Patents 39. Dy. 268. pl. 18. 2 Rol. Abr. 195. E. pl. 5.

[h] M. 8. H. 4. 2. a. 2 Rol. Abr. 194. C. pl. 1. Hob. 2 3. Davis 57. b. Lit. R. 116. 1 Co. 46. b.

Nota bene.

[i] H. 5. Ed. 2. Fitz. Quare Impedit 165 Bro. Cinque Ports 21.

[*] M. 33. Ed 3. Fitz. Grant 102.

[k] Ante 331 (i).

could not be taken that he was miſconuſant of the Tenure; but in this laſt Caſe the Patent is general, viz. that he might amortiſe Lands or Tenements to the Value of 100 s. without naming what Lands or Tenements, and ſo (he ſaid) is the Diverſity, and he did not aſcribe it to the Clauſe *de gratia ſpeciali* in the one Caſe or in the other. [a] And to the ſame Purpoſe he cited the Caſe in 19. *Ed.* 3. in a *Quare Impedit*, where the King gave Licenſe to a Prior to appropriate an Advowſon, who accordingly did ſo, and the Advowſon was held of the King, and for this Cauſe the King claimed it, and brought a *Quare Impedit*, and it ſeems by the Book that the Charter, which did not recite the Tenure, was not a ſufficient Warrant to appropriate the Advowſon, wherefore the Prior traverſed that it was not held of the King. So that Words in the King's Charter don't exclude the King from any ſpecial Advantage, without expreſs Mention thereof.

[a] P. 19. Ed. 3. Fitz. Grant 58. Dy. 268, 269. pl. 18. 10 Co. 110. a. 2 Rol. R. 275, 360. Litt. R. 114. Godb. 222. Lane 110. Poſt 499 (c).

Note here that in this Caſe the Advowſon was named, as the Houſe was in 41 Aſs. *and* quære *if the Diverſity between the Caſes is not by Reaſon of the Clauſe* de gratia ſpeciali, *which is in the one Caſe, and not in the other.*

Nota bene

[b] And to the like Effect he cited the Caſe of the Sanctuary of *Culnham* in 1. *H.* 7. where the Words in the King's Charter made to the Abbot of *Abbington* were, *ut inhabitatores ejus nullius regis aut miniſtrorum ſuorum, epiſcopive, aut ſuorum officialium jugo inde deprimerentur, ſed in cunctis rebus, eventibus, et diſcuſſionibus cauſarum, Abbatis monaſterii prædicti decreto ſubjicerentur*, which were not ſufficient to make a Sanctuary for Treaſon, but ſhould be taken to a common Intent, and not to take away from the Crown a Thing of ſo high a Nature, and which is ſo nearly annexed to the Crown, without expreſs Words thereof in the Charter. Wherefore the Counſel on this Part concluded, that from theſe Caſes it is manifeſt that Words in the King's Charters ſhall enure to a common Intent, and ſhall not deveſt out of the King Things of a high Degree, or Things which are annexed to the Crown in Point of Prerogative. From whence it follows that the Word *(Mines)* here will be ſufficient to convey baſe Mines, but not Mines Royal which belong to the King by Prerogative; and the Words *de gratia ſpeciali, certa ſcientia, et mero motu* will not make other Things to paſs, which are not comprehended in the Nature of the Words, but for ſuch Things, and no others, as are within the Meaning of them, the Words will make them to be largely and favourably conſtrued and extended to the Benefit of the Party. [c] And *Gerard* ſaid that about 24. *H.* 8. a Caſe came in Queſtion concerning the Manor of *Bowerhall* in *Eſſex*, which the King, *de gratia ſpeciali, certa ſcientia, et mero motu ſuis*, had given to one and to his Heirs Males; and it was the Opinion of the Juſtices, that no Eſtate of Inheritance paſſed to the Patentee by thoſe Words, for they will not make an Eſtate-tail, nor a [d] Fee-ſimple in the Caſe of the King, notwithſtanding they are *ex gratia ſpeciali, certa ſcientia, &c.* for his Intent was that it ſhould not go to the Heirs Females of the Patentee, and he cannot make a new Courſe of Inheritance, and *(certa ſcientia)* will not conclude him from ſaying that it was no ſuch Courſe of Inheritance as he intended. And as to what *Shirborn* [e] has ſaid, that if the Earl ſhould not have the Mines Royal, he ſhould take nothing by the Word *(Mines)*, for that baſe Mines ſhall paſs by the Grant of the Land; Sir, what then? they are Words of Surpluſage as to Mines in the ſame Land, as the Words are of granting Wards, Marriages, and Eſcheats, which are frequently put in Patents; or elſe if they be not Words of Surpluſage, they may take Effect for Mines which *Henry* the late Earl had in the Lands of others. And as to the Statute of 4 & 5 *Philip* and *Mary*, *Barham* ſaid, true it is that the Act makes the Letters-patent good, notwithſtanding the Want of the true Name of the Natures, Kinds, and Sorts of the Hereditaments; but how ſhall they be good? Sir, the Act ſays, according to the Tenor of the ſame Letters-patent. And true it is that the Act ſays that the Letters-patent ſhall be expounded, conſtrued, deemed, and adjudged moſt beneficially for the Patentees; but, Sir, how? the Act ſays afterwards, according to the Words and Purport of the Letters-patent. So that the Tenor, Words, and Purport of the Letters-patent are the Rule and Guide to be obſerved for the Nature of the Things, and for the beneficial Conſtruction of the Patent towards the Patentee. And then, he ſaid, if in the Word *(Land)* in the one Caſe the Royal Ore is not granted, and in the Word *(Mines)* in the other Caſe the Mine Royal is not granted, but the baſe Ore and the baſe Mines are only granted, the Act does not extend but to the Nature of the baſe Ore and of the baſe Mines which are granted, and as to them it ſhall be beneficially expounded for the Advantage of the Patentee, and that is, according to the Tenor, Words, and Purport of the Letters-patent; and by this Conſtruction the Intent and Effect of the Statute is ſatisfied, but not by conſtruing the Ores and Mines Royal to paſs, for that would be contrary to the Tenor and Purport of the Patent. So that the Matter reſts upon the Expoſition of the Words, as well as if it had been before the Act, and the Words are to be conſtrued *ut ſupra*, whereupon he and the other Counſel on the ſame Side prayed Judgment for the Queen.

[b] P. 1 H. 7. 23. 26. Fitz. Corone 49. Bro. Sanctuary 18.

[c] M. 18. H. 8. Bro. Eſtates 84. Patents 104. B. N. C. § 5. 1 Co. 43. b. 46. a. 49. a. Davis 43. a. 2 And. 156. Moor 416. Hob. 224. 1 Bulſt. 10, 222. 1 Rol. R. 459. 1 Brownl. 45. 2 Brownl. 334. 1 Rol. Abr. 860. pl. 2. Gouldſb. 20. Lit. R. 6. Co. Litt. 27. a. 1 Finch 91. 2 Finch 101, 102. Curſon 14.

[d] *E contra* in Caſe of a common Perſon, 18. Aſs. pl. 5. *per Thorp* ſaid to be ſo adjudged in Parliament in *Multon's* Caſe. Bro. Eſtates 33. 8 Co. 21. b. Lit. R. 6. 1 Bulſt. 222. Crompt. J. C. 21. b.

[e] Ante 332 (b).

And in this Argument ſome of them on this Part affirmed that this Mine, being a Mine Royal, could not be granted nor ſevered from the Crown even by expreſs Words, for it is an Incident inſeparable to the Crown, as Eſcheats for Treaſon are; which the Counſel for the Earl denied. For, they ſaid, as this Mine might be leaſed or demiſed to another rendering Rent, as the Precedents ſhew us, ſo might it be demiſed or granted without Rent, becauſe it is but a Profit or Revenue of the Crown. And Things which are more nearly annexed to the Prerogative of the King, and to the Perſon of the King, than this is, may be granted to another, as *Mead* ſaid. [f] For if the King impeaches any one for Felony, as for Robbery, or the Death of a Man, and the Party is arraigned upon an Indictment at the King's Suit, he ſhall not wage Battle againſt the King, for in ſuch Caſes Battle ought to be waged in proper Perſon, and not by Champion, and it would be very dangerous for the King if the Law ſhould force him to wage Battle in proper

[f] S. P. C. 180. b. Fleta lib. 1. cap. 34. § 25. 2 Finch 423. 2 Hawk. P. C. 427, § 5. Vin. Abr. tit. Trial K. 4. pl. 5.

† P. 20. Ed. 3. Fitz. Corone 125. M. 2. Ed. 3. Fitz. Ibid. 157. S. P. C. 180. c. 2 Hawk. P. C. 427, § 6.

Perſon with every Felon whom he impeaches and puts to anſwer, wherefore the Law does not admit it, but the King by Prerogative ſhall ouſt him of Battle, and the King may grant ſuch Prerogative to another, † as appears in 20. *Ed.* 3. where the King granted to the Citizens of *London* that none ſhould wage Battle againſt them in an Appeal, and there it ſeems that the Grant is good. So that the King may convey a Point of his Prerogative from his own Perſon to that of another. So if a Man takes the King's Goods wrongfully, the King may take or ſeize the Party's Goods until he has made Reſtitution, as it is the common Courſe in the Exchequer, * and the King may grant ſuch Power to another, as appears by 8. *R.* 2. where the King had granted to the Town of *Lynn*, that they ſhould be quit of Toll throughout the Realm, and alſo granted by the ſame Charter, that if any took Toll of them contrary to the ſame Charter, they might take *Withernam* for the ſame at another Time within their Juriſdiction; by Force whereof they juſtified, in Replevin, the taking in lieu of *Withernam* the Goods of a Merchant of *Newcaſtle upon Tyne*, which were brought within their Juriſdiction, for that they of *Newcaſtle upon Tyne* had taken Goods for Toll of divers Merchants of *Lynn*, and the Goods ſo taken at *Lynn* they detained in lieu of *Witherham*, becauſe they of *Newcaſtle upon Tyne* would not deliver the other Goods; and as it ſeems by the Book the taking is good and juſtifiable. And if the Law be ſo that the King may grant to another a Point of his Prerogative in theſe Caſes, *a fortiore* he might in our Caſe, where the Thing is but a Revenue or Profit.

* H. 8. R. 2. Fitz. Grant 105.

Hill. Term 10 Eliz. Curia.

And after theſe Arguments made at the Bar, all the Juſtices and Barons aſſembled ſeveral Times the ſame Term to confer together upon the Matter. And then they took Reſpite further until *Hillary* Term then next following, in which Term they aſſembled twice, and at laſt they gave their ſeveral Opinions, and the Cauſe thereof, at which I was not preſent, for there were none preſent but themſelves and the Counſel who had argued for the Queen. And (as I was informed by ſeveral of them who were there) their Reſolution was as follows.

3 [a] Vin. Abr. tit. Prerogative K. a. pl. 15.

But ſee 2. H. 7. 19.

First, all the Juſtices and Barons agreed, [a] that by the Law all Mines of Gold and Silver within the Realm, whether they be in the Lands of the Queen, or of Subjects, belong to the Queen by Prerogative, with Liberty to dig and carry away the Ores thereof, and with other ſuch Incidents thereto as are neceſſary to be uſed for the getting of the Ore.

[b] Vin. Abr. tit. Prerogative K. a. pl. 16. Crompt. J. C. 111. b. 1 Finch 146. 2 Finch 132.

[b] Alſo *Harper*, *Southcote*, and *Weſton* Juſtices agreed, that if Gold or Silver be in Ores or Mines of Copper, Tin, Lead, or other baſe Metal in the Soil of Subjects, as well the Gold and Silver as the baſe Metal entirely belongs of Right to the Subject who is the Proprietor of the Soil, if the Gold or Silver does not exceed the Value of the baſe Metal; but if the Value of the Gold or Silver exceeds the Value of the Copper or other baſe Metal, then it was their Opinion that the Crown ſhould have as well the baſe Metal as the Gold or Silver; and in ſuch Caſe it ſhall be called a Mine Royal, and otherwiſe not; but if the baſe Metal exceeds the Value of the Gold or Silver, then it draws the Property of the whole to the Proprietor of the Land. But they three agreed, that foraſmuch as the Information ſets forth that the Ore and Mine of Copper contained in it Gold or Silver, and the Defendant has not denied it, but has fully confeſſed it, thereby it ſhall be taken that the Gold or Silver were of the greater Value, for the beſt ſhall be intended for the Queen; and therefore they aſſented with all the other Juſtices and Barons, that Judgment ſhould be given againſt the Earl, and for the Queen. But all the other Juſtices and Barons of the Exchequer unanimouſly agreed, [c] that if the Gold or Silver in the baſe Metal in the Land of a Subject be of leſs Value than the baſe Metal is, as well the baſe Metal as the Gold or Silver in it belong by Prerogative to the Crown, with Liberty to dig for it, and to put it upon the Land of the Subject, and to carry it away from thence; and in ſuch Caſe it ſhall be called a [d] Mine Royal, for the Records don't make any Diſtinction herein, but they are general, and prove that all Ores or Mines of Copper or other baſe Metal containing or bearing Gold or Silver belong to the King. And where *Weſton* ſaid, that there is a Text in the Civil Law to this Effect, viz. that by the Negligence or Poverty of the Proprietor of the Soil *poſſunt fodi omnia metalla in alieno ſolo, invito domino, quia utile eſt reipublicæ, et aliter non*; to this *Saunders* Chief Baron ſaid, [e] that the ſame Law ſays, *quòd optima legum interpres eſt conſuetudo*, and here there is *conſuetudo*, for the Precedents and the Accounts prove that from Time to Time it has been a Cuſtom and Uſage, that the Kings of this Realm have had the Profit of ſuch Mines of baſe Metal containing or bearing Gold or Silver, without any Diſtinction with Regard to the Value of the Gold or Silver, be the ſame greater or leſs than the baſe Metal. Wherefore he and all the others (except the three above mentioned) took it that the whole Ore and Mine belonged to the Queen, altho' the baſe Metal be of the greater Value. And here it is confeſſed by the Defendant that the Ore and Mine of Copper contains in it Gold or Silver, ſo that it agrees with the Precedents. And therefore as well the other three as all the reſt unanimouſly agreed that Judgment ſhould be given for the Queen upon this Plea, altho' they differed in the Matter itſelf, and in the Reaſons of the Judgment, as it is ſhewn before.

[c] But ſee Poſt 338, 339, the Reporter ſeems to doubt this, and gives ſtrong Reaſons to the contrary. See 4 Bac. Abr. 162, 163.

[d] But now by the Statute of 1 *W. & M. cap.* 30, no ſuch Mine ſhall be called a Mine Royal.

• Kitch. 474.

[f] Vin. Abr. tit. Prerogative K. a. pl. 17. See Poſt 339 (d), where the Reporter cites Authorities to prove that there is no ſuch Mine as this in the Realm, for there is naturally ſome Portion of Gold or Silver Ore in every baſe Metal, and therefore that this Point of the Reſolution is vain, and proceeds from the Want of knowing the Nature of baſe Mines.

[f] Alſo they all agreed, that if the Ore or Mine in the Soil of a Subject be of Copper, Tin, Lead, or Iron, in which there is no Gold or Silver, in this Caſe the Proprietor of the Soil ſhall have the Ore or Mine, and not the Crown by Prerogative, for in ſuch barren baſe Metal no Prerogative is given to the Crown.

3 [g] Vin. Abr. tit. Prerogative K. a. pl. 18.

[g] Alſo they all agreed, that a Mine Royal, whether of baſe Metal containing Gold or Silver, or of pure Gold and Silver only, may by the Grant of the King be ſever'd from the Crown, and be granted to another, for it is not an Incident inſeparable to the Crown, but may be ſevered from it by apt and preciſe Words.

But

But all the Juſtices and Barons (except the ſaid three Juſtices, and they alſo, if ſo be theſe Ores and Mines in Queſtion ſhall be called Royal) unanimouſly agreed that the Ores in the firſt Plea ſpecified ſhall not paſs to the Earl by the Grant of the *Land*, nor the Mine in the ſecond Plea ſpecified, by the Grant of the *Mines*, although the Patent be *de gratiâ ſpeciali, certa ſcientia, et mero motu*, [a] but the Words *(Land)* and *(Mines)* ſhall be taken to common Intent, and ſhall not make the Ores-royal nor the Mines-royal to paſs, to convey which there ought to be in the Patent preciſe Words expreſſing them. And the Act of 4 & 5 *Philip* and *Mary* will not avail the Earl in this Caſe, becauſe the Tenor, Words, or Purport of the Charter don't extend to a Mine-royal. But the Lord *Dyer* Chief Juſtice of the Common Bench ſaid, [b] that if the Queen has a Mine-royal in the Soil of *J. S.* and ſhe *ex gratia ſpeciali, certa ſcientia, et mero motu ſuis*, grants to a Stranger all Mines which ſhe has in the Land of *J. S.* by this Grant the Mine-royal ſhall paſs, for elſe the Words would be void and without Effect, becauſe ſhe cannot have a baſe Mine in the Soil of another; and therefore when ſhe ſays *ex certa ſcientia*, and recites that it is in the Soil of another, ſhe ſhall not be taken to be miſconuſant of the Thing, for which Reaſon it ſhall paſs. But it is not ſo here, for the King and Queen might intend to make baſe Mines paſs, ſo that the Words may be ſatisfied in that Intent.

[a] 1 Co. 46. b. Davis 17. a. 57. b. Litt. R. 114, 116. Palm. 60. Noy 175. Jenk. 277. pl. 99. 1 Show. 483, 4 Bac. Abr. 163, 204, 213.

[b] S. P. Jenk. 277. pl. 99. Vin. Abr. tit. Prerogative E. c. 3. pl. 3.

And the Lord *Dyer* ſaid in this Caſe, that although the Vein or Ore mentioned in the firſt Plea was not open, but cloſe, at the Time of the Date of the Patent, yet it might be termed a Mine, *quia de mineris aliquæ ſunt occultæ, et aliquæ apertæ*, and that which is not open may be called a Mine, in his Opinion. And Baron *Frevil* held, that if there is a Vein of Copper in the Mine without Mixture of Gold, and in digging further there is a Vein of Gold with little or no other Metal in it, in this Caſe it ſhall be called a Mine of Copper and Gold, and not a Mine of Copper only, although in the firſt Vein there was nothing elſe but Copper.

And *Mead* took Exception to the Information, becauſe it was not ſhewn in what Town or Hamlet *Newlands* lay; ſo that if the Defendant had pleaded not-guilty, it was uncertain from whence the Viſne ſhould come. But all the Juſtices and Barons agreed that the Information was good, becauſe it is but in Effect for a Treſpaſs, for which the Queen ſhall recover only Damages; and here there is no Iſſue to be tried, inaſmuch as there is a Demurrer in Law, [c] in which Caſe it is not ſo neceſſary as it ſhould have been if Iſſue had been joined triable *per pais*. But if it had been in an Action real, there it ought to have been ſhewn in what Town or Place the Land was, for otherwiſe the Sheriff could not know where to put the Party in Seizin if he recovered; whereas here there is no ſuch Cauſe, but Damages only are recoverable for the Offence, for which Reaſon the Exception was diſallowed.

[c] S. P. 3 Leon. 173.

And *note* that by the Queen's Command a Copy of the Patent made to the Earl was delivered to the Juſtices, in order to ſee if there was any Thing more in it than was in the Pleading, which would make the Ores and Mines paſs or not to the Earl; for ſhe was deſirous to be fully appriſed of the Intereſt in the Ores and Mines. And the Charter was in this Form; *ſciatis quod nos tam pro meliore et ampliore ſuſtentatione et manutentione ſtatus, et dignitatis, et gradus, ad quem nuper vocavimus et elegimus præcharissimum conſanguineum noſtrum Thomam Percy comitem Northumbriæ, quam pro bono et ſtrenuo ſervitio, quod ſperavimus præfatus comes et poſteritas ſua nobis, hæredibus, et ſucceſſoribus noſtris facient, prout anteceſſores ſui progenitoribus noſtris regibus Angliæ antehac multipliciter fecerint, et ad humilem petitionem ejuſdem comitis, de gratia noſtra ſpeciali, ac certa ſcientia, et mero motu noſtris dedimus et conceſſimus, &c.* And it was the Opinion of *Catline* Chief Juſtice of *England*, [d] that the Words *(ad humilem petitionem ejuſdem comitis)* diminiſh the Force of the Words *(de gratia ſpeciali, ac ex certa ſcientia, et mero motu)* for the Charter ſhall not be taken to proceed purely from the King's Grace, and ſo to be conſtrued moſt ſtrongly againſt the King, and moſt favourably for the Patentee, unleſs it is meerly of the King's own Motion, without Suit of the Party; whereas the Words *(ad humilem petitionem ejuſdem comitis)* ſhew that the Suit of the Earl was one of the Cauſes of making the Patent, in which Caſe the Patent is not ſo effectual to make the Ores and the Mine paſs as by the Pleading it is confeſſed to be. And afterwards in the ſaid *Hillary* Term 10 *Elizabeth* Judgment was given for the Queen, and againſt the Earl, as follows.

[d] Vin. Abr. tit. Prerogative E. c. 3. pl. 4.

The reſt of the Record.

And becauſe the Barons here not yet, *&c.* Day is given here to the aforeſaid *Thomas* Earl of *Northumberland*, in the ſame State in which it now is, until the Octave of *St. Hillary*, that the ſame Barons here in the mean time may further adviſe themſelves touching the Premiſſes, and may deliberate thereupon with the Juſtices of both Benches. And thereupon it is agreed between the Barons here as well by the Aſſent of the ſaid Attorney of the Lady the Queen, as of the ſaid Attorney of the aforeſaid Earl, and of the Counſellors learned in the Law of the ſame Earl, that ſome Perſons learned in the Law as well of the Counſel and Behalf of the ſaid Lady the Queen, as of the Counſel and Behalf of the aforeſaid Earl, be in the mean time publickly heard to argue, touching the aforeſaid Matter in Law and other the Premiſſes, in the Chamber of this Exchequer commonly called the *Exchequer-Chamber* before the ſame Barons aſſiſted by the ſame Juſtices of both Benches. Afterwards in the mean Time between the aforeſaid Octave of *St. Michael* and the aforeſaid Octave of *St. Hillary viz.* in the aforeſaid Term of *St. Michael*, as well the Serjeants of the ſaid Lady the Queen at Law, and the Attorney and Solicitor General of the ſaid Lady the Queen, on Behalf of the ſaid Lady the Queen, as three learned in the Law being of the Counſel of the aforeſaid Earl in the Premiſſes on Behalf of the aforeſaid Earl, five ſeveral Days in the ſaid *Exchequer-Chamber*, before the Barons of this Exchequer aſſiſted then there by the aforeſaid Juſtices of both Benches, were openly and ſeverally heard to argue at large, and

ſummarily, and what they could or would ſay thereupon on both Sides concerning the aforeſaid Matter in Law and the reſt of the Premiſſes (the Record aforeſaid being then there read over and recited.) Which ſame Serjeants of the Lady the Queen at Law, and the aforeſaid Attorney and Solicitor of the ſaid Lady the Queen, in and upon certain Arguments on Behalf of the ſaid Lady the Queen to prove and maintain her Prerogative aforeſaid in the ſaid Information ſpecified, produced, laid open, and ſhewed before the aforeſaid Juſtices and Barons, among other Things, divers and many Records of Commiſſions, Accounts, Demiſes, and other Precedents of this Exchequer aforeſaid, manifeſtly and ſtrongly declaring, proving, and maintaining the Prerogative of the Lady the Queen to have ſuch Mines and Metals by Reaſon of her ſame Prerogative in Manner and Form aforeſaid. And at the aforeſaid Octave of *St. Hillary* the aforeſaid *Thomas* Earl of *Northumberland* came here by the aforeſaid *Thomas Fanſhaw* his Attorney aforeſaid: And becauſe the aforeſaid Barons here will further adviſe themſelves touching the Premiſſes, that in the mean time they may deliberate further upon the Premiſſes with the aforeſaid Juſtices before they give Judgment thereon, Day is given here to the aforeſaid *Thomas* Earl or *Northumberland*, in the ſame State in which it now is, until the Octave of the *Purification* of the bleſſed Virgin *Mary* next coming. At which Day the aforeſaid *Thomas* Earl of *Northumberland* came here by the aforeſaid *Thomas Fanſhaw* his Attorney abovenamed. And the Premiſſes being ſeen and underſtood by the Barons here, and mature Deliberation amongſt them being thereupon had, becauſe it ſeems to the ſame Barons that the aforeſaid Pleas by the aforeſaid *Thomas* Earl of *Northumberland* in Manner and Form aforeſaid above pleaded, and each of them, and the Matter therein contained, as to the aforeſaid Interruption and Diſturbance of the aforeſaid *Thomas Thurland* and *Daniel Howſeter*, and other the aforeſaid Labourers in the Mines and Ores aforeſaid, as well from and in the making and continuing the Search and digging aforeſaid of the Lands and Mines for the Ore and Metal aforeſaid belonging to the ſaid Lady the Queen by Reaſon of her royal Prerogative in Manner and Form in the aforeſaid Information ſpecified, within the aforeſaid Waſt-lands called *Newlands* in the aforeſaid Information ſpecified, as from and in the aforeſaid taking and carrying away of the aforeſaid ſix hundred thouſand Pounds Weight of Ore and Metal of Copper aforeſaid there in Form aforeſaid dug up and laid upon the Land, are inſufficient in Law to diſcharge the ſame Earl from the aforeſaid Contempts and Treſpaſſes, or any of them, by him of for and in the ſame Interruption and Diſturbance in Form aforeſaid done and perpetrated; it is conſidered by the ſame Barons that the aforeſaid *Thomas* Earl of *Northumberland* be convicted of the aforeſaid Contempts and Treſpaſſes by him of for and in the aforeſaid Interruption and Diſturbance of the aforeſaid *Thomas Thurland* and *Daniel Howſeter* and other the aforeſaid Labourers in the Ores and Mines aforeſaid in Form aboveſaid done and perpetrated; and that the ſaid Lady the Queen recover againſt the aforeſaid Earl of *Northumberland* her Damages by Occaſion of the aforeſaid Interruption and Diſturbance ſuſtained. But becauſe it is unknown what Damages the ſame Lady the Queen has ſuſtained by Occaſion thereof, the Sheriff of the aforeſaid County of *Cumberland* is commanded that by the Oath of good and lawful Men of his Bailiwick he diligently enquire what Damages the ſaid Lady the Queen has ſuſtained by Occaſion of the Interruption and Diſturbance aforeſaid: And that the Inquiſition, *&c.* And likewiſe it is conſidered by the ſame Barons here that the aforeſaid *Thomas* Earl of *Northumberland*, as to the aforeſaid Intruſion by him above in the Information aforeſaid ſuppoſed to be made into the aforeſaid waſt or mountainous Lands called *Newlands* in the ſame Information ſpecified, go at preſent without Day, ſaving always the Right of the Queen if at another Time, *&c.*

Judgment.

Nota bene by the Reporter.

There ſeems to me to be a Diverſity between a Mine of Copper containing in it Gold, and a Mine of Gold containing in it Copper. For when it is called a Mine of Copper containing in it Gold, it is to be intended that the Copper is the greater, and the Gold the leſs, for every Thing contained is leſs than the Thing which contains it, and that which comprehends another Thing is greater than the Thing comprehended; and foraſmuch as the Copper is the greater, the Mine takes its Name from it, and is called a Mine of Copper containing Gold. And for the ſame Reaſon if it is called a Mine of Gold containing Copper, the Gold, from whence the Mine has its Name, is the greater, and the Copper the leſs. And this is agreeable to the Notion of thoſe who have treated of Minerals, as George Agricola, *and* Chriſtopher Eucelius, *and others. From whence it follows that the Records of the Exchequer, which prove that the King had the Mines of Copper containing or bearing Gold or Silver, prove that the King had the whole where the Gold and Silver were the leſs. But how the greater or the leſs ſhall be eſteemed ſome are in doubt, that is to ſay, whether it ſhall be taken according to the Quantity, or according to the Value. For ſome ſay it ſhall be eſteemed according to the Quantity, and therein they confeſs that true it is, as to the Quantity, the Thing which comprehends the other is greater than the Thing comprehended, as of a Hoggſhead of Wine, or a Barrel of Ale, for the Hoggſhead in Quantity is greater than the Wine, and the Barrel than the Ale, but not in Value, and yet it takes its Name from the greater, and therefore it is called a Hoggſhead of Wine; ſo that the Name proceeds from the greater. So in the Caſe of a Mine, the Mine of Copper containing Gold has its Name from the greater in Quantity, but not in Value, for it may properly enough be ſaid that of a Mine of Copper containing Gold, the Gold may be the greateſt in Value. And thus it ſeems to them that the Precedents which prove that the King ought to have Mines of Copper or Lead containing Gold or Silver prove nothing againſt the Aſſertion of the three Juſtices. But if ſo be the Mine ſhall take its Name from the greater in Value, and not from the greater in Quantity, then the Precedents prove di-*

rectly contrary to the Opinion of the three Judges, and confirm the Opinion of the others who were the Majority. For if it ſhall be taken that Mines of Copper containing Gold or Silver (which is to be underſtood, where the Copper is of greater Value, and the Gold or Silver of leſs) ſhall belong entirely to the King by the Precedents, ergo *the Precedents prove the Law to be directly contrary to the Opinion of the three Juſtices. So that in order to underſtand the Precedents, it is to be known whether in the Words (Mines of Copper containing Gold or Silver) the Copper ſhall be taken the greater in Quantity, or the greater in Value. And it ſeems to many that the Name ſhall be taken from the Value, and not from the Quantity, for that every Thing is eſteemed according to its Value*; quære de hoc.

And if ſo be that by the Precedents the Crown ſhall have the whole Mine where the Gold or Silver is of leſs Value than the baſe Metal, yet it ſeems reaſonable to have Regard to the Value of the Gold or Silver, for if there is no more than a Quilful of Gold or Silver in a great Value of Copper, as Bell *ſaid, it is not reaſonable that ſo ſmall a Quantity ſhould be reſpected, but the Quantity ought to be ſuch as is of ſome Value in itſelf over and above the Charges of getting it, and above the baſe Metal conſumed therein.* [a] *For if the Value is not regarded, but the Gold or Silver, be it ever ſo little, ſhall entitle the Crown to the whole Mine, from thence it would follow that the Crown would have all the Mines of baſe Metal in the Realm, if that be true which thoſe who are ſkilled in* re metallica *have written. For (as the ancient Authors in this Art affirm) there are but ſix Kinds of Metals in the Earth, viz. Gold, Silver, Tin, Copper, Lead, and Iron, for that which is called in Latin* chalibs, *and in Engliſh* Steel, *is but the harder Part of Iron, and that which is called in Latin* auricalcum, *and in Engliſh* Lattin, *as alſo that which we call in Engliſh* Braſs, *are not Metals of themſelves, but are a Compoſition of Copper and other Things. For there is a Stone (whereof we have a great Number in this Realm, as I have heard) which we call the* Calamine-Stone, *and which, as I take it, is the ſame Stone that is called in Latin* cadmia, *and by ſome* lapis calaminaris, *ſome of which Stones have Gold in them, and others none, and this Stone is fuſile, and is uſed to be melted with Copper, and from the Copper and this Stone mixed and melted together* Lattin *is made, which is more valuable than the Copper alone, for the ſaid Stone being melted along with the Copper makes the Copper more flexible, and turns the Colour of it from red to yellow, like to the Colour of Gold, and becauſe the Copper melted with it is made more precious, it is of greater Price. And Braſs is made of Copper mixed and melted along with Tin or Lead, and becauſe the Copper itſelf is debaſed by ſuch a Compoſition with a more baſe Metal, it is of leſs Price. So that (as the ancient Authors have written) there are but the ſaid ſix Kinds of Metals fuſil and malleable, which in Latin they call* corpora metallica, *and (as* [b] Eucelius *ſays)* conſtant ex ſulphure patre, et argento vivo, matre. *For he ſays,* principia generationis veluti Deus optimus maximus omnium animalium conſtituit marem et fæminam, &c. tali modo Deus in rebus etiam metallicis conſtituit generationis principia marem et fæminam, et voluit materiam eſſe omnium metallorum ſulphur, ut patrem, et argentum vivum, ut matrem, quorum nempe coitu omnia fierent metalla. *And afterwards he ſays,* etſi autem ex his duobus principiis, ſulphure et argento vivo, quaſi patre et matre, coeuntibus omnia metalla procreantur, quorum multæ ſunt ſpecies et diverſæ, natura tamen ſemper proponit et contendit ad perfectiſſimum metallum, ſcilicet, aurum. Accidentia vero diverſa ſupervenientia diverſa transformant metalla, et ſecundum puritatem et impuritatem ſulphuris et argenti vivi, pura et impura generantur metalla, veluti ex leproſis parentibus leproſi procreantur filii. *And afterwards he ſays that Gold is to Sulphur and Quickſilver* quaſi filius et perfectiſſimum metallum naturæ, et paululum immutata commixtione argenti vivi, fit argentum, quaſi filia ignobilior fratre auro.

And the other Metals, viz. Tin, Copper, Lead, and Iron, as imperfect Metals, proceed from their ſaid Father and Mother, who were by Accidents become imperfect, veluti leproſi filii ex leproſis parentibus.

And it ſeems by the Aſſertion of [c] Agricola, *in his Book* de re metallicâ, *that there is naturally in theſe baſe Metals ſome Portion of Gold or Silver, for thus he ſays,* naturaliter autem potiſſimum auri quædam portio ineſt in argento, et in ære; argenti quædam in auro, in ære, in plumbo nigro, in ferro; æris aliqua in auro, in argento, in plumbo nigro, in ferro; plumbi nigri aliqua in argento; ferri denique quædam in ære. *And he goes further, and ſhews the Way by which the one Metal may be divided from the other when it is melting in the Veſſel; ſo that according to his Authority, Gold and Silver is naturally in Copper, and Silver is naturally in Iron and Lead. And it is to be obſerved that he uſes the Word* (æs) *for Copper, for that is the proper Engliſh for* (æs), *and it has no proper Signification but that, though by a Figure much uſed, Braſs and Lattin are called* (æs), *becauſe they conſiſt chiefly of Copper. Wherefore if no Regard ſhould be had to the Quantity of the Gold or Silver that is found in the baſe Metal (inaſmuch as there is naturally ſome in every baſe Metal), the King would have all Mines of baſe Metals in the Realm. And then the Reſolution* [d] *of all the Juſtices and Barons, that the Subject ſhall have ſuch Mines of baſe Metal which are void of Gold or Silver in his own Land, is vain and of no Effect, for by the ſaid Author there is no ſuch Mine in this Realm, or elſewhere: So that ſuch Reſolution is grounded upon an Ignorance of the Nature of baſe Mines. And therefore it ſeems to be reaſonable and fit to conſider the Nature of baſe Mines, and the Value of the Gold or Silver in the baſe Metal,* [e] *and that it ſhould be at leaſt of ſuch Value as to counterballance the Charges of getting it, or elſe in my Opinion it is not reaſonable that it ſhould draw to the Crown the Property of the baſe Metal, but the Proprietor of the Soil ought to have the Gold and Silver alſo along with the baſe Metal. But this preciſe Point was not left to the Judges to determine, for they were diſcharged of that by the Defendant's Confeſſion that the Ore contained Gold or Silver, which ſhall be intended*

[a] 4 Bac. Abr. 163. Ante 328 (c). *Note,* the Reaſons here urged by *Plowden* ſeem very juſtly to impugn the Conſtruction made in this Caſe, in that Latitude wherein it is taken; and agreeable herewith ſeems to be the Conſideration of the Parliament in 1 *W. & M. cap.* 30. whereby it is enacted, *that no Mine of Copper Tin, Iron, or Lead, ſhall be adjudged a royal Mine, although Gold or Silver may be extracted out of the ſame:* Provided that the King ſhall have the Ore of ſuch Mines, paying for the ſame according to the Rates expreſſed in the explanatory act of 5 *W. & M. cap.* 6.

[b] Eucelius lib. 1. cap. 1.

[c] Agricola lib. 10 cap. 1. *Note,* he terms the Metal according to the Name of the greater Part in Quantity, as it ſeems.

[d] Ante 336 (f).

[e] Crompt. J. C. 111. b.

intended the beſt for the Queen, viz. that it was of ſufficient Value; but the Earl ought to have ſhewn
* Crompt. J. C. 111. b. 112. a. * *that the Ore contained ſome Gold or Silver, but not of the greater Value, nor as much as would defray the Charges of getting it,* abſque hoc, *that it contained Gold or Silver in other Manner, and then by this or ſuch like Pleading the Judges would have been preſſed thereupon in Point of Judgment, which is now paſſed over by the Pleading.*

And for the better Underſtanding whether any baſe Mines are void of Gold or Silver, it is good to know Authors and Experience, for the Truth of this Matter ought to direct the Judgments of the Judges.

A Report of a Judgment and of the Cauſe thereof given, after Argument, in the Common-Bench *in* Trinity *Term in the* tenth *Year of the Reign of Queen* Elizabeth, *in an Avowry upon* Replevin *brought by* Thomas Brett *Plaintiff againſt* John Rigden *Defendant; the Record whereof appears in* Hillary *Term* 7 Elizabeth, Rot. 624. *and was as follows.*

Kent.

Declaration.

Same Precedent Raſt. Entr. 562. b.

JOHN Rigden was ſummoned to anſwer *Thomas Brett* of a Plea, wherefore the Cattle of the ſaid *Thomas* he took, and them unjuſtly detained againſt Gages and Pledges, *&c.* And whereupon the ſame *Thomas* by *Richard Toke* his Attorney complains, that the aforeſaid *John* the 5th Day of *December* in the 6th Year of the Reign of the Lady the Queen now, at *Kingſnoth* in a certain Place called *Linnets and Colnets*, took the Cattle, *viz.* three Cows of him the ſaid *Thomas*, and them unjuſtly detained againſt Gages and Pledges until, *&c.* Wherefore he ſays that he is prejudiced and has Damage to the Value of 10*l.* and therefore he produces the Suit, *&c.*

Avowry.

And the aforeſaid *John* by *Henry Lawrence* his Attorney comes and defends the Force and Injury when, *&c.* and well avows the taking of the Cattle aforeſaid in the aforeſaid Place where, *&c.* and juſtly, *&c.* becauſe he ſays that the ſame Place in which the taking of the Cattle aforeſaid is ſuppoſed to be done, is, and at the aforeſaid Time of the ſaid taking above ſuppoſed to be done, was, 12 Acres of Land with the Appurtenances in *Kingſnoth* aforeſaid, and that one *Giles Brett* was ſeized of and in 10 Acres of Land with the Appurtenances in *Kingſnoth* aforeſaid, called *Clatches-farm*, in his Demeſn as of Fee, and being ſo ſeized thereof, held the ſame 10 Acres of Land with the Appurtenances of *Henry* Lord *Hunſdon*, as of his Manor of *Wye* in the aforeſaid County of *Kent*, by Fealty only of and for all and all Manner of other Services. And afterwards and before the aforeſaid Time when, *&c. viz.* the 15th Day of *June* in the Year of the Lord 1556, the aforeſaid *Giles Brett* being then ſeized of the aforeſaid 10 Acres of Land with the Appurtenances called *Clatches-farm* as is aforeſaid, at *Kingſnoth* aforeſaid, made his laſt Will and Teſtament in Writing, and by his ſame Will bequeathed and deviſed the aforeſaid 10 Acres of Land with the Appurtenances called *Clatches-farm*, amongſt other Things, by the Name of all his Lands and Tenements in *Kingſnoth* aforeſaid or elſewhere in the County of *Kent* to one *Henry Brett* Son of *John Brett* Brother of the aforeſaid *Giles*, by the Name of *Henry Brett* of *Callis* Son of his Brother, to have and to hold to the ſame *Henry* and to his Heirs for ever. And afterwards and before the aforeſaid Time when, *&c.* one *Humphry Clerk* was ſeized of and in the aforeſaid 12 Acres of Land with the Appurtenances in *Kingſnoth* aforeſaid in which, *&c.* in his Demeſn as of Fee, and held the ſame 12 Acres of Land of the aforeſaid Lord *Hunſdon*, as of his aforeſaid Manor of *Wye*, by Fealty only of and for all other Services. And being ſo ſeized thereof, the ſame *Humphry* afterwards and before the aforeſaid Time when, *&c.* of the ſame 12 Acres of Land with the Appurtenances in which, *&c.* enfeoffed the aforeſaid *Giles Brett*, to have to him and to his Heirs for ever. By virtue of which ſaid Feoffment the aforeſaid *Giles* was of the ſame 12 Acres of Land with the Appurtenances in which, *&c.* among other Things ſeized in his Demeſn as of Fee. And the ſame *Giles* being ſo ſeized of all the aforeſaid Tenements with the Appurtenances in *Kingſnoth* aforeſaid, the aforeſaid *Henry Brett* of *Callis* afterwards and before the aforeſaid Time when, *&c.* had Iſſue lawfully begotten one *Thomas Brett* his Son. And afterwards the ſame *Henry Brett* of *Callis*, before the aforeſaid Time when, *&c.* and in the Lifetime of the ſame *Giles*, *viz.* the 19th Day of *April* in the Year of the Lord 1559, at *Wilſbored* in the aforeſaid County of *Kent*, died, after whoſe Death the aforeſaid *Giles*, knowing that the aforeſaid *Henry Brett* of *Callis* was dead, and the ſame *Giles* ſeeing the aforeſaid *Thomas Brett* Son and then Heir of the aforeſaid *Henry Brett*, then and there ſaid and declared to the ſame *Thomas Brett* the Son, in the hearing and Preſence as well of the aforeſaid *Thomas* as of many other Perſons, that he the ſame *Thomas Brett* the

Son

Son ſhould be Heir to the aforeſaid *Giles*, and that he the ſame *Thomas* ſhould have all the Lands, Tenements, and Hereditaments, with the Appurtenances, which the aforeſaid *Henry* ſhould have had by the laſt Will and Teſtament of the ſame *Giles*, if he had ſurvived the ſame *Giles*. And afterwards, and before the aforeſaid Time when, the aforeſaid *Giles* being ſeized, among other Things, as well of the aforeſaid 10 Acres of Land, called *Clache's-Farm*, as of the aforeſaid 12 Acres of Land with the Appurtenances in which, *&c.* the laſt Day of *October* in the Year of the Lord 1561, at *Charte-Magna* in the aforeſaid County of *Kent*, died thereof ſeized, without Iſſue of his Body. After the Death of which ſaid *Giles*, the ſame *Thomas Brett* the Son, as Son and Heir of the aforeſaid *Henry*, as well by Virtue and Authority of the aforeſaid laſt Will and Teſtament, as of the Saying and Declaration of the aforeſaid *Giles*, into the aforeſaid 12 Acres of Land with the Appurtenances in which, *&c.* before the aforeſaid Time when, *&c.* among other Things, entered, and was thereof ſeized in his Demeſn as of Fee. And the ſame *Thomas Brett* the Son being ſo ſeized of the aforeſaid 12 Acres of Land with the Appurtenances, before the aforeſaid Time when, *viz.* the firſt Day of *October* in the 4th Year of the Reign of the Lady the Queen now, at *Charte-Magna* aforeſaid, demiſed the aforeſaid 12 Acres of Land with the Appurtenances in which, *&c.* among other Things, to the ſame *John Rigden*, to have to him and to his Aſſigns from the ſame Day unto the End of the Term of two Years from thence next following, and fully to be compleat; by virtue of which Demiſe the ſame *John Rigden* was thereof at the Time when, *&c.* poſſeſſed. And becauſe the Cattle aforeſaid the ſame Time when, *&c.* were in the aforeſaid Place in which, *&c.* the Graſs in the ſame then growing eating up, and doing Damage there, the ſame *John* in his own proper Right well avows the taking of the Cattle aforeſaid in the aforeſaid Place in which, *&c.* and juſtly, *&c.* ſo doing Damage there, *&c.*

And the aforeſaid *Thomas* by proteſting that the aforeſaid *Giles*, knowing that the aforeſaid *Henry Brett* was dead, did not ſay and declare to the aforeſaid *Thomas Brett*, the Son of the ſame *Henry*, in the hearing and Preſence as well of the aforeſaid *Thomas* as of many other Perſons, that the ſame *Thomas Brett* the Son ſhould be Heir to the ſame *Giles*, and that the ſame *Thomas* the Son ſhould have all the Lands, Tenements, and Hereditaments, with the Appurtenances which the aforeſaid *Henry*, if he had lived, ſhould have had by the laſt Will and Teſtament of the ſame *Giles*, as the aforeſaid *John* has above alledged, for Plea the ſame *Thomas* ſays, that the aforeſaid Plea or Avowry of the aforeſaid *John Rigden* above pleaded is inſufficient in Law to maintain the aforeſaid *John* to avow the taking of the aforeſaid three Cows in the aforeſaid Place in which, *&c.* juſt, or to preclude him the ſaid *Thomas* from having his Action aforeſaid for the taking aforeſaid againſt the aforeſaid *John*, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer to the ſaid Plea in Manner and Form aforeſaid pleaded. And this he is ready to verify, wherefore for Want of a ſufficient Plea or Avowry in this Behalf, and for that the aforeſaid *John* the taking of the Cattle aforeſaid in the aforeſaid Place in which, *&c.* above acknowledges, the ſame *Thomas* prays Judgment, and his Damages by Occaſion of the taking and unjuſt Detention of the Cattle aforeſaid to be adjudged to him, *&c.* Plaintiff demurs.

And the aforeſaid *John*, for that he has above alledged ſufficient Matter in Law to maintain him the ſaid *John* to avow the taking of the Cattle aforeſaid in the aforeſaid Place in which, *&c.* juſt, and to preclude the aforeſaid *Thomas* from having his Action aforeſaid for the taking aforeſaid againſt him the ſaid *John*, which he is ready to verify, and which ſaid Matter the aforeſaid *Thomas* doth not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſes to admit, prays Judgment, and a Return of the Cattle aforeſaid, together with his Damages, *&c.* to be adjudged to him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until from the Day of *Eaſter* in fifteen Days, to hear their Judgment thereon, becauſe the ſame Juſtices here thereof not yet, *&c.* Joinder in Demurrer.

THE Caſe was recited in this Manner. *Thomas Brett* Plaintiff in Replevin againſt *John Rigden* has declared that the ſaid *John*, the 5th Day of *December* in the 6th Year of the Reign of the preſent Queen, at *Kingſnoth* in a certain Place called *Linnets and Colnets*, took his Cattle, *&c.* The Defendant ſays that the Place where, *&c.* is 12 Acres of Land; and that one *Giles Brett* was ſeized of 10 Acres of Land in *Kingſnoth* aforeſaid called *Claches-Farm* in his Demeſn as of Fee, and being ſo ſeized, held the ſame 10 Acres of *Henry* Lord *Hunſdon*, as of his Manor of *Wye* in the County of *Kent*, by Fealty only. And being ſo ſeized, the 15th Day of *June* in the Year of our Lord 1556, he made his laſt Will in Writing, and thereby deviſed the ſaid 10 Acres called *Claches-Farm*, by the Name of all his Lands and Tenements in *Kingſnoth* or elſewhere in the ſaid County of *Kent*, to one *Henry Brett* Son of *John Brett* Brother of the ſaid *Giles*, by the Name of *Henry Brett* of *Callis*, to have and to hold to the ſaid *Henry* and to his Heirs for ever. And afterwards one *Humphry Clerk* was ſeized of the ſaid 12 Acres in which, *&c.* in his Demeſn as of Fee, and held them of the ſaid Lord *Hunſdon*, as of the ſaid Manor of *Wye*, by Fealty only. And being ſo ſeized, afterwards and before the Time of the taking, he enfeoffed *Giles Brett* of the ſaid 12 Acres, to have to him and to his Heirs for ever; by Force whereof the ſaid *Giles* was ſeized of the 12 Acres in which, *&c.* in his Demeſn as of Fee. And he being ſo ſeized of all the ſaid Acres, the ſaid *Henry Brett* had Iſſue one *Thomas Brett* his Son. And afterwards the ſaid *Henry Brett* in the Life of the ſaid *Giles*, *viz.* the 19th Day of *April* in the Year of our Lord 1559 died, after whoſe Death the ſaid *Giles*, knowing that the ſaid *Henry Brett* was dead, and ſeeing the ſaid *Thomas Brett* the Son and then Heir of the ſaid *Henry*, ſaid and declared to

The CASE.
A. deviſes Land to *B.* and his Heirs, *B.* dies in the Life of the Deviſor, *C.* the Heir of *B.* ſhall take nothing by the Will, (tho' after the Death of *B.* the Deviſor ſaid to *C.* that he ſhould be his Heir, and ſhould have all the Lands which *B.* ſhould have had if he had outlived the Deviſor) for the Heirs of *B.* were not named as immediate Purchaſers, but only to expreſs the Quantity of Eſtate that *B.* ſhould take. S.P. adjudged *Fuller v. Fuller* Cro. E. 423. *Steed v. Berrier* 1 Freem. 293. And ſee S. C. cited 1 Co. 105. a. 155. b. 2 Rol. R. 484. Lane 61. W. Jones 59. Cart. 4. Latch 137. Palm. 556. Jenk. 124. 2 Sid. 53. 1 Vent. 341. 10 Mod. 371, 372, 421. 11 Mod. 156. 2 Show. 64. Fitzgib. 242. 1 P. Wms. 85. Strange 26, 31. 2 Vern. 209, 468, 722. Preced. Cha. 440. Andrew's Rep. 266. 1 Eq. Abr. 215. pl. 1. 2 Danv. Abr. 538 pl. 2. 2 Bac. Abr. 86. Vin. Abr. tit. Deviſe W. c. pl. 9. tit. Heir M. pl. 10. Godolph. Orph. Leg. 227, 318, 319. Treat. of Wills 3. Law of Teſtaments, &c. 172. Swinb. 34, 35, 142, 560. Nelſ. Lex Teſtament. 248. Gilb. Law of Deviſes, 88, 89. See L. C. *Goodright v. Wright* 1 P. Wms. 397.

the ſaid *Thomas Brett* the Son, in the hearing and Preſence as well of the ſaid *Thomas* as of divers others, that he the ſame *Thomas Brett* the Son ſhould be Heir to the ſaid *Giles*, and that he the ſame *Thomas* ſhould have all the Lands, Tenements, and Hereditaments which the ſaid *Henry* ſhould have had by the laſt Will and Teſtament of the ſaid *Giles*, if he had ſurvived the ſaid *Giles*. And afterwards the ſaid *Giles* being ſeized as well of the ſaid 10 Acres as of the ſaid 12 Acres in which, *&c.* the laſt Day of *October* in the Year of our Lord 1561, at *Charte-Magna* in the County of *Kent*, died thereof ſeized, without Iſſue, after whoſe Death the ſaid *Thomas Brett* the Son, as Son and Heir of the ſaid *Henry*, as well by Virtue and Authority of the ſaid laſt Will and Teſtament, as of the Saying and Declaration of the ſaid *Giles*, entered into the 12 Acres in which, *&c.* before the ſaid Time when, *&c.* and thereof was ſeized in his Demeſn as of Fee. And the ſame *Thomas* the Son being ſo ſeized of the 12 Acres, he the firſt Day of *October* in the 4th Year of the Reign of the preſent Queen, at *Charte-Magna* aforeſaid, leaſed the ſaid 12 Acres in which, *&c.* to the ſaid Defendant, to have to him and to his Aſſigns from the ſame Day unto the End and Term of two Years from thence next enſuing; by Force whereof the ſaid Defendant was at the Time when, *&c.* poſſeſſed. And becauſe the Cattle at the Time when, *&c.* were in the ſaid Place in which, *&c.* eating up the Graſs, and doing Damage, the ſaid Defendant in his own proper Right well avows the taking of the ſaid Cattle in the ſaid Place in which, *&c.* and juſtly, *&c.* ſo doing Damage. And upon this the Plaintiff has demurred.

Trin. Term 10 *Eliz.*

And the laſt Term the Matter was argued by *Loveleſs* Serjeant on the Part of the Plaintiff, and by *Manwood* Serjeant on the Part of the Defendant. But I was only preſent at Part of *Manwood*'s Argument. And now this *Trinity* Term in the 10th Year of the Reign of the preſent Queen it was argued by all the Juſtices of the Common Bench, but I myſelf was not preſent, but that which I here report of their Arguments I relate upon the credible Information of thoſe who were preſent. And *Loveleſs* took Exception to the Avowry, becauſe the Defendant had not averred it. But the Exception was diſallowed by the Rule of the Court, becauſe the Defendant in his Avowry is Actor, for he ſhews his Matter, which ſhewing is like unto a Count, and is to have a Return, which is in Nature of a Recovery, and therefore he is *quaſi* Plaintiff, in which Caſe he ſhall not aver his Avowry, for it is not uſual for the Plaintiff to aver his Count, but the Defendant muſt; for which Reaſon the Avowry is good without ſaying, *et hoc paratus eſt verificare*.

Averment not neceſſary in Avowry. S. P. Ante 163. and ſee the Books there cited.

The Points of the Caſe.

As to the Matter, it was divided into three Points. The firſt was, admitting that there was a Perſon limited capable of receiving the Thing given, whether or no the 12 Acres, in which the Cattle were taken, are given by the Words and Intent of the Will of *Giles Brett*, inaſmuch as at the Time of making the Will he had nothing in them, but purchaſed them after the Will was made, for at the Time of the Date and Publication of the Will he was ſeized only of the other 10 Acres called *Clache's-Farm*, which alone (as it was ſaid) he intended to paſs by the Words *(all his Lands and Tenements.)* The ſecond Point was, whether or no the Son and Heir of *Henry Brett* ſhould take the Lands by the Deviſe, inaſmuch as they were given by the Will to *Henry Brett* and to his Heirs, and *Henry* died in the Life of the Deviſor, and afterwards the Deviſor died. The third Point was, admitting that he ſhall not take them, whether or no the Saying of the Deviſor to *Thomas* the Son of *Henry Brett* that he ſhould be his Heir, and that he ſhould have all his Lands and Tenements which his Father ſhould have had by the Deviſor's laſt Will and Teſtament, if he had ſurvived the Deviſor, ſhall be of any Avail to *Thomas* the Son.

And the two firſt Points were well argued in *Michaelmas* Term laſt paſt by the new Serjeants. (For at three Weeks of *Eaſter* in the 9th Year of the Reign of the preſent Queen, ſeven new Serjeants were made, *viz.* out of the Middle-Temple, *Thomas Mead*, who was born at *Elmſden* in the County of *Eſſex*, and now dwells at *Wendenlofts* in the ſame County: Out of the Inner-Temple, *Thomas Gawdy*, (who was born at *Harleſton* in the County of *Norfolk*, and dwells at *Claxton-Hall* in the ſame County) and *Roger Manwood*, (who was born at *Sandwich* in the County of *Kent*, and dwells at *St. Stephens* in *Hackington* Pariſh near *Canterbury* in the ſame County): Out of Lincoln's-Inn, *Chriſtopher Wray*, who was born in the Pariſh of *Bedal* in the County of *York*, and now dwells at *Glenworth* in the County of *Lincoln:* And out of Gray's-Inn, *Nicholas Barham*, (who was born at *Wadherſt* in the County of *Suſſex*, and dwells at *Maidſtone* in the County of *Kent*) *John Jeffrey*, (who was born at *Chetynglith* in the County of *Suſſex*, and now dwells there) and *William Loveleſs*, (who was born at *Betherſden* in the County of *Kent*, and dwells in the City of *Canterbury*). And the two firſt Points were inſerted in the Serjeant's Caſe and by them well argued in *Michaelmas* Term laſt paſt; but the Caſe was not then argued nor adjudged by the Judges. But becauſe I heard all the Arguments very attentively when this Demurrer was argued, except the Argument of *Manwood*, Part of which I only heard, I ſhall repeat ſome Things which were ſaid by the Serjeants *Loveleſs* and *Manwood* in their firſt Arguments.

1 Point. For the Defendant. Whether Lands purchaſed after the making of a Will ſhall paſs by the Deviſe of all his Lands. *Negatur.* S. P. Fitzgib. 229. Strange 26. Swinb. 141, 194. Godolph. Orph. Leg. 307, § 6. 309. Treat. of Wills 15, 28. Nelſ. Lex. Teſtam. 480. Gilb. Law of Deviſes 85, 149, 150.

And as to the firſt Point, *Manwood* held that by the Words in the Deviſe of *all his Lands and Tenements*, as well the 12 Acres as the 10 Acres ſhould paſs. For, he ſaid, it is to be preſumed that no Subject of this Realm is miſconuſant of the Law whereby he is governed. * For Ignorance of the Law excuſes none. And foraſmuch as in indifferent Matters every one ſhall be preſumed to know the Law according to his Duty, from thence it follows that in a laſt Will it ſhall be preſumed that every Man is conuſant of that which the Law has ordained touching the ſame *viz.* that it is of no Effect until the Death of the Teſtator, at which Time only it begins to operate, for by the Death of the Teſtator the Will is conſummate, and that which is written in his Lifetime is of no Force, but the precedent Death alone makes the Will effectual. The Words of the Will therefore are to be conſidered, and here we ought to put ſuch Conſtruction upon them as the precedent Death of the Teſtator permits and allows, for the Death of the Teſtator is precedent, and the Conſtruction of the Words of his Will is ſubſequent, which ought to be made in

* Dr. & Stud. lib. 2. cap. 46. 1 H. H. P. C. 42.

ſuch

ſuch Manner as if the Words had been ſpoken at the laſt Inſtant of his Life, and as if the Teſtator himſelf had expreſſed in what Manner they ſhould be conſtrued after his Death. And then when he gave to another all his Lands and Tenements, and well knew that the Word *(all)* muſt receive ſome Conſtruction and Expoſition after his Death, it ſhall be taken for "all that he had at the "laſt Inſtant of his Life," at which Time his Death commenced: (For before this laſt Inſtant the Will does not take Effect, nor ſhall the Words be adjudged to be ſpoken, and it ſhall be preſumed that he knew the Law to be ſo.) And ſo it ſhall be taken that he gave all his Lands and Tenements which he had at the Time when his Life ended and his Death commenced, and it ſhall be preſumed that his Intent was ſuch, foraſmuch as he ſhall not be deemed miſconuſant of the Time when the Law adjudges Wills to take Effect. So that the Teſtator ſhall not be intended miſconuſant of the Law in this Point, and neither the Date of the Will nor the Time of its being written is to be conſidered, inaſmuch as that Time is not material, nor gives Eſſence to the Will. [b] And therefore if a Man makes his Will the 1ſt Day of *May*, and thereby gives to another the Manor of *Dale* in Fee-ſimple, and the 10th Day of *May* one of the Tenancies eſcheats to the Manor, and the 20th Day of *May* the Deviſor dies, now the Deviſee ſhall have the Tenancy eſcheated, for the Will takes Effect at the Time of the Death, at which Time it was Parcel of the Manor; and yet if we ſhould only regard the Date of the Will, and expound it according to that Time, and not according to the Time of the Death, the Tenancy eſcheated ſhould not paſs, for then the Deviſor had no Eſtate in it: But the Date is not to be conſidered. [c] For if a Feme-ſole makes her Will the 1ſt Day of *May*, and gives Land thereby, and afterwards the 10th Day of *May* ſhe takes Huſband, who dies the 20th Day of *May*, and afterwards the Woman dies the 30th Day of *May*, the Deviſe is good, and yet if it ſhould be conſidered according to the Time of the Date, the Will would be countermanded by the Eſpowſals, but it is not ſo, for it does not take Effect until her Death, at which Time ſhe was [d] diſcovert as ſhe was at the Time of making the Will, and the Intermarriage ſhall not countermand that which was of no Effect in her Lifetime.

Another Reaſon he urged from the Generality of the Words, for by the Gift of all his Lands and Tenements no Exception was intended. So that the Latitude of the Deviſor's Intent appears from the Latitude of the Words. [e] For if a Man makes his Will the 1ſt Day of *May*, and thereby deviſes to another all his Plate, and he buys more Plate the 10th Day of *May*, and dies the 20th Day of *May*, the Deviſee ſhall have all his Plate which he had at the Time of his Death, for the Largeneſs of the Words declares his Intent to be that they ſhall be taken beneficially for the Deviſee. So here the Deviſe of all his Lands and Tenements implies a large and benevolent Intent towards the Deviſee, and therefore as well the 12 Acres as the 10 Acres ſhall paſs to the Deviſee. And he ſaid many other Things to enforce this Point.

[b] See Fitzgib. 231.

[c] S. P. Godolph. Orph. Leg. fo 29. §1. Treat. of Wills 10. Law of Teſtaments, &c. 31. 4 Co. 60. b. Vin. Abr. tit. Deviſe R. 2. pl. 1.

[d] *Note*, in *Forſe.* and *Hembling's* Caſe ſuch Will of a Feme-ſole, who after took Huſband, was adjudged to be countermanded, but the Reaſon given by the Book is not only becauſe ſhe afterwardsmarried, but alſo becauſe ſhe was Covert-Baron at the Time of her Death, ſo that the Reſolution there does not ſeem to impeach the Caſe here put. See the Book 4 *Co.* 61. *b.* yet it is ſaid that the Act of Marriage itſelf is a Revocation of a Woman's Will, 2 P. Wms. 624 *Per Ld. C. King.*

[e] S. P. adjudged M. 29. Car. 2. in Canc. *Morgan v. Morgan*, and a Diverſity there taken where all the Things of one *Species* (as in the Caſe here put) are deviſed, and where one particular Thing (as his white Horſe, or gold Cup) are deviſed. *Per Ld. C. Finch.* with which agrees Wentw. Off. of Exec. 23. Treat. of Wills 28. See Godolph. Orph. Leg. 272, 273, 274, 419. Cowel's Inſt. 145. much good Matter hereupon

But *Loveleſs* and all the Juſtices argued to the contrary. [f] For the making of a Teſtament conſiſts of three Parts, as do all other human Acts which are done with Diſcretion, *viz.* Inception, Progreſſion, and Conſummation. [g] Inception is the Writing of the Teſtament, and this is the firſt Part; Progreſſion is the Publication of it, in which it commences, and this is the ſecond Part; the Death of the Teſtator is the Conſummation of the Will, and this is the third Part, which being done, the Act has its Perfection. But there is one ſame Thing annexed to each of theſe Parts, and that is, the Intent of the Party, for every one who does any Act with Diſcretion, has an Intent in the Inception of it; for no Man begins a Thing but to ſome End or Purpoſe. And in the Progreſſion and Conſummation of it the ſame Intent alſo ſubſiſts, ſo that one ſame Intent runs through all the Parts, and continues in the doing of them. Then when *Giles Brett* wrote his Will, and thereby gave all his Lands and Tenements, and at that Time he had no more than 10 Acres, what was his Intent therein? Certainly no other but that the Deviſee ſhould have thoſe 10 Acres, and when he afterwards purchaſed 12 Acres more, it could not poſſibly be his Intent that thoſe ſhould paſs, for there is nothing in the Will that intimates ſuch Intent, and it is to be preſumed that the Teſtator apprehended he would die at the Time when the Will was written and publiſhed. So that he could not have any Intent to give that which he had not, nor was there any Preſumption that he would afterwards have them. And therefore in the [h] Commencement of the Will there does not appear to be any Kind of Intent that the 12 Acres ſhould paſs, and when he publiſhed that which was written as his Will, and that too before the Purchaſe of the 12 Acres, this Publication carries with it the ſame Intent which the Teſtator had in the Commencement of the Will, and therefore it is as void of any Intention to paſs the 12 Acres as the Commencement was, and when he died, whereby the Will became conſummate, that Conſummation was agreeable and conſonant to the firſt Intent. For if the Commencement of the Will ſhould have one Intent, and the Conſummation of it another, then would it be conſummate in that which was never intended at the Beginning, which is incoherent and incongruous in itſelf, and by no Means agreeable with Acts of Diſcretion, and therefore it ſhall not be ſo taken here. For which Reaſon the Intent of the Teſtator, which ſubſiſted in the making of the Will, and in the Publication of it, and in its Conſummation, excludes the Deviſee from having the 12 Acres. And *Loveleſs* ſaid that *teſtamentum eſt teſtatio mentis*, and of thoſe two Words it is compounded, but here there does not appear any Evidence of his Mind (which is no other than his Intent) that the 12 Acres ſhould paſs. And to prove that the [i] Commencement is to be regarded in Wills, he put this Caſe, *viz.* [k] if a Feme-covert makes her Will, and thereby gives Land deviſeable by the common Law, and publiſhes her Will, and afterwards her Huſband dies, and after that ſhe dies, the Deviſe ſhall be void, becauſe the Conſummation is founded upon the firſt Parts, *viz.* the making and publiſhing, which are void, and yet at the Time of her Death ſhe was diſcovert, but the Death

E contra for the Plaintiff.

[f] Treat. of Wills 2.

[g] 3 Co. 31. b.

[h] Strange 26. Nelſ. Lex Teſtam. 480.

[i] Strange 26.

[k] Salk. 238. 11 Mod. 123. Rep. *temp.* Holt 240, 244, 747. Fitzgib. 240. Swinb. 88. Treat. of Wills 15. Law of Teſtaments, &c. 31. Godolph. Orph. Leg. 29. § 1. 315, 393. § 9. 1 Finch 9. 2 Finch 12. Wing. Max. reg. 28. pl. 16. Gilb. Law of Deviſes 11, 124, 146. 2 Bac. Abr. 49. 1 Eq. Abr. 172. pl. 3. Vin. Abr. tit. Deviſe G. pl. 5.

Death cannot give Effect to the Will, unleſs the Commencement be good. [b] So is it of an Infant who makes a Will and publiſhes it, and dies at full Age, it is of no Effect, *cauſa qua ſupra.* Wherefore the Commencement and Intent is to be reſpected in all Acts. [c] And, he ſaid, if a Man be diſſeized of two Acres in *Dale*, and the Diſſeizee releaſes to the Diſſeizor his Right in all the Lands in *Dale*, and delivers the Releaſe as an Eſcrow to be delivered over to the Diſſeizor as his Deed the laſt Day of *May*, and before the laſt Day of *May* the Diſſeizor diſſeizes him of another Acre in *Dale*, and afterwards the Deed is delivered to the Diſſeizor the laſt Day of *May*, the Right of the third Acre ſhall not paſs, becauſe it was not the Intent of the Diſſeizee, who made the Releaſe, that the Right thereof ſhould paſs, and yet the Delivery of the Releaſe to the Diſſeizor was the Conſummation and chief Part of the Act. But the firſt Delivery was one Part of the Act, and that was void of any Intent to make the Right of the third Acre to paſs, and the Conſummation of it is alſo void of ſuch Intent. So, he ſaid, if one has a Reverſion in Fee of two Acres which *J. S.* holds for Life, and he grants to another the Reverſion of all the Lands which *J. S.* holds for Life, and afterwards the Grantor purchaſes the Reverſion of another Acre which *J. S.* holds for Life, and after that *J. S.* attorns to the Grantee for all the three Acres, the third Acre ſhall not paſs, for in the Grant of the Reverſion of all the Lands, *&c.* he intended no more than the two Acres, and although the Grant did not take Effect until Attornment was had, at which Time it firſt took Effect, yet this Attornment ſhall not make more to paſs than was contained in the Intent of the firſt Grant. So here by the Deviſe of all his Lands the Deviſor intended no more than thoſe which he had at the Time when the Will was written and publiſhed. [d] But if after the Purchaſe of the 12 Acres he had newly publiſhed the Will, there perhaps it would have been otherwiſe, for by the new Publication it ſhall be taken to be his Intent that all which the Words contain at the Time of the Publication ſhould paſs, and the Words contain that the Deviſee ſhould have all that the Deviſor then had. [e] But, he ſaid, if a Man deviſes Land in certain, as the Manor of *Dale*, or *White-Acre*, and has nothing in it at the Time of making the Will, and afterwards he purchaſes it, there it ſhall paſs to the Deviſee; for it ſhall be taken that it was his Intent to purchaſe it, and if it ſhould not paſs, the Will would be void to all Intents. But in our Caſe when the Deviſor had 10 Acres, and he gave all his Lands, the Words *(all his Lands)* are ſatisfied in the paſſing of the 10 Acres, and ſo they ſhall take Effect, and as to the other 12 Acres, there are no Words which ſhew his Intent to extend to them, as there are when the Thing is particularly named, as the Manor of *Dale*, or *White-Acre*; ſo that there is a plain Diverſity between the Caſes. And the Lord *Dyer* ſaid that by the Statute of 32 & 34. *H.* 8. it is intended that the Deviſor ſhould be ſeized of the Lands deviſed at the Time of making the Will, for the Words are, *that every Perſon* [f] *having, or that* after the Act *ſhall have any Lands or Tenements, &c. ſhall have full and free Liberty to deviſe them by his Teſtament, &c.* wherefore inaſmuch as the Deviſor had not the 12 Acres at the Time of making the Will, it is out of the Words of the Act. And he and all the other Juſtices were of Opinion that the 12 Acres ſhould not paſs.

b 1 Sid. 162. Salk. 238. 11 Mod. 123. Rep, *temp.* Holt 240, 249, 747. Fitzgib. 240. Godolph. Orph. Leg, fo. 23. § 1. 57. § 5. 393. § 10. Treat. of Wills 12, 15. 1 Finch 9. 2 Finch 12. Gilb. Law of Deviſes 124, 146. 2 Bac. Abr. 50. 1 Eq. Abr. 172. pl. 4. Vin. Abr. tit. Enfant D. pl. 19.

c 1 Finch 9. 2 Finch 12. Owen 69.

d Cro. E. 423. 495. 1 Freem. 292. Pollex. 548. 1 Vent. 341. Salk. 238. Rep. *temp.* Holt 243. Swinb. 141. Godolph. Orph. Leg. 307, § 6. Nelſ. Lex. Teſtam. 477. Gilb. Law of Deviſes 86, 87, 88. But note, ſince the Statute *of Frauds* this Republication muſt be in Writing, 9 Mod. 78.

e M. 39. H. 6. 18. b. Stath. Deviſe 11. Fitz. 17. Bro. 15, in fine. Swinb. 194. Godolph. Orph. Leg. 307. § 6. Treat. of Wills 28. Gilb. Law of Deviſes 86. Sed contra Bac. Max. reg. 14. And ſee *Bronker v. Coke* Fitz. 230. Rep. *temp.* Holt 247, 252. 11 Mod. 127 128. Gilb. Law of Deviſes 130. where this Caſe was denied to be Law by Holt C. J. and that the Book of 39 *H.* 6. here cited does not warrant this Opinion, to which *Powel* J. agreed. And the ſame was ſaid by *Trevor* C. J. in the Caſe of *Arthur v. Bockenham* 11 Mod. 163. Gilb. Law of Deviſes 155.

f Note the Word (having), 3 Co. 31. a. Salk. 238. Strange. 27. 2 Bac. Abr. 51. Law of Teſtaments, &c. 63. See Rep. *temp.* Holt 246, 248. Fitz. 232, the Opinion of *Holt* C. J.

2 Point.

For the Defendant.

Whether the Heir of the Deviſee ſhall take, where Lands are deviſed to one and his Heirs, and the Deviſee dies in the Life of the Deviſor. *Negatur.* See the Books cited Ante 341, at the Head of the Caſe.

As to the ſecond Point, *Manwood* ſaid that although *Henry* the Deviſee died in the Life of the Deviſor, yet the Deviſe ſhould not be void, but ſhould veſt in the Heir of the Deviſee, who was included in the Deviſe; for when the Deviſe was to *Henry* and to his Heirs, it was the Will of the Deviſor that the Heir ſhould have it. But perhaps it may be objected that it was his Intent that the Heir ſhould not have it immediately, but mediately, *viz.* by Deſcent; Sir, poſſibly he did intend that the Heir ſhould have it mediately, nevertheleſs his Intent was that he ſhould have it ſome Way or other, and if he cannot have it immediately, he ſhall not have it at all; and to ſay ſo, would be more contrariant to the Will of the Deviſor than to ſay that he ſhould have it immediately, for the one Way he ſhould not have it at all, and the other Way he ſhould have it, but not in the ſame Form. [g] And in Wills the Intent or Effect is more to be regarded than the Form, for the Effect is that the Heir ſhall have it, and the Form of the Limitation is that he ſhall have it by Deſcent. And ſooner than the Form and Effect ſhall periſh together, the Effect ſhall take Place, and the Form ſhall periſh, which is more agreeable to the Will of the Deviſor, and to ſound Reaſon. [h] As if a Man deviſes Lands to *A.* for Life, the Remainder in tail to *B.* and *A.* dies in the Life of the Deviſor, *B.* ſhall take it in Tail, and yet the Words and Intent of the Deviſor was, that *B.* ſhould not take the Land in Poſſeſſion immediately, but ſhould have the Remainder in Tail therein, and that *A.* ſhould have the Poſſeſſion: But inaſmuch as by the Act of God he cannot take it in that Manner, he ſhall take it as he may, *viz.* the Poſſeſſion immediately in Tail, ſo that the Effect ſhall be fulfilled, although the Form is not. [i] So if one deviſes Land to the Wife of *J. S. J. S.* dies, ſhe takes to Huſband *J. D.* and afterwards the Deviſor dies, ſhe ſhall take the Land, and yet ſhe is not the Wife of *J. S.* when the Deviſor dies, nor ſhall ſhe take it as his Wife, but the Intent was that ſhe who was the Wife of *J. S.* at the Time of making the Will ſhould have it; ſo that the Effect ſhall be performed, although the formal Part is not ſtrictly adhered to. [k] And if a Man deviſes Land to *Alexander Nowel* Dean of *Paul's*, and to the Chapter there, and to their Succeſſors, and *Alexander Nowel* dies, and a new Dean is made, and afterwards the Deviſor dies, the Land ſhall veſt in the new Dean and Chapter, and yet it does not veſt according to the Words, but according to the Intent: For the chief Intent was to convey it to the Dean and Chapter and to their Succeſſors for ever, and the ſingle Perſon of *Alexander Nowel* was not the principal Cauſe, though perhaps it was one of the Cauſes. So here the

g Vin. Abr. tit. Deviſe F. a. pl. 3. 2 P. Wms. 673. Andrew's Rep. 267.

h Dy. 122. pl. 20. 1 Rol. R. 138. 2 Bulſt. 273. Cro. E. 423. Cart 4. 8 Mod. 126. 10 Mod. 371 Perk. § 568. 2 Vern. 468, 723. 1 Eq. Abr. 216. pl. 4. 2 Bac. Abr. 87. 2 Danv. Abr. 538. pl. 2. Vin. Abr. tit. Deviſe W. c. pl. 2. Treat. of Wills 16, 55. Law of Teſtaments, &c. 173. Curſon 310.

i Vin. Abr. tit. Deviſe T. b. pl. 2. 10 Mod. 371. Godolph. Orph. Leg. 462.

k Vin. Abr. tit. Corporation G. 6. pl. 11. tit. Deviſe W. c. pl. 4. Treat. of Wills 173.

Effect

Effect of the Gift was, that the Land ſhould continue in the Heirs of *Henry Brett* for ever, and not in him only, for he could not have the Land longer than for his Life. And therefore altho' he is one of the Cauſes of the Gift, yet the Continuance of the Land from Heir to Heir for ever is the principal Cauſe and Intent of the Deviſe. [a] And if a Man makes a Feoffment upon Condition to enfeoff two in Fee at ſuch a Time, and before the Time one of them dies, the Feoffment ought to be made to the Survivor only, and to his Heirs, becauſe of the Intent which appears in the Condition. And if a Man's Intent in a Condition ſhall be ſo much purſued where the Words cannot be performed, *a fortiore* in a Will the Intent ſhall be obſerved, where the Words cannot. [b] And in 21. *R.* 2. Land was deviſed to one for Life, the Remainder for Life, the Remainder to the Church of *St. Andrew* in *Holborn*, and after the Deaths of the Tenants for Life the Parſon of the Church ſued an *ex gravi querela*, and it was pleaded in Judgment that the Remainder did not take Effect, becauſe the Church was not *perſona capax*, and upon this it was demurred, and adjudged that the Deviſe was good, and that the Parſon ſhould have Execution, and yet the Parſon was not named in the Deviſe, but he was comprehended in it. So is the Heir here, for which Cauſes it ſeemed to him that the Land ſhould veſt in the Heir. And of this Opinion alſo was *Walſh* Juſtice as to this Point.

[a] H. 4. H. 7. 3. b. *per Jay.* Bro. Condition 127.

[b] P. 21. R. 2. Fitz. Deviſe 27. Bro. Corporation 77. Bellew's C. 138. Perk. § 509. O. Bendl. 179. 10 Co. 57. b. Hob. 32. 2 Sid. 26. Bridgm. 105. 4 Leon. 75. Forteſc. Rep. 24. Godolph. Orph. Leg. 356, § 8. Nelſ. Lex Teſtam. 351. Treat. of Wills 15, 31, 169, 170. Law of Teſtaments, &c. 302. Herne's pl. 1. Poſt 523.

Char. Uſes 231. Vin. Abr. tit. Charitable Uſes B.

But *Loveleſs* Serjeant and all the other Juſtices argued to the contrary. [c] For it is a Principle in the Law that in all Gifts, whether they be by Deviſes or otherwiſe, there ought to be a Donee in *eſſe*, who has Power and Capacity to take the Thing given at the Time when it ought to veſt. For if there be none ſuch *in rerum naturâ* when the Thing ought to veſt, the Gift ſhall be void. And here the Thing ought not to veſt in the Deviſee until the Death of the Deviſor, at which Time the Deviſee was dead, and ſo not *in rerum naturâ*. And as to the Heirs being named in the Gift, viz. *to Henry Brett and to his Heirs*, for which Reaſon it is alledged that they ſhall be contained and included in the Intent of the Deviſor, they ſaid [d] that the Heirs are not named there to take immediately, but only to expreſs the Quantity of Eſtate which *Henry* ſhould have. For the Deviſor could not properly make an Eſtate of Fee-ſimple in the Deviſee without mentioning his Heirs. So that Heirs are there named only to make a Fee-ſimple in *Henry*, and in none other, and not to the Intent to make any other than *Henry* take an Eſtate by them; and they are there put to make the Deviſee able as well to alien the Land to another, as to ſuffer it to deſcend to his Heir, for the Deſcent to the Heir is but a Thing ſubſequent to the Eſtate of Fee-ſimple veſted firſt in *Henry Brett* the Deviſee, and a Thing at the Pleaſure of the Deviſee. And it is by no Means a juſt Concluſion that becauſe the Land ſhould have deſcended to the Heir of *Henry*, if it had firſt veſted in *Henry*, that *ergo* the Heir of *Henry* ſhall take it immediately, inaſmuch as his Father died in the Life of the Deviſor; for by the ſame Way of reaſoning it might be ſaid, that if *Henry* had died without Heir, the Lord ſhould have had the Land by Eſcheat, and that the Wife of *Henry* ſhall have the third Part, becauſe ſhe ſhould have been endowed if it had veſted in *Henry*: And every other Concluſion might be made a Cauſe to veſt the Land in others, as well as the Deſcent to veſt the Land in the Heir. [e] And by the ſame Reaſon alſo it might be ſaid, that if a Man deviſes a Leaſe or Goods to *J. S.* who dies, and afterwards the Deviſor dies, the Executors of *J. S.* ſhall have them, which moſt certainly is not Law, for they ſhall not have them. So that theſe Things which would follow by Concluſion, if the Eſtate had firſt veſted, are not good Cauſes to make Things veſt in others than in them only to whom they are limited. For which Reaſon all the Juſtices except *Walſh* were of Opinion that the Land ſhould not veſt in *Thomas Brett* the Son.

E Contra for the Plaintiff.

[c] Dy. 304. pl. 50. Strange 31 *per Parker* C. J. Treat. of Wills 14. Vin. Abr. tit. Deviſe J. 8. pl. 3.

[d] See the Books cited Ante 341. at the Head of the Caſe. *See also* 1. Wms. 397. Doug. 3. ed. 339.

[e] Vin. Abr. tit. Deviſe G. c. pl. 1.

And as to the third Point, all the Juſtices unanimouſly argued and agreed that the Deviſor's ſaying to *Thomas Brett* the Son that he ſhould be his Heir, and ſhould have all the Lands and Tenements which the ſaid *Henry* ſhould have had by his laſt Will, if he had ſurvived the Deviſor, was of no Effect in Law, and that no Regard ought to be given to it, inaſmuch as it was not written in his laſt Will. For the ſaid Statutes of 32 and 34 *H.* 8. give Liberty and Authority to every one to deviſe his Lands by his laſt Will and Teſtament in Writing. In which Caſe all that can make the Deviſe effectual ought to be in Writing. And if the reſt which is in Writing is not ſufficient to make the Land paſs without the Words ſpoken to *Thomas* the Son, then it follows that the ſubſtantial Matter, which ſhould make the Land paſs, is not written, but reſts in Words only, and is not within the Statute, for no Will is within the Statute but that which is in Writing, which is as much as to ſay, that all that is effectual and to the Purpoſe muſt be in Writing, without ſeeking Aid of Words not written. And herein all the Juſtices agreed. Wherefore inaſmuch as *Thomas Brett* the Plaintiff has ſued a Replevin of his Cattle taken, and the Defendant has not ſhewn a good Right or Title in himſelf to take them, becauſe he has not ſhewn a good Right or Title in *Thomas Brett* the Son, who was his Leſſor, and who is a Stranger to *Thomas Brett* the Plaintiff, (for if the Title of his Leſſor is not good, the Title of himſelf being Leſſee cannot be good) and inaſmuch as his Title is bad and inſufficient for the Reaſons above ſhewn, the Juſtices awarded, the ſame *Trinity* Term in which they argued, that the Plaintiff ſhould recover his Damages; which Judgment was as follows.

3 Point. Where the Deviſee in Fee dies in the Life of the Deviſor, if a verbal Declaration afterwards by the Deviſor to the Heir of the Deviſee that he ſhall have the Land is ſufficient to give it to him. *Negatur.* S. P. Godolph. Orph. Leg. 52. Gilb. Law of Deviſes 88, 89.

At which Day here came as well the aforeſaid *Thomas Brett* by his Attorney aforeſaid, as the aforeſaid *John Rigden* by his Attorney. Whereupon the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it ſeems to the ſame Juſtices here that the aforeſaid Avowry of the aforeſaid *John Rigden* above pleaded is inſufficient in Law to maintain the ſaid *John* to avow the taking of the Cattle aforeſaid in the aforeſaid Place in which, &c. juſt, or to preclude the ſaid *Thomas Brett* from having his Action aforeſaid againſt the aforeſaid *John*, as the aforeſaid *Thomas* above has alledged. Therefore it is conſidered that the aforeſaid *Thomas Brett* recover againſt the aforeſaid

The reſt of the Record.

Judgment.

ſaid *John Rigden* his Damages by Occaſion of the taking and unjuſt Detention of the Cattle aforeſaid; but becauſe it is not known what Damages the ſame *Thomas* has ſuſtained by Occaſion thereof, the Sheriff is commanded that by the Oath of good and lawful Men of the County aforeſaid he diligently enquire what Damages the ſame *Thomas* hath ſuſtained as well by Occaſion of the taking and unjuſt Detention of the Cattle aforeſaid, as for his Coſts and Charges by him about his Suit in this Behalf expended; and the Inquiſition which, &c. the Sheriff make appear here under the Seal, &c. and the Seals, &c.

A Report of a Judgment given in the King's Bench *in* Michaelmas *Term, in which the* tenth *Year of the Reign of Queen* Elizabeth *ended, upon a ſpecial Verdict found in a Bill of* Treſpaſs *exhibited by* Beatrice Dalamere *Plaintiff againſt* Thomas Sermon, Thomas Hyet, William Pitt, *and* John Barnard *Defendants. And the Record appears among the Records of* Michaelmas *Term* 9 & 10 Eliz. *Rot.* 216. *And was as follows.*

Worceſt. Declaration. BE *it remembered*, that on *Thurſday* next after the Octave of *St. Michael* in this ſame Term before the Lady the Queen at *Weſtminſter* came *Beatrice Dalamere* Widow by *Richard Beſt* her Attorney, and brought here into the Court of the ſaid Lady the Queen then there her certain Bill againſt *Thomas Sermon*, *Thomas Hyet*, *William Pitt*, and *John Barnard* in the Cuſtody of the Marſhal, &c. of a Plea of Treſpaſs, and there are Pledges of proſecuting, viz. *John Doe* and *Richard Roe*. Which ſaid Bill follows in theſe Words, viz. *Worceſter*, viz. *Beatrice Dalamere* Widow complains of *Thomas Sermon*, *Thomas Hyet*, *William Pitt*, and *John Barnard* in the Cuſtody of the Marſhal of the *Marſhalſea* of the Lady the Queen before the Queen herſelf, for this, that they the 2d Day of *October* in the 8th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, with Force and Arms, &c. the Houſes and Cloſes of the ſaid *Beatrice* at *Elfield* otherwiſe *Elderfield* in the County aforeſaid broke and entered, and her Graſs to the Value of 100 Marks there lately growing with certain Cattle, viz. Horſes, Oxen, Cows, Hogs, and Sheep, eat up, trod down, and deſtroyed, the Treſpaſs aforeſaid as to the eating up, treading down, and deſtroying the Graſs aforeſaid from the aforeſaid 2d Day of *October* in the 8th Year aboveſaid, until the Day of obtaining this Bill, viz. the 12th Day of *November* in the 9th Year of the Reign of the ſaid Lady the Queen that now is, at divers Days and Times continuing; and other Wrongs to her did, againſt the Peace of the ſaid Lady the Queen, and to the Damage of the ſaid *Beatrice* 100l. and therefore ſhe produces the Suit, &c.

Not guilty. *Venire facias.* The *Poſtea.* And the aforeſaid *Thomas*, *Thomas*, *William*, and *John* by *Thomas Stranſham* their Attorney come and defend the Force and Injury when, &c. and ſay that they are not guilty thereof, and of this they put themſelves upon the Country, and the aforeſaid *Beatrice* likewiſe, &c. Therefore let a Jury thereon come before the Lady the Queen at *Weſtminſter* on *Friday* next after the Octave of *St*, *Hillary* by whom, &c, and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame Day is given to the Parties aforeſaid there, &c. Afterwards at the Day and Place within contained before *Edward Saunders* Knight Chief Baron of the Exchequer of the Lady the Queen, and *Thomas Carus* one of the Juſtices of the ſaid Lady the Queen aſſigned to hold Pleas before the Queen herſelf, Juſtices of the ſame Lady the Queen aſſigned to take Aſſizes in the County of *Worceſter* by the Form of the Statute, &c. comes as well the within named *Beatrice Dalamere* Widow, as the within written *Thomas Sermon*, *Thomas Hyet*, *William Pitt*, and *John Barnard* in their own proper Perſons. And the Jurors of the Jury within ſpecified being called likewiſe come.

Evidence for the Plaintiff. Whereupon the aforeſaid *Beatrice* ſays, and in Evidence to the Jurors aforeſaid ſhews, that the Treſpaſs within ſpecified, whereof ſhe now within complains, was done in one Meſſuage and 50 Acres

Acres of Land, Meadow, and Paſture in *Elfield* within ſpecified, now in the Occupation of the aforeſaid *Thomas Sermon*; and in one Meſſuage and 14 Acres of Land, Meadow, and Paſture in *Elfield* aforeſaid, now in the Occupation of the aforeſaid *William Pitt*; and in one Meſſuage and 48 Acres of Land, Meadow, and Paſture in *Elfield* aforeſaid, now in the Occupation of the aforeſaid *John Barnard*. And the aforeſaid Jurors of the Jury aforeſaid to ſay the Truth of the within contained being choſen, tried, and ſworn, ſay upon their Oath, as to the Treſpaſs aforeſaid in the aforeſaid Meſſuage and 50 Acres of Land, Meadow, and Paſture in the Occupation of the aforeſaid *Thomas Sermon*, and in the aforeſaid Meſſuage and 14 Acres of Land, Meadow, and Paſture in the Occupation of the aforeſaid *William Pitt*, that the aforeſaid *Thomas Sermon*, *Thomas Hyet*, *William Pitt*, and *John Barnard* are guilty of the ſaid Treſpaſs in Manner and Form as the aforeſaid *Beatrice* within complains againſt them, And they aſſeſs the Damages of the ſaid *Beatrice* by Occaſion of the ſaid Treſpaſs (beſides her Coſts and Charges by her about her Suit in this Behalf expended) at 20 s. and for thoſe Coſts and Charges at 13 s. 4 d. And the aforeſaid Jurors, as to the Treſpaſs aforeſaid in the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture in the Occupation of the aforeſaid *John Barnard* within ſuppoſed to be done, ſay upon their Oath, that long before the ſaid Treſpaſs ſuppoſed to be done, one *Robert Dalamere* was of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture now in the Occupation of the aforeſaid *John Barnard*, among other Things, ſeized in his Demeſn as of Fee, and being ſo thereof ſeized, the ſame *Robert Dalamere*, the 25th Day of *Auguſt* in the 13th Year of the Reign of Lord *Henry* the *eighth* late King of *England*, of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances enfeoffed one *Thomas Jennings*, *Thomas Lee*, *John Sandford* Gentlemen, *William Hill* and *Thomas Harper* Chaplains: To have and to hold to the ſame *Thomas Jennings*, *Thomas Lee*, *John Sandford*, *William Hill*, and *Thomas Harper*, and to their Heirs for ever, to the Uſe of the aforeſaid *Robert Dalamere*, and of the aforeſaid *Beatrice Dalamere* then his Wife, and of the Heirs of the Bodies of the ſame *Robert Dalamere* and *Beatrice* between them lawfully begotten; and for Default of ſuch Iſſue between them lawfully begotten, to the Uſe of the aforeſaid *Robert Dalamere*, and of the Heirs of his Body lawfully begotten; and for Default of ſuch Iſſue of the Body of the ſaid *Robert* lawfully begotten, then to the Uſe of *Simon Dalamere*, Brother of the aforeſaid *Robert Dalamere*, and of his Heirs for ever. By virtue of which ſaid Feoffment the aforeſaid *Thomas Jennings*, *Thomas Lee*, *John Sandford*, *William Hill* and *Thomas Harper* were of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture now in the Occupation of the aforeſaid *John Barnard* ſeized in their Demeſn as of Fee, to the Uſe of the aforeſaid *Robert Dalamere*, and of the aforeſaid *Beatrice*, and of the Heirs of the Bodies of the ſame *Robert* and *Beatrice* between them lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of the aforeſaid *Robert Dalamere*, and of the Heirs of his Body lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of the aforeſaid *Simon Dalamere*, and of his Heirs for ever, according to the Form of the Feoffment aforeſaid. And the ſaid *Thomas Jennings*, *Thomas Lee*, *John Sandford*, *William Hill*, and *Thomas Harper* being ſeized of the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances now in the Occupation of the aforeſaid *John Barnard* to the Uſes above mentioned, the aforeſaid *Robert Dalamere*, the 20th Day of *Auguſt* in the 26th Year of the Reign of Lord *Henry* the *eighth* late King of *England*, of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances enfeoffed one *William Dyal*, to have to him and to his Heirs for ever. By virtue of which Feoffment the ſame *William Dyal* was of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances ſeized in his Demeſn as of Fee. And being ſo thereof ſeized, the ſame *William Dyal* afterwards, viz. the 11th Day of *September* in the 27th Year of the Reign of the ſaid late King *Henry* the *eighth*, of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances enfeoffed *Richard Lyſter* Knight, to have to him and to his Heirs for ever. By virtue of which ſaid Feoffment the ſame *Richard Lyſter* was of the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances ſeized in his Demeſn as of Fee. And the ſame *Richard Lyſter* being ſo thereof ſeized, he the 22d Day of *April* in the 2d Year of the Reign of Lord *Edward* the *ſixth* late King of *England*, of the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances enfeoffed the aforeſaid *Simon Dalamere* above in Remainder of the Uſe aforeſaid laſt named, to have to him and to his Heirs for ever. By virtue of which ſaid Feoffment the ſame *Simon Dalamere* was of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances ſeized in his Demeſn as of Fee. And being ſo thereof ſeized, the ſame *Simon Dalamere* afterwards, viz. the 28th Day of *October* in the 3d Year of the Reign of the ſaid late King *Edward* the *ſixth*, of the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances enfeoffed the aforeſaid *John Barnard*, to have to him and to his Heirs for ever. By Force whereof the ſame *John Barnard* was of the ſame Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances ſeized in his Demeſn as of Fee. And the ſaid *John Barnard* being ſo thereof ſeized, as well the aforeſaid *Robert Dalamere* as the aforeſaid *Thomas Lee*, *John Sandford*, *William Hill* and *Thomas Harper* (in the aforeſaid Feoffment to the ſeveral Uſes aforeſaid together with the aforeſaid *Thomas Jennings* named) the 20th Day of *June* in the 4th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, at *Elfield* aforeſaid, died, and the aforeſaid *Thomas Jennings* ſurvived them, and the ſame *Thomas Jennings* afterwards and before the aforeſaid Time when, &c. there likewiſe died; after whoſe Death, and before the aforeſaid Time when, &c. viz. the 20th Day of *April* in the 8th Year of the Reign of the ſaid Lady the Queen now, *William Jennings* Son and Heir of the aforeſaid *Thomas Jennings*, for the Revival of the Uſe aforeſaid to the aforeſaid *Beatrice* according to the Form of the aforeſaid firſt Feoffment, into the aforeſaid Meſſuage and 48 Acres of Land, Meadow,

As to Part of the Treſpaſs aſſigned the Jury find the Defendants guilty.

Special Verdict as to the other Part.

Meadow, and Paſture with the Appurtenances upon the Poſſeſſion of the aforeſaid *John Barnard* entered, and was thereof ſeized in his Demeſn as of Fee. By Reaſon whereof, and by Force of a Statute made in a Parliament of Lord *Henry* the *eighth* late King of *England*, at *Weſtminſter* in the County of *Middleſex*, the 4th Day of *February* in the 27th Year of the Reign of the ſaid late King held, concerning the transferring of Uſes into Poſſeſſion, the aforeſaid *Beatrice* before the aforeſaid Time when, &c. was ſeized of and in the ſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture in her Demeſn as of Fee-tail, and afterwards entered into the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances, upon the Poſſeſſion of which ſaid *Beatrice* thereof the aforeſaid *John Barnard* in his own proper Right, and the aforeſaid *Thomas Sermon*, *Thomas Hyet*, and *William Pitt*, as Servants of the ſaid *John Barnard* and by his Command, afterwards, viz. the aforeſaid Time when, &c. into the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances re-entered, and the Graſs there growing, with his Cattle aforeſaid eat up, trod down, and deſtroyed. But whether or no the Entry of the aforeſaid *William Jennings*, for the Revival of the Uſe aforeſaid to the aforeſaid *Beatrice* according to the Form of the aforeſaid firſt Feoffment, into the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances in the Occupation of the aforeſaid *John Barnard* upon the Poſſeſſion of the ſame *John Barnard* thereof in Manner and Form aforeſaid made, be or in Law ought to be adjudged (upon the whole Matter aforeſaid) a good and lawful Entry to revive the Uſe aforeſaid to the aforeſaid *Beatrice*, according to the Form of the aforeſaid firſt Feoffment, the ſame Jurors are wholly ignorant, and thereof they pray the Advice and Diſcretion of the Juſtices aforeſaid, and of the Court, &c. And if upon the whole Matter aforeſaid in Form aforeſaid found it ſhall ſeem to the ſame Juſtices that the aforeſaid Entry of the aforeſaid *William Jennings* into the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances in *Elfield* aforeſaid in the Occupation of the aforeſaid *John Barnard*, upon the Poſſeſſion of the ſame *John* thereof, in Form aforeſaid made, be a good and lawful Entry in Law, then the ſame Jurors ſay upon their Oath that the aforeſaid *Thomas Sermon*, *Thomas Hyet*, *William Pitt*, and *John Barnard* are guilty of the Treſpaſs aforeſaid in the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances, as the ſame *Beatrice* within complains againſt them, and then they aſſeſs the Damages of the ſaid *Beatrice* by Occaſion of the Treſpaſs aforeſaid in the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture (beſides the Damages, Coſts, and Expences aforeſaid above by them before aſſeſſed) at 2 s. And if upon the whole Matter aforeſaid it ſhall ſeem to the Juſtices aforeſaid that the ſame Entry of the aforeſaid *William Jennings*, for the Revival of the Uſe aforeſaid to the aforeſaid *Beatrice* according to the Form of the aforeſaid firſt Feoffment, into the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances in the Occupation of the aforeſaid *John Barnard*, upon the Poſſeſſion of the ſame *John Barnard* thereof, in Form aforeſaid made, be not a good and lawful Entry in Law, then the ſame Jurors ſay upon their Oath, that the ſame *Thomas Sermon*, *Thomas Hyet*, *William Pitt* and *John Barnard* are not guilty of the Treſpaſs aforeſaid in the aforeſaid Meſſuage and 48 Acres of Land, Meadow, and Paſture with the Appurtenances in *Elfield* aforeſaid, as they have within alledged, &c.

THE CASE.

A. and B. (the Plaintiff) his Wife being *Ceſtuy que Uſe* in ſpecial Tail, Remainder to himſelf in general Tail, Remainder to C. in Fee, enfeoffs D. who before the Statute 27. *H.* 8. enfeoffs E. who enfeoffs C. the Remainder Man, in Fee of the Uſe, who enfeoffs the Defendant in Fee, upon whom, after the Death of A. the firſt Feoffor, and of the Feoffees, the Heir of the ſurviving Feoffee enters for the reviving of the Uſe to the Plaintiff the Wife of A. the firſt Feoffor: And adjudged that his Entry was lawful, for there he gained his ancient Fee-ſimple, for the Feoffment of C. the Remainder Man in Fee of the Uſe was not within the Statute of 1. *R.* 3. becauſe he had only a Uſe in Remainder, and that Statute is intended

IT appears by the Record that the Treſpaſs was aſſigned the 2d Day of *October* in the 8th Year of the Reign of the preſent Queen, and laid to be done in breaking and entering into the Houſes and Cloſes of the Plaintiff at *Elfield* in the County of *Worceſter*; and the Defendants pleaded, not guilty. And at *Niſi prius* the Plaintiff gave in Evidence to the Jury that the Treſpaſs was done in one Meſſuage and 50 Acres, &c. in the Occupation of the ſaid *Sermon*; and in another Meſſuage and 14 Acres, &c. in the Occupation of the ſaid *Pitt*; and in another Meſſuage and 48 Acres, &c. in the Occupation of the ſaid *Barnard*. And as to the Meſſuages and Lands in the Occupations of the ſaid *Sermon* and *Pitt*, the Jury found all the Defendants guilty, and for ſo much they aſſeſſed Damages at 20 s. and for Coſts at 13 s. 4 d. And as to the Treſpaſs aſſigned in the other Meſſuage and Lands in the Occupation of the ſaid *Barnard*, they gave a ſpecial Verdict, viz. that one *Robert Dalamere* was ſeized thereof in Fee-ſimple, and being ſo ſeized, in the 13th Year of the Reign of King *Henry* 8. he thereof enfeoffed *Thomas Jennings* and divers others in Fee-ſimple, to the Uſe of him the ſaid *Robert Dalamere*, and of the ſaid Plaintiff then being his Wife, and of the Heirs of their Bodies between them lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of the ſaid *Robert Dalamere*, and of his Heirs of his Body lawfully begotten, and for Default of ſuch Iſſue, to the Uſe of *Simon Dalamere* his Brother, and of his Heirs for ever. And the Feoffees being ſeized to theſe Uſes, the ſaid *Robert Dalamere* the 20th Day of *Auguſt* in the 26th Year of the Reign of the ſaid King *Henry* 8. enfeoffed *William Dyal* in Fee of the ſame Tenements, which *Dyal* in *September* in the 27th Year of the ſame King enfeoffed Sir *Richard Lyſter* Knight in Fee-ſimple of the ſame Tenements, who made a Feoffment in Fee over to the ſaid *Simon Dalamere* in the 2d Year of the Reign of King *Edward* 6. which *Simon* in the 3d Year of the Reign of the ſaid King *Edward* 6. enfeoffed the ſaid *John Barnard* in Fee of the ſame Tenements. And afterwards, viz. in the 4th Year of the Reign of the preſent Queen, as well the ſaid *Robert Dalamere* as all the Feoffees, except the ſaid *Thomas Jennings*, died, and after that the ſaid *Jennings* the Survivor died. After whoſe Death, viz. the 20th Day of *April* in the 8th Year of the Reign of the preſent Queen, *William Jennings* Son and Heir of the ſaid *Thomas Jennings* the Survivor, for the Revival of the ſaid Uſe to the ſaid *Beatrice* the Plaintiff, entered upon the ſaid *John Barnard*, by Reaſon whereof, and by the Statute of 27. *H.* 8. *of Uſes*, the ſaid *Beatrice* now Plaintiff was ſeized, and afterwards ſhe entered, upon whoſe Poſſeſſion the ſaid *John Barnard* in his own Right, and the other Defendants as his Servants and by his Command, afterwards, viz. at

of *Ceſtuy que Uſe* in Poſſeſſion, S. C. cited 1 Co. 128. a. 1 And 330. Gilb. Law of Uſes 29. Vide Dy. 88. b.

the

the ſaid Time when, &c. into the ſaid Meſſuage and 48 Acres re-entered, and did the Treſpaſs, &c. But whether the Entry of the ſaid *William Jennings*, to revive the ſaid Uſe, upon the ſaid *Barnard* be lawful or not, they did not know, and thereof they prayed the Advice and Diſcretion of the Juſtices. And if it ſhall be adjudged lawful, then they ſaid that the Defendants are guilty of the Treſpaſs in the ſame Meſſuage and 48 Acres, as the Plaintiff has alledged, and then they aſſeſſed Damages at 2 s. over and above the former Damages. And if his Entry ſhall not be adjudged lawful, then they ſaid that the Defendants are not guilty of the Treſpaſs in the ſaid Meſſuage and 48 Acres.

And upon this Verdict an Apprentice of the Middle Temple, and *Thomas Bromley* Recorder of *London*, who were of Counſel with the Plaintiff, prayed Judgment for the Plaintiff for the Treſpaſs in the ſaid Meſſuage and 48 Acres. And *Fettiplace*, who was of Counſel with the Defendants, prayed that they by Judgment might be diſcharged from the ſame Treſpaſs; and it ſeemed very doubtful what Judgment ſhould be given upon the Matter. And it was oftentimes debated as well in *Trinity* Term laſt paſt, as in this preſent *Michaelmas* Term, which concludes the *tenth* Year of the Reign of the preſent Queen. And the Doubt aroſe upon the Feoffment of *Simon Dalamere*; for it was agreed on all Sides that the Fee-ſimple of the Land, which *Robert Dalamere* had firſt given to *Dyal*, and *Dyal to Lyſter*, and *Lyſter* to *Simon*, was defeaſible after the Death of *Robert* by the Feoffees, who might enter to the Uſe of the Plaintiff, and thoſe Feoffments were no Obſtacle to their Entry. But when *Simon* made a Feoffment to *Barnard*, by that Feoffment he gave quite another Thing from what he had before received by the Feoffment made to him, that is to ſay, he gave thereby his Uſe of the Fee-ſimple, which he had upon a good and indefeaſible Eſtate. And in Reſpect thereof, it was ſaid on Behalf of the Defendants, that he had given to *Barnard* the Fee-ſimple of the Land indefeaſibly by the Statute of *Rich.* 3. which ordains *that every Eſtate, Feoffment, and Gift of Lands and Tenements to be made by* Ceſtuy que Uſe *ſhall be good and effectual to him to whom they are made, againſt the Feoffor and his Heirs, and againſt all others having or claiming any Title or Intereſt in the ſame only to the Uſe of the ſame Feoffor at the Time of the Gift made.* And foraſmuch as the Intereſt and Title of the Heir of the Survivor of the Feoffees of the Land was to the Uſe as well of the Fee-ſimple which *Simon* claimed in Remainder, as of the Tail which the Wife claimed in Poſſeſſion, he is barred from claiming the Fee-ſimple, becauſe it is lawfully given to *Barnard*, and if the Feoffees enter, they muſt have either their ancient Fee-ſimple, or elſe a new Fee-ſimple, and their ancient Fee-ſimple they cannot have, becauſe it is lawfully conveyed to *Barnard* the Feoffee, in which Caſe the Law will not ſuffer the Heir of the Survivor of the Feoffees by his Entry to take it from him. And a new Fee-ſimple he cannot have, for he has no Right to any other Fee-ſimple but to the ancient one. And it is inconſiſtent with the Law for him to have another Fee-ſimple, for then there would be two [a] Fees-ſimple of one ſame Land, which cannot be. And he cannot have any other Eſtate than a Fee-ſimple, for no other Eſtate was taken from the Feoffees by the Feoffment of *Robert*. So that if he is barred from that, he is barred from all the reſt of the Eſtate. And hereupon it was reſembled to the Caſe in *Littleton*, [b] that if a Diſſeizor makes a Leaſe for Life, and the Diſſeizee confirms the Eſtate of the Diſſeizor, he ſhall not enter upon the Tenant for Life, for his Right was to the whole Eſtate in the Land, and if he is barred of the Fee ſimple, he is barred of the Eſtate for Life, for of ſuch Eſtate he was not diſſeized, nor was ſuch Eſtate taken from him; and a new Fee ſimple he ſhall not have, for he had no Right but to the ancient Fee-ſimple, wherefore inaſmuch as he is barred of the Fee, he is barred of the whole. So here the Heir of the Survivor cannot take away the Fee-ſimple lawfully veſted in *Barnard* the Feoffee, any more than the Diſſeizee can in the other Caſe. And he cannot have a new Fee ſimple, or a leſſer Eſtate than a Fee-ſimple, for the Feoffees had not ſuch before, for which Reaſon the Entry of the Heir of the Survivor here is not lawful, but is a Diſſeizin, in which Caſe it does not revive the Uſe in the Feme Plaintiff, and therefore the Defendants ought to be acquitted of the Treſpaſs. And many other Things were ſaid to enforce the Reaſon aforeſaid.

Mich. Term 10 *Eliz.*

For the Defendants.

[a] See *Ante* 248 (b). and the Books there cited.

[b] Litt. § 521. Co. Litt. 298. a.

But on the other Hand it was ſaid that the Caſe here does not come to that Point. For firſt it is to be obſerved, that the Feoffees were ſeized in Fee to the Uſe of *Robert* and his Wife in ſpecial Tail, and afterwards to the Uſe of *Robert* in general Tail, and afterwards to the Uſe of *Simon* in Fee-ſimple, in which Caſe *Simon* neither by the Common Law, nor by the Statute of *Rich.* 3. had any Power to make a [c] Feoffment of the Land, nor to alien the Fee-ſimple of the Land, nor to [d] meddle at all with the Poſſeſſion of the Land. [e] For by the Common Law *Ceſtuy que Uſe* could not enter upon the Land, but if he had entered, the Feoffees might have had an Action of Treſpaſs againſt him, and have puniſhed him. For the Land as fully belonged to the Feoffees as if there had been no Uſe of it; ſo that if the Feoffees had ouſted the *Ceſtuy que Uſe*, or had ſued him for taking the Profits, he ſhould not have had any Anſwer or Defence at the Common Law, but was driven to ſeek his Remedy in a Court of Conſcience. And by the like Reaſon *Ceſtuy que Uſe* could not make a Feoffment to others, but for Remedy thereof the Satute of 1. *Rich.* 3. *cap.* 1. was made, which enacts *that every Eſtate,, Feoffment, Gift, Releaſe, Grant, Leaſe and Confirmation of Lands and Tenements made, or afterwards to be made, ſhall be good and effectual to him to whom they are ſo made, had, or given, and to all others to his Uſe, againſt the Seller, Feoffor, Grantor &c. and againſt all others having or claiming any Title or Intereſt in the ſame only to the Uſe of the ſame Feoffor, Donor, or his Heirs, at the Time of the Bargain, Giſt, or Grant made.* So that by this Act all Feoffments made before the Act or ſince the Act by *Ceſtuy que Uſe* are made good and effectual. But, Sir, by what *Ceſtuy que Uſe?* [f] by no *Ceſtuy que Uſe* but by *Ceſtuy que Uſe* in Poſſeſſion, for *Ceſtuy que Uſe* in Reverſion or Remainder is out of the Letter and Intent alſo of the Act, for no Feoffments are made good againſt the Feoffees of the Land, except they claim Title or

E contra for the Plaintiff.

[c] Gilb. Law of Uſes 26, 239.

[d] Kelw. 42. b. *per Frowick*, by the Courſe of the Common Law *Ceſtuy que Uſe* has no more to do with the Land than the meereſt Stranger in the World. S. P. Poſt *Manxel's* Caſe 3. Crompt. J. C. 60. a.

[e] H. 15. H. 7. 2. pl. 4. Bro. Feoffm. al Uſes 39. 1 Co. 140. a. *per Anderſon* C. J. 1 And. 320. Poſt *Manxel's* Caſe 3. Vin. Abr. tit. Uſes E. b. pl. 3.

[f] Vin. Abr. tit. Uſes W. a. pl. 1. *in notis.* Gilb. Law of Uſes 259.

or Intereſt therein only to the Uſe of the ſame Feoffor at the Time of the Feoffment made. [a] In which Caſe if there is *Ceſtuy que Uſe* for Life, the Remainder in Fee, the Feoffment of *Ceſtuy que Uſe* in Remainder is not made good againſt the Feoffees, for they do not claim only to his Uſe at the Time of the Feoffment, but they claim to the Uſe of *Ceſtuy que Uſe* for Life, and after his Deceaſe their Claim is to the Uſe of him in Remainder, but they do not preſently claim only to the Uſe of the Feoffor, which is him in Remainder. [b] But in this Caſe if *Ceſtuy que Uſe* for Life, where the Remainder in Fee is over to another, makes a Feoffment, this is a good Feoffment during his Life, for he had the Uſe in Poſſeſſion, and during his Life the Feoffees claim only to his Uſe, for the whole Eſtate and Poſſeſſion of the Feoffees is to the Uſe of *Ceſtuy que Uſe* for Life during his Life; and inaſmuch as the Confidence of the whole Eſtate, that is, of the whole Fee-ſimple, was put in *Ceſtuy que Uſe* for Life during his Life, for this Cauſe he may give the whole Eſtate during his Life. So that by his Feoffment more paſſes than for his Life, for a Fee-tail or the whole Fee ſimple ſhall paſs according to the Limitation of the Words of *Ceſtuy que Uſe* for Life expreſſed upon the Livery. And yet in this Caſe if one ſhould lay all the Streſs upon the Word *(only)*, a Man might cavil and ſay that the Feoffees claim to the Uſe of one for Life, and afterwards to the Uſe of another in Fee, ſo that they don't claim *only* to the Uſe of *Ceſtuy que Uſe* for Life, *ergo* his Feoffment is not warranted by the Statute, but the firſt Feoffees may ouſt the ſecond Feoffee preſently in the Life of *Ceſtuy que Uſe*; Sir, by ſuch Argument all particular *Ceſtuy que Uſes*, as *Ceſtuy que Uſes* in Tail, for Life, or for Years, would be totally deveſted of any Intereſt or Concern in the Land, ſo that they could not make Leaſes or Gifts. But for Anſwer thereto, we do not rely only upon the Letter, but upon the Intent alſo. [c] For if a Feme-covert be *Ceſtuy que Uſe*, the Huſband may make a Feoffment, and yet the Claim of the Feoffees is not only to his Uſe, but to the Uſe of him and his Wife. But there the Intent of the Statute warrants his Feoffment during the Coverture, becauſe the Law gives to the Huſband the Direction of the Things of his Wife. And ſo if there are two joint *Ceſtuy que Uſes* in Fee, and one of them makes a Feoffment of the Moiety, it is a good Feoffment, and ſhall bind the Feoffees, altho' they were not ſeized only to the Uſe of him, but to the Uſe of him and his Companion, for the Intent was that he who had the Moiety of the preſent Uſe might give or leaſe the Moiety of the Land. And in theſe Caſes altho' the Letter does not warrant the Acts of the *Ceſtuy que Uſe*, yet they are warranted by the Intent of the Makers of the Act. And alſo in theſe Caſes the Uſe was preſent and in Poſſeſſion, and therefore it is reaſonable that he ſhould have Authority over the Poſſeſſion. But to make the *Ceſtuy que Uſe* in Reverſion or Remainder (who has nothing to do with the Poſſeſſion or Profits of the Land) give away the Poſſeſſion to another, is out of the Words and Intent alſo. And from thence great Confuſion would enſue, [d] for ſuppoſe a Feoffment was made to the Uſe of A. for Life, and afterwards to the Uſe of B. for Life, and afterwards to the Uſe of C. in Fee, now every one will admit that B. and C. may grant their Uſes to whomſoever they pleaſe, but they cannot meddle with the Perception of the Profits, nor with the Poſſeſſion, and therefore they cannot give any Poſſeſſion to another. For if B. might enter and make a Feoffment, or a Leaſe for Life, thereby he would take away the Poſſeſſion from the Feoffees, and thereby alſo he would take away the Uſe of A. the firſt *Ceſtuy que Uſe*, for after that A. could not take the Profits of the Land, nor make a Leaſe for Life or Years, for the Eſtate which B. had made would not be to the Uſe of A. but to ſuch Uſe as B. pleaſed to limit and appoint. And if it ſhould be ſaid in this Caſe, that if B. had entered upon the Feoffees, and had made a Leaſe for his own Life, the Feoffees ſhould not be bound, but might enter and be ſeized to the Uſe of A. for Life; Sir, what Eſtate ſhould the Feoffees have after their Regreſs? for before they ſhould have had a Fee-ſimple, and if by their Entry they ſhall recontinue the Fee-ſimple again, then the Eſtate which B. made is taken away: And, Sir, if a Man ſhould ſay that after their Entry they ſhall leave in the Leſſee of B. the Freehold which B. gave him, then of Neceſſity muſt they have but a particular Eſtate, viz. for the Life of A. who is the firſt *Ceſtuy que Uſe*; and from thence it follows that they ſhall have another Eſtate than they had before, and a particular Eſtate without a Leſſor. And then it is to be aſked, whether the Eſtate for Life which B. made ſhall be a Remainder or a Reverſion? and if he ſhall do Fealty? and to whom? and in what Degree the Uſe in Remainder in Fee is? and out of what Eſtate the Uſe in Fee iſſues? and if he who had the Uſe in Remainder in Fee may enter and make a Feoffment or Leaſe as well as the firſt *Ceſtuy que Uſe* in Remainder for Life? and many other perplexed Queſtions would ariſe, if the Statute ſhould be ſo expounded as to enable him in Reverſion or Remainder to make an Eſtate of the Land. But the ſaid Apprentice ſaid, [e] that if a Leaſe for Life is made to the Uſe of A. and afterwards the Reverſion is granted to another for Life to the Uſe of B. and Attornment is had, and afterwards the Reverſion is granted to another in Fee to the Uſe of C. in Fee, and Attornment is had, in this Caſe A. may give the firſt Eſtate for Life to whomſoever he pleaſes, and B. may grant the Reverſion for Life to whomſoever he pleaſes, and C. may grant the Reverſion in Fee to whomſoever he pleaſes, for there the Eſtates are ſeveral, and the Uſes go out of ſeveral Eſtates, that is to ſay, every Uſe out of a ſole and ſeveral Eſtate. But in the other Caſe all the ſeveral Uſes iſſue out of one Eſtate, viz. out of the Fee-ſimple, which is one ſame Eſtate without Diviſion, and the ſeveral Poſſeſſors of the ſeveral Uſes cannot ſever the Eſtate which is entire: So that, he ſaid, there is a Diverſity between the Caſes. [f] But he ſaid that if a Feoffment is made to the Uſe of one for Life, and afterwards to the Uſe of another in Fee, there he who has the Uſe in Fee in Remainder may make a Leaſe for Years to commence after the Death of the *Ceſtuy que Uſe* for Life, for by the Leaſe for Years no Poſſeſſion is taken from the Feoffees, nor is any Eſtate out of them, for a Leaſe for Years to commence at a Day to come is but a Contract executory, and ſtands well enough with the Eſtate, inaſmuch as it does not commence until the firſt Eſtate

[a] 25. H. 8. Bro. Feoffm. al Uſes 44. B. N. C. § 75. 1 Co. 87. a. Poſt *Manxel's* Caſe 3. Gilb. Law of Uſes 29, 239, 240.

[b] M. 4. H. 7. 18. pl. 9. Fitz. Feoffments 31. Bro. Feoffm. al Uſes 22. Gilb. Law of Uſes 28, 239, 240.

[c] P. 6. H. 7. 3. pl. 5.

[d] 25. H. 8. Bro. Feoffm. al Uſes 44.

[e] Gilb. Law of Uſes 30, 240.

[f] Gilb. Law of Uſes 30.

Eſtate is determined, when the Intereſt of the Leſſor comes into Poſſeſſion. [a] And by the ſame Reaſon he may grant a Rent-charge to commence when his Uſe ſhall be executed. But an Eſtate for Life in the Land, or a greater Eſtate, he in the Remainder cannot make without dividing the Eſtate of the Feoffees, or taking the Freehold from them, for an Eſtate for Life, in Tail, or in Fee ſhall paſs preſently, and ſhall not be executory as a Leaſe for Years is, which is limited to commence when the Leſſor ſhall have an Intereſt in the Poſſeſſion. So that, as they ſaid, the Eſtate which the Statute makes good againſt the Feoffees ought to be made by the *Ceſtuy que Uſe* in Poſſeſſion, and thoſe Eſtates, Releaſes, or Confirmations which he makes of another's Land, viz. of the Land of the Feoffees, are good, and ſuch Senſe is reaſonable.

[a] Gilb. Law of Uſes 30.

And if the Law be ſo that *Ceſtuy que Uſe* in Reverſion or Remainder cannot convey to another any Poſſeſſion from the Feoffees, this will in the End avoid the Objection which has been made in our Caſe on Behalf of the Defendants, which Caſe is now to be conſidered And firſt, when *Robert Dalamere* and his Wife now Plaintiff had the preſent Uſe in ſpecial Tail, the Remainder to *Robert* in general Tail, the Remainder to *Simon* in Fee, and *Robert* made a Feoffment, he had Power to do it, as is aforeſaid, and the Fee-ſimple of the Land paſſed fully until Regreſs made by the Feoffees after his Death, and after his Death they might enter if there was no other Obſtacle than his Feoffment, for the Feoffment is made good and effectual againſt all having or claiming any Title or Intereſt in the ſame only to the Uſe of the ſame Feoffor or his Heirs, &c. And when the Feoffor here was dead, the Feoffees did not claim to the Uſe of his Heirs, but to the Uſe of the Wife now Plaintiff, who is another than his Heirs, in which Caſe the Feoffees are not reſtrained from their Entry by the Statute, and the Common Law does not reſtrain them at all. So that notwithſtanding the Feoffment the Feoffees might enter after the Death of the Huſband; but nevertheleſs in the mean time the Fee-ſimple was taken away from the Feoffees by the Feoffment, and paſſed to *Dyal* the new Feoffee, from whence it follows that the Uſe in Fee was taken out of *Simon*, and diſcontinued until lawful Regreſs made by the Feoffees. For there is a Diverſity when the Feoffees to Uſe make a Feoffment over, and when the *Ceſtuy que Uſe* makes it. [b] For when the Feoffees make a Feoffment over, if the new Feoffees have Notice of the firſt Uſe, (be the Feoffment upon Conſideration or not) [c] or if they have no Notice, and the Feoffment is without Conſideration, in theſe Caſes the new Feoffees ſhall be ſeized to the firſt Uſes. So that if the Feoffees here had made the Feoffment to *Dyal*, and he had had Notice of the firſt Uſes, or if he had had no Notice, and the Feoffment had been without Conſideration, *Dyal* had been ſeized to the Uſe of *Robert* and *Beatrice* in ſpecial Tail, and afterwards to the Uſe of *Robert* in general Tail, and afterwards to the Uſe of *Simon* in Fee, according to the firſt Uſes, ſo that the Uſe of *Simon* had not been diſcontinued by ſuch Feoffment. [d] But when the Feoffment is made by the *Ceſtuy que Uſe* himſelf, who may lawfully make it, as here he has done to *Dyal*, all the ancient Uſes are diſcontinued, altho' the new Feoffee had Notice of the firſt Uſes, or altho' the Feoffment be made without Conſideration. For all the firſt Eſtate, out of which all the Uſes ariſe, is taken from the Feoffees, and a new Eſtate is made by the Authority of the Statute, which new Eſtate ſhall be to the Uſes newly expreſſed or intended, and ſhall never be to the firſt Uſe, but thereby all the ancient Uſes are diſcontinued. Then here by the Feoffment made by *Robert* to *Dyal* the Uſe of *Simon* was diſcontinued, ſo that he could not alien the Uſe, for he had but a Right of Uſe in Remainder, and no Uſe in Deed. Therefore in Reſpect of the Uſe which is diſcontinued he cannot do any Thing with the Land, nor ſhall any Thing be executed by the Statute of 27. *H.* 8. *cap.* 10. [e] For that Statute conveys no Poſſeſſion to a Right of Uſe, but only to a Uſe in *eſſe*. And if the Law be ſo, then when *Dyal* enfeoffed *Lyſter*, and *Lyſter* enfeoffed *Simon*, and *Simon* enfeoffed *Barnard*, this Feoffment of *Simon* to *Barnard* has no Force nor Authority given it by the Statute of *Rich.* 3. for two Cauſes. One is, becauſe the Uſe of *Simon* was diſcontinued and was not in *eſſe*, and the Power by the Statute of *Rich.* 3. is given to him who has a Uſe in *eſſe*, and not to him who has but a Right. The other Cauſe was, for that the Uſe which he had was in Remainder, which is not warranted by the Statute of *Rich.* 3. to give away the Poſſeſſion. So that the Feoffment having no Authority given to it by the Statute of *Rich.* 3. reſts meerly at the [f] Common Law, by which Feoffment *Simon* by the Common Law has given to *Barnard* by way of Extinguiſhment his Right of the Uſe in Fee-ſimple which he had in Remainder, in which Caſe this Feoffment made according to the Common Law, without any Warrant or Force by the Statute of *Rich.* 3. does not take away the Entry of *William Jennings* Heir to the Survivor of the Feoffees.

[b] M. 14. H. 8. 9. a. *per Pollard.* Dy. 8. pl. 18. Vide 5. Ed. 6. Bro. Feoffments al Uſes 57. Crompt. J. C. 53. a.

[c] Dr. & Stud. lib. cap. Perk. § 1 Co. 122. b. Gilb. Law of Uſes 181.

[d] S. P. 1 Co. 122. b. 3 Leon. 158. Vin. Abr. tit. Uſes E. pl. 8. Gilb. Law of Uſes 180.

[e] 1 Co. 126. a. Pollexf. 96, 98, 388. Gilb. Law of Uſes 27. Vin. Abr. tit. Uſes X. a. pl. 46. *in notis.* Hill. 33. Geo. 2. B. R. *Strong & Tate, per Nolar, arguendo.*

[f] Palm. 352.

But the ſaid Apprentice ſaid, that if the Matter had reſted only upon the Diſcontinuance of the Uſe, and upon the Feoffment of *Simon* afterwards, and the other Point of the Remainder had not been in the Caſe, but the firſt particular Eſtates before the Feoffment of *Simon* had been ended, then the Caſe would have been more difficult, as to the Entry of *William Jennings*, than it is. [g] For, he ſaid, if a Feoffment in Fee had been made to the Uſe of one in Fee, and the Feoffee had been diſſeized after the Statute of *Rich.* 3. and before the Statute of 27. *H.* 8. and the *Ceſtuy que Uſe* had releaſed to the Diſſeizor, the Diſſeizee ſhould not have entered, for by the Words of the Act the Releaſe is good and effectual againſt all having or claiming any Title or Intereſt to the Uſe of the Releaſor: And there the Claim and Title of Entry, which the Diſſeizee had at the Time of the Releaſe made, was to the Uſe of him who releaſed, and if the Title and Right of Entry, which the Diſſeizee had, was not to his own Uſe, but to the Uſe of *Ceſtuy que Uſe*, who has now by his Releaſe conveyed away his Right of the Uſe to the Diſſeizor by way of Extinguiſhment, it ſtands with good Reaſon and Conſcience that the Releaſe of the Right ſhould take away the Right of the Diſſeizee, as well as that the Feoffment of him who has a Uſe in Poſſeſſion ſhould take away from the Feoffees their Poſſeſſion of the Land, and the Makers of the Act, who had the one Intent, could not be void of the other, but the Reaſons of both are the ſame in the

[g] M. 14. H. 8. 7. a. *per Carel.* M. 27. H. 8. 29. pl. 21. *per Fitzh.* Gilb. Law of Uſes 28.

Opinions

Opinions of the Makers of the Act, and of every other reasonable Creature. [a] And to this Purpose he cited the Case in 27. *H.* 8. where the Feoffees of *Cestuy que Use* were disseized, and the Disseizor enfeoffed *Cestuy que Use*, who enfeoffed a Stranger, and the Question there was, if by this Feoffment made by *Cestuy que Use* the Right of the first Feoffees was determined and extinct: And there *Fitzherbert* is of Opinion that by the Feoffment the Right of the first Feoffees is gone, and that it passed with the Feoffment made to the Stranger, altho' no Use was in *Cestuy que Use* at the Time of the Feoffment, as if the *Cestuy que Use* had released to the Disseizor; and of the same Opinion *Shelley* seems to be. From whence (he said) it follows in our Case, that inasmuch as the Right of the Use in Remainder, which *Simon* had, passed by Way of Extinguishment by his Feoffment to *Barnard*, if the other Point of the Continuance of the first Estates, and of the Use being in Remainder and not in Possession, had not made the Matter clear and beyond Doubt, in his Opinion it would have been more difficult in this Case to prove the Entry of *William Jennings* to be lawful after the particular Estates ended: But inasmuch as the Right of the Use was in Remainder and not in Possession, he held it to be a clear Case that the said *William Jennings* might enter and revive the Use in the particular Estates, viz, in the Tail to the Feme Plaintiff, and in the Remainder to the Heirs of the Body of *Robert Dalamere*.

[a] M. 27. H. 8. 29. pl. 21. Bro. Feoffm. al Uses 8. 1 Co. 112. a. 4 Leon. 135, 221. Godb. 314.

And at last all the Justices, after many Arguments and long Deliberation taken thereupon, (for it was debated ten Times at least at the Bar and Bench) resolved that the Entry of *William Jennings* was lawful, and that thereby he had revived the Use in the Feme Plaintiff, and that by the Statute of 27 *H.* 8. the Possession of the Land was immediately upon the Entry vested in her in Tail, for which Reason she ought to have Judgment. And they all held, that it would be dangerous to make a particular Estate of the Use, viz. an Estate-tail, or an Estate for Life, subject to the Will of him in Remainder or Reversion in Fee of the Use, for if his Release, after his own Use discontinued, or his Act should hinder the Feoffees from entering to revive the particular Uses discontinued, then the particular Uses would be oftentimes lost thro' the Obstinacy, Confederacy, or Maliciousness of them in Reversion or Remainder, which would be a great Inconvenience, and was never intended by the Makers of the Act of *Rich.* 3. nor was it intended that the Acts of them in Remainder or Reversion, before the particular Estates determined, should hurt the particular Uses, or the Estate of the Feoffees seized to particular Uses, but that they might enter to revive the first Uses. Wherefore each of them severally declared his Opinion to be, that the Entry of *William Jennings* was lawful, and that the Plaintiff should have Judgment.

And in the Argument of this Case another Point was debated at large as well at the Bench as at the Bar. And that was, when *William Jennings* entered, and thereby revived the Use in Tail in the Wife now Plaintiff, with the Remainder in Tail to the Heirs of the Body of the Husband begotten, in what Person the Fee-simple of the Use shall be revived, and in whom shall it be executed by the Statute of 27. *H.* 8. And this was debated three Ways, for some held that inasmuch as the Use of the Fee-simple was given away by Extinguishment in the Feoffment of the Land to *Barnard*, and thereby the Entry of *William Jennings* was not taken away but remained, he upon his Entry shall hold the Land to his own Use discharged of the Use in Fee, as he should do in Case of a Rent-charge which *Simon* had out of the Land, if he had had any before his Purchase of the Land and his Feoffment. And some others held, that inasmuch as the Use was discontinued, and not in *esse*, *Simon*, who had it not in him, could not give it by his Feoffment, and therefore after the Regress of *William Jennings* the Use of the Fee-simple shall be revived, and by the Statute the Fee-simple shall be executed in *Simon*. And the Counsel for the Plaintiff held, that by the Regress of *William Jennings* the Use in Fee-simple of the Land shall be executed in *Barnard*, for they said that inasmuch as the Feoffment made by *Simon* was not warranted by the Statute of *Rich.* 3. because his Use was in Remainder, and was also then discontinued, as is aforesaid, the Case rests meerly [b] at the Common Law, and stands in the same Manner as the Common Law was before the Statute of *Rich.* 3. and as if that Statute had not been made.

[b] Palm. 352.

[c] And they said that before the said Statute if *Cestuy que Use* had disseized his Feoffees, and afterwards had made a Feoffment in Fee, and they had re-entered upon the Feoffee, they should have been seized to the Use of the last Feoffee, for inasmuch as the *Cestuy que Use* has made a Feoffment, he himself has not retained any Use or Interest in the Land, for in the Gift of the Land he gave and conveyed from himself [d] all Uses and other Interests which he could demand out of the Land, or have by Reason thereof, and therefore no Use remained in him after the Feoffment. And when the Feoffees have re-entered, they cannot have it to their own Use, [e] for the Use is not like a Rent out of the Land, but it is a Thing collateral annexed to the Person touching the Land, and is no more than a Confidence for the Use of the Land, that is to say, a Confidence that the Feoffees, to whom the Land is given, shall permit the Feoffor and his Heirs, and such Persons as he shall appoint, to receive the Profits of the Land, and that the Feoffees shall make such Estates of the Land as he shall limit. So that their Estate is but upon Confidence, and there is no Act done by the Feoffor to signify that they shall have the Land to their own Use, but clearly the contrary, for it evidently appears to be his Intent, in the making of a Feoffment to another, that they who were the first Feoffees shall not have the Land. So that there is no Confidence or Equity which entitles them to have the Land to their own Use. But when the Feoffor upon Confidence enters upon the Feoffees, and gives the Land to another, in that Gift it is implied that his Intent is, that he to whom the Gift is made shall have the Land, and all Things comprehended in the Land, or dependant upon it, and then when the first Feoffees have entered, and taken the Land from the last Feoffee, yet they have not, nor can they take away the Intent which the Feoffor had in making the Gift, viz. that the Feoffeee should have the Land, and if the Feoffee cannot have the whole, yet he shall have as much as cannot be taken away by the ancient Feoffees, and that is, the Use, which was implied in the Gift of the Land. So that it stands with good Reason and Conscience that the last Feoffee before the Statute of *Richard* 3. should have the Use, and not the Feoffor

[c] See 2 Rol. R. 316. Gilb. Law of Uses 26, 239.

[d] 2 Rol. R. 323.

[e] 1 Co. 121. a. b. 7 Co. 13. b. Co. Litt. 272. b. 1 And. 318. Poph. 3, 71. Hardr. 491. W. Jones 116, 117. 1 Mod. 39. Pollexf. 97. Ld. Raym. 876. Hill. 33 Geo. 2. B. R. *Strong v. Tate, per Nolar. arguendo.*

nor

nor the firſt Feoffee. And in ſuch Degree is our Caſe here, for inaſmuch as the Feoffment of *Simon* was not warranted by the Statute of *Rich.* 3. but reſts at the Common Law, from thence it follows that *William Jennings* by his Entry has revived the Uſe of the Fee ſimple in *Barnard*, ſo that immediately thereupon the Statute of 27. *H.* 8. executed the Poſſeſſion according to the Uſe, that is to ſay, in *Beatrice* to her and to the Heirs of her Body and of her Huſband (who is dead) begotten, with the Remainder in general Tail to the Heirs of the Huſband, with the Remainder in Fee to *Barnard.*

But the Juſtices were not agreed in whom the Fee-ſimple ſhould be, wherefore *Catline* chief Juſtice ſaid, it is in vain for us to diſpute in whom the Fee-ſimple is executed, for it is not material for our Judgment, nor does it come in Queſtion in the Caſe before us. But we are all unanimouſly agreed that the Entry of *William Jennings* is lawful, and that neither the Feoffment of *Simon* made to *Barnard*, nor any other Thing found by the Verdict, is an Impediment or Obſtacle to his Entry, and that by his Entry he has revived the Uſe in Tail to the Wife now Plaintiff, and the Statute of 27 *H.* 8. executed the Poſſeſſion in Tail according to that Eſtate, for which Reaſon the Wife is Tenant in Tail, and ſo able to puniſh the Treſpaſs. So that this is ſufficient for the Judgment, but in whom the Uſe in Fee-ſimple is revived, and who ſhall have the Fee-ſimple by the Execution of the Statute, is to no Purpoſe for us to know in order to adjudge upon the preſent Caſe, for be it in the one, or in the other, or in the third, the Wife now Plaintiff ought to have Judgment. Wherefore he ordered *Haywood* the Prothonotary to enter the Judgment for the Plaintiff, who accordingly did ſo, and the Judgment was entered in this Form.

The reſt of the Record.

At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid, whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, for that it ſeems to the Court of the Lady the Queen here, upon the whole Matter aforeſaid in Form aforeſaid found, that the aforeſaid Entry of the aforeſaid *William Jennings* into the Tenements aforeſaid in the Poſſeſſion of the aforeſaid *John Barnard* in Form aforeſaid made is a good and lawful Entry to revive the Uſe aforeſaid in the aforeſaid *Beatrice*, according to the Form of the aforeſaid firſt Feoffment; therefore it is conſidered that the aforeſaid *Beatrice* recover againſt the aforeſaid *Thomas Sermon*, *Thomas Hyet*, *William Pitt*, and *John Barnard* all the Damages aforeſaid by the Jurors aforeſaid in Form aforeſaid aſſeſſed, and alſo 6*l.* 13*s.* 4*d.* to the ſame *Beatrice* by the Court of the Lady the Queen here for her Coſts and Charges with her Aſſent of Increaſe adjudged. Which ſaid Damages in the whole amount to 8*l.* 8*s.* 8*d.* and that the aforeſaid *Thomas*, *Thomas*, *William*, and *John* be taken, *&c.*

1 Judgments 176, there miſprinted (172).

Judgment.

A Report of the Arguments made in a Caſe which was in the Common-Bench *by Writ of* Entry upon a Diſſeizin *brought by* John Stowel *Eſquire Demandant againſt* George Zouch *Lord* Zouch Saintmaure *and* Cautelupe *Tenant, for the Moiety of certain Lands in* Northmolton *in the County of* Devon. *Which Arguments began in the* Common-Bench *in* Eaſter *Term in the* ſixth *Year of the Reign of the preſent Queen, and upon the Judges there diſagreeing in Opinion, (for two of them were of one Opinion, and the other two of another Opinion) the Matter was adjourned from thence into the* Exchequer-Chamber *before all the Juſtices of* England, *and the Chief Baron, where it depended in Argument until this preſent* Hillary *Term in the* eleventh *Year of the Reign of Queen* Elizabeth, *in which Term the Caſe was adjudged according to the Opinion of the greater Number of the Juſtices. And the Record thereof appears among the Records of* Michaelmas *Term* 4 & 5 Elizabeth Rot. 1797. *and was as follows.*

Mich. Term 4 & 5 *Eliz. Rot.* 1797. *Devon.*

Declaration.

Same Precedent Reſt. Entr. 276 b. pl 1. See Booth 176, 177.

JOHN *Stowel* Eſquire by *Richard Calmady* his Attorney demands againſt *George Zouch* Lord *Zouch Saintmaure* and *Cautelupe* the Moiety of 80 Meſſuages, 500 Acres of Land, 100 Acres of Meadow, 300 Acres of Paſture, 200 Acres of Wood, 1000 Acres of Furze and Heath, 80 Acres of Elderwood, and 100 Acres of Moor with the Appurtenances in *Northmolton*, of which the ſame *George* unjuſtly and without Judgment diſſeized the aforeſaid *John* within 30 Years now laſt paſt, *&c.* And whereupon he ſays, that he himſelf was ſeized of the Moiety aforeſaid with the Appurtenances in his Demeſn as of Fee and Right in Time of Peace, in the Time of the Lady the Queen now, by taking thereof Eſplees to the Value, *&c.* And of which, *&c.* And therefore he produces the Suit, *&c.*

Bar.

And the aforeſaid *George Zouch* Lord *Zouch* by *John Heydon* his Attorney comes and defends his Right when, *&c.* and ſays that the aforeſaid *John* his Action aforeſaid againſt him ought not to have, becauſe he ſays that long before the aforeſaid *John* had any Thing in the aforeſaid Moiety with the Appurtenances, one *John Zouch* Knight Lord *Zouch Saintmaure* and *Cautelupe*, Grandfather of him the ſaid *George* Lord *Zouch*, whoſe Heir he is, was ſeized of the ſame Moiety with the Appurtenances in his Demeſn as of Fee; and being ſo thereof ſeized, a certain Fine levied in the Court of Lord *Henry* the *Eighth* late King of *England* at *Weſtminſter* from the Day of *Eaſter* in fifteen Days, in the 30th Year of the Reign of the ſame late King, before *John Baldwin*, *Anthony Fitzherbert*, *William Shelley*, and *Thomas Willoughby* then Juſtices of the ſaid late King of the Bench at *Weſtminſter*, and other Lieges of the ſaid late King then there preſent, between one *Francis Ainſworth* Complainant, and the aforeſaid *John* Lord *Zouch* Deforceant of the Moiety aforeſaid with the Appurtenances, among other Things, by the Name of the Manor of *Northmolton* with the Appurtenances, and of 20 Meſſuages, 12 Cottages, 10 Toſts, one Water-mill, one Windmill, 1000 Acres of Land, 500 Acres of Meadow, 1000 Acres of Paſture, 100 Acres of Wood,

100 Acres of Moor, 200 Acres of Furze and Heath, and 10*l.* Rent, and alſo of the Advowſon of the Church of *Northmolton* with the Appurtenances in *Northmolton*, whereof a Plea of Covenant was ſummoned between them in the ſame Court of the aforeſaid late King, *viz.* that the aforeſaid *John* acknowledged the aforeſaid Manor, Tenements, and Rent with the Appurtenances, and the Advowſon aforeſaid, to be the Right of the ſaid *Francis*, as them which the ſame *Francis* had of the Gift of the aforeſaid *John*, and them remitted and quit-claimed from himſelf and his Heirs to the aforeſaid *Francis* and his Heirs for ever. And further the ſame *John* granted for himſelf and his Heirs, that they would warrant to the aforeſaid *Francis* and his Heirs the aforeſaid Manor, Tenements, and Rent with the Appurtenances, and the Advowſon aforeſaid, againſt all Men for ever. And for that Acknowledgment, Remiſe, Quit-claim, Warranty, Fine and Agreement the ſame *Francis* granted to the aforeſaid *John* the aforeſaid Manor, Tenements, and Rent with the Appurtenances, and the Advowſon aforeſaid, and them to him rendered in the ſame Court, to have and to hold to the ſame *John* for the Term of one Month; and after that Term ended, that the aforeſaid Manor, Tenements, and Rent with the Appurtenances, and the Advowſon aforeſaid ſhould wholly remain to the ſame *John* and *Ann* his Wife (to hold of the chief Lords of the Fee by the Services which ſhould belong to the aforeſaid Manor, Tenements, Rent and Advowſon) all the Life of them the ſaid *John* and *Ann*, and of the longeſt Liver of either of them, without Impeachment of Waſt; and after the Death of the ſaid *John* and *Ann*, that the aforeſaid Manor, Tenements, and Rent with the Appurtenances and the Advowſon aforeſaid ſhould wholly remain to the right Heirs of the ſaid *John*, (to hold of the chief Lords of the Fee by the Services which ſhould belong to the aforeſaid Manor, Tenements, Rent, and Advowſon) for ever. Which ſaid Fine in Form aforeſaid levied was ingroſſed, and afterwards in the Court aforeſaid, according to the Form of a Statute in a Parliament of Lord *Henry* late King of *England* the *ſeventh* from the Conqueſt at *Weſtminſter* in the County of *Middleſex* in the *fourth* Year of his Reign thereof made and provided, was publickly and ſolemnly read and proclaimed in Form following, *viz.* the firſt Proclamation was made the 27th Day of *May* in *Eaſter* Term in the 30th Year of the Reign of the aforeſaid late King *Henry* the *Eighth*, the ſecond Proclamation was made the 29th Day of *May* in the ſame Term, the third Proclamation was made the 1ſt Day of *June* in the ſame Term, the fourth Proclamation was made the 3d Day of *June* in the ſame Term, the fifth Proclamation was made the 3d Day of *July* in the Term of the *Holy Trinity* in the ſame Year, the ſixth Proclamation was made the 6th Day of *July* in the ſame Term, the ſeventh Proclamation was made the 9th Day of *July* in the ſame Term, the eighth Proclamation was made the 11th Day of *July* in the ſame Term, the ninth Proclamation was made the 21ſt Day of *November* in the Term of *St. Michael* in the ſame Year, the tenth Proclamation was made the 23d Day of *November* in the ſame Term, the eleventh Proclamation was made the 26th Day of *November* in the ſame Term, the twelfth Proclamation was made the 28th Day of *November* in the ſame Term, the thirteenth Proclamation was made the ſixth Day of *February* in the Term of *St. Hillary* in the ſame Year, the fourteenth Proclamation was made the 8th Day of *February* in the ſame Term, the fifteenth Proclamation was made the 10th Day of *February* in the ſame Term, the ſixteenth Proclamation was made the 12th Day of *February* in the ſame Term, as by the ſaid Fine here of Record remaining fully appears. And the ſame *George* Lord *Zouch* ſays, that at the Times of the Readings and Proclamations aforeſaid made all Pleas in the ſame Court of the aforeſaid late King ceaſed, according to the Form of the Statute aforeſaid. By virtue of which ſaid Fine the aforeſaid *John* Lord *Zouch* and *Ann* were ſeized of the Moiety aforeſaid with the Appurtenances among other Things, that is to ſay, the aforeſaid *John* Lord *Zouch* in his Demeſn as of Fee, and the aforeſaid *Ann* in her Demeſn as of Freehold. And they being ſo thereof ſeized, the aforeſaid *Ann* at *Haringworth* in the County of *Northampton* died, and the aforeſaid *John* Lord *Zouch* ſurvived her, and was thereof ſeized in his Demeſn as of Fee. And the ſaid *John* Lord *Zouch* being ſo ſeized of the Moiety aforeſaid with the Appurtenances among other Things, the ſame *John* Lord *Zouch* afterwards, and before the Day of obtaining the Writ original of the aforeſaid *John Stowel*, at *Haringworth* aforeſaid, likewiſe died of ſuch Eſtate thereof by Proteſtation ſeized, after the Death of which ſaid *John* Lord *Zouch* the Moiety aforeſaid with the Appurtenances among other Things deſcended to one *Richard* Lord *Zouch Saintmaure* and *Cautelupe*, as Son and Heir of the aforeſaid *John* Lord *Zouch*, whereby the ſame *Richard* Lord *Zouch* into the Moiety aforeſaid with the Appurtenances entered, and was thereof ſeized in his Demeſn as of Fee. And the ſame *Richard* Lord *Zouch* being ſo ſeized of the Moiety aforeſaid with the Appurtenances, of ſuch Eſtate thereof at *Stafordſdale* in the County of *Somerſet* died by Proteſtation ſeized, after whoſe Death the Moiety aforeſaid with the Appurtenances deſcended to him the ſame *George* Lord *Zouch* as Son and Heir of the aforeſaid *Richard* Lord *Zouch*, whereby he the ſame *George* Lord *Zouch* was and yet is of the Moiety aforeſaid with the Appurtenances among other Things ſeized in his Demeſn as of Fee. And this he is ready to verify, wherefore he prays Judgment if the aforeſaid *John Stowel* his Action aforeſaid, contrary to the Fine aforeſaid with the Proclamations aforeſaid levied, againſt him ought to have, *&c.*

Replication. And the aforeſaid *John Stowel* ſays, that by any Thing before alledged he ought not to be precluded from having his Action aforeſaid, becauſe he ſays that before the aforeſaid *John* Lord *Zouch* had any Thing in the Moiety aforeſaid with the Appurtenances, one *John Stowel* the Grandfather of him the ſaid *John Stowel* now Demandant, whoſe Heir he is, was ſeized of the ſame Moiety with the Appurtenances in his Demeſn as of Fee, until the aforeſaid *John* Lord *Zouch* the ſaid *John Stowel* the Grandfather, *&c.* thereof unjuſtly and without Judgment diſſeized, whereby the ſame *John* Lord *Zouch* was ſeized of the ſaid Moiety with the Appurtenances in his Demeſn as of Fee by Diſſeizin, *&c.* And the ſaid *John* Lord *Zouch* being ſo thereof ſeized by that Diſſeizin, the aforeſaid Fine with Proclamations in Form aforeſaid was levied, as the aforeſaid

ſaid *George* Lord *Zouch* above thereupon has alledged: And that the aforeſaid *John Stowel* the Grandfather, *&c.* at the aforeſaid Time of the levying the Fine aforeſaid, and of the Proclamations aforeſaid upon the ſaid Fine above ſuppoſed to be made, was ſurviving and in full Life, *viz.* at *Cotherſton* in the County of *Somerſet*; and afterwards, *viz.* the 25th Day of *Auguſt* in the 33d Year of the Reign of the aforeſaid late King *Henry* the *Eighth*, at *Cotherſton* aforeſaid the ſame *John Stowel* the Grandfather, *&c.* died, after whoſe Death the Right of the Moiety aforeſaid deſcended to him the ſame *John Stowel* now Demandant, as Couſin and Heir of the aforeſaid *John Stowel* the Grandfather, *&c. viz.* as Son and Heir of *Richard Stowel*, Son and Heir of the aforeſaid *John Stowel* the Grandfather, *&c.* he the ſame *John Stowel* now Demandant then, *viz.* the aforeſaid Time of the Death of the aforeſaid *John Stowel* his Grandfather, being within the Age of 21 Years, *viz.* of the Age of 6 Years, and no more: And that he the ſame *John Stowel* now Demandant afterwards, *viz.* the 25th Day of *Auguſt* in the 3d and 4th Years of the Reign of Lord *Philip* and Lady *Mary* late King and Queen of *England*, came to his full Age of 21 Years, and not before, whereby he the ſame *John Stowel* now Demandant afterwards, *viz.* the 22d Day of *October* in the aboveſaid 3d and 4th Years of the Reign of the aforeſaid late King and Queen, into the Moiety aforeſaid with the Appurtenances upon the Poſſeſſion thereof of the aforeſaid *George* Lord *Zouch* entered, and was thereof ſeized in his Demeſn as of Fee, until the ſame *George* Lord *Zouch* him the ſaid *John Stowel* now Demandant thereof unjuſtly and without Judgment diſſeized, as he by his Writ and Declaration aforeſaid above has ſuppoſed. And this he is ready to verify, wherefore he prays Judgment and Seizin of the Moiety aforeſaid with the Appurtenances, together with his Damages by Occaſion of the Diſſeizin aforeſaid, to be adjudged to him, *&c.*

Rejoinder.

And the aforeſaid *George* Lord *Zouch*, by proteſting that the aforeſaid *John* Lord *Zouch* did not diſſeize the aforeſaid *John Stowel* the Grandfather of the Moiety aforeſaid with the Appurtenances, by proteſting alſo that he did not diſſeize the aforeſaid *John Stowel* now Demandant of the Moiety aforeſaid with the Appurtenances, for Plea ſays that the aforeſaid Plea of the aforeſaid *John Stowel* now Demandant above by replying pleaded is inſufficient in Law to maintain the ſaid *John Stowel* now Demandant to have his Action aforeſaid againſt him the ſaid *George*, and that he has no Neceſſity, nor is by the Law of the Land bound to anſwer that Plea in Manner and Form aforeſaid pleaded, and this he is ready to verify; wherefore for want of a ſufficient Plea in this Behalf he prays Judgment, and that the aforeſaid *John Stowel* now Demandant from having his Action aforeſaid againſt him may be precluded.

Demurrer to the Replication.

Joinder in Demurrer.

And the aforeſaid *John Stowel* now Demandant, for that he has above by replying alledged ſufficient Matter in Law to have and maintain his Action aforeſaid againſt the aforeſaid *George*, which he is ready to verify, and which ſaid Matter the aforeſaid *George* does not deny, nor thereunto in any wiſe anſwer, but the ſaid Averment wholly refuſes to admit, as before prays Judgment and Seizin of the Moiety aforeſaid with the Appurtenances, together with his Damages by Occaſion of the Diſſeizin aforeſaid, to be adjudged to him, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the Octave of *St. Hillary* to hear their Judgment thereon, becauſe the ſame Juſtices here thereof not yet, *&c.*

The CASE.

THE Caſe was recited in this Manner. *John Stowel* has demanded againſt *George Zouch* Lord *Zouch Saintmaure* and *Cautelupe* the Moiety of 80 Meſſuages, 500 Acres of Land, 100 Acres of Meadow, 300 Acres of Paſture, 200 Acres of Wood, 1000 Acres of Furze and Heath, 80 Acres of Elder-wood, and 100 Acres of Moor with the Appurtenances in *Northmolton*, of which the ſaid *George* had diſſeized him within 30 Years, *&c.* and he alledges his Seizin in the Time of the preſent Queen. Againſt which the Tenant has pleaded in Bar, that long before the Demandant had any Thing, one *John Zouch* Knight, the Grandfather of the ſaid *George*, whoſe Heir he is, was ſeized of the ſame Moiety in his Demeſn as of Fee. And being ſo ſeized, a Fine was levied in fifteen Days of *Eaſter* in the 30th Year of the Reign of the late King *Henry* 8. between *Francis Ainſworth* Complainant and the ſaid *John Zouch* Deforceant, of the ſame Moiety among other Things, by the Name, *&c.* By which Fine the ſaid *John* acknowledged the Tenements to be the Right of the ſaid *Francis*, as them which he had of his Gift, *&c.* And the ſaid *Francis* rendered the ſame Tenements by the ſame Fine to the ſaid *John Zouch* for one Month, the Remainder over to the ſaid *John* and to *Ann* then his Wife for their Lives, the Remainder to the right Heirs of the ſaid *John:* Which Fine ſo levied was engroſſed, and afterwards in the ſaid Court, according to the Form of the Statute made in the 4th Year of the Reign of King *Henry* 7. it was openly and ſolemnly read and proclaimed in Form following, that is to ſay, four Proclamations were made the ſame Term, and four others in each of the ſaid three other ſucceeding Terms, which are expreſſed in certain, and he ſays that at the Time of the Readings and Proclamations made, all Pleas in the ſaid Court ceaſed, according to the Form of the ſaid Statute. By Force of which Fine the ſaid *John Zouch* and his Wife were ſeized accordingly. And they being ſo ſeized, the Wife died, and afterwards and before the Writ purchaſed the ſaid *John Zouch* died by Proteſtation ſeized, after whoſe Death the ſaid Moiety deſcended to *Richard* Lord *Zouch* as Son and Heir of the ſaid *John*; by Reaſon whereof the ſaid *Richard* entered, and died by Proteſtation ſeized, after whoſe Death the ſaid Moiety deſcended to the ſaid *George* as Son and Heir of the ſaid *Richard*, by Reaſon whereof he was and yet is ſeized of the ſaid Moiety in his Demeſn as of Fee. And this he is ready to verify, and he demands Judgment if the Demandant ought to maintain his Action againſt him, contrary to the Fine aforeſaid with the ſaid Proclamations levied. And the Demandant replies, that by any Thing before alledged he ought not to be barred of his Action, becauſe he ſays that before the ſaid *John Zouch* had any Thing in the ſaid Moiety, *John Stowel* the Grandfather of the ſame Demandant, whoſe Heir he is, was ſeized of

Diſſeizor levies a Fine with Proclamations, Diſſeizee after 3 Years, and within 5 Years, dies, his Heir being within Age, who after the 5 Years expired becomes of full Age, and within a Year after his full Age enters, and adjudged that his Entry was not lawful, for here the 5 Years given by the Statute of 4. *H.* 7. firſt attached in his Anceſtor, and in ſuch Caſe being once commenced there ſhall not be any Intermiſſion or interruption of them, but the Heir, though within Age, muſt claim within thoſe five Years, or he ſhall be barred, and he ſhall not have other five Years after his full Age. S. P. Co. Litt. 246. a. 1 And. 172. Poph. 113. 2 Mod. 225. Crompt. J. C. 20. b. 96. b. Weſt's Symb. pt. 2. fo. 3. b. 67. b. Shep. Pract. Counſ. 49, 71, 76, 77, 78, 104. 2 Bac. Abr. 532. Vin. Abr. tit. Fine W. 4. § 4. fo. 262.

the

the ſaid Moiety in his Demeſn as of Fee, until the ſaid *John Zouch* diſſeized him, whereby the ſaid *John Zouch* was ſeized of the ſaid Moiety in his Demeſn as of Fee by Diſſeizin. And he being ſo ſeized, the ſaid Fine with Proclamations was levied in Form aforeſaid, as the ſaid Tenant has alledged. And the ſaid *John Stowel* the Grandfather at the Time of the ſaid Fine levied, and of the ſaid Proclamations ſuppoſed to be made, was in full Life at *Cotherſton* in the County of *Somerſet*. And afterwards, *viz.* the 25th Day of *Auguſt* in the 33d Year of the Reign of the aforeſaid King *Henry* 8. the ſaid *John Stowel* the Grandfather died, after whoſe Death the Right of the ſaid Moiety deſcended to the Demandant as his Couſin and Heir, *viz.* as Son and Heir of *Richard Stowel*, Son and Heir of the ſaid *John Stowel* the Grandfather, he the ſame *John Stowel* the Demandant then, *viz.* at the Time of the Death of the ſame *John Stowel* the Grandfather, being within the Age of 21 Years, *viz.* of the Age of 6 Years, and no more, and that afterwards, *viz.* the 25th Day of *Auguſt* in the 3d and 4th Years of the Reign of King *Philip* and Queen *Mary*, he the ſaid *John Stowel* now Demandant came to the full Age of 21 Years, and not before, by Reaſon whereof he the ſame *John Stowel* now Demandant afterwards, *viz.* the 22d Day of *October* in the 3d and 4th Years of the Reign of the ſaid late King and Queen, entered into the ſame Moiety upon the Poſſeſſion of the ſaid *George* Lord *Zouch*, and was thereof ſeized in his Demeſn as of Fee, until the ſaid *George Zouch* thereof diſſeized him the ſame *John Stowel* now Demandant, as he by his Writ and Count has alledged, and he demands Judgment, and prays Seizin. And the ſaid *George*, by proteſting that the ſaid *John Zouch* did not diſſeize the ſaid *John Stowel* the Grandfather of the ſaid Moiety, and alſo by proteſting that he himſelf did not diſſeize the ſaid *John Stowel* now Demandant, for Plea demurs upon the Replication, and the Demandant alſo joins in Demurrer.

And the Matter was argued in the Common-Bench in *Eaſter* Term 6 *Elizabeth*, by *Puttrel* and *Carus* Serjeants on the Part of the Lord *Zouch* the Tenant, and by *Harper* and *Bendloe* Serjeants on the Part of *Stowel* the Demandant. And in *October* afterwards it was argued by the Judges of the ſame Place, who diſagreed in Opinion, for *Walſh* and *Brown* argued that the Law was with *Stowel* the Demandant, and *Weſton* and the Lord *Dyer* argued to the contrary. Whereupon the Judges of the Common-Bench adjourned the Matter into the Exchequer-chamber for the further Argument of it. And there it was argued in *Eaſter* Term 7 *Elizabeth* by *Puttrel* and *Harper*, and in *October* following by *Carus* and *Bendloe*. And whilſt this Matter depended there in Argument, two of the Juſtices died before they had made their Arguments in the Exchequer-chamber, *viz. Corbet*, one of the Juſtices of the King's-Bench, in whoſe Place *Carus* was made Juſtice, and *Anthony Brown*, one of the Juſtices of the Common-Bench, (who was a Judge of profound Learning and great Eloquence, upon whoſe Death the Verſes written under the Report of this Caſe *fo.* 376, were juſtly made, and in the Place of the ſame *Brown*, *Harper* was made Juſtice. But he and *Carus* did not argue this Caſe as Juſtices, becauſe they were made Juſtices after the Argument of any of the other Judges who were their Ancients: But after they were called to the Office of Juſtices they retained their former Opinions which they had maintained when they were Serjeants. But all the other Juſtices, and *Saunders* Chief Baron of the Exchequer, argued in the Caſe. And that which I here report of *Brown*'s Argument was made in the Common Bench. And *Harper* and *Bendloe*, as is aforeſaid, and *Walſh* in both his Arguments, and *Brown*, as is ſaid before, and *Saunders* Chief Baron of the Exchequer held that the Law was with *Stowel* the Demandant, and that he ought to recover.

The Point of the Caſe.

And the Point argued was but one, and that was, inaſmuch as the Statute of 4. *H.* 7. *cap.* 24. *of Fines* gives five Years to every Stranger, and here *John Stowel* the Grandfather, who was diſſeized, was a Stranger to the Fine, and had Liberty to enter or bring his Action within five Years, and he died within five Years, if the ſaid *Stowel* the Demandant being his Heir, and being within Age at the Time of his Death, and having ſuffered the firſt five Years to paſs during his Nonage, ſhall have other five Years after he comes of full Age, where the Reſidue of the five Years attached in his Grandfather, or if he ſhall be bound to the five Years firſt given, inaſmuch as Part of them attached in *Stowel* the Grandfather.

And the Act, excluſive of the Preamble, was divided by one or other of them all that argued into four Points, which were thought to contain the Subſtance of the whole Purview of the Act.

The firſt was, whether or no *Stowel* the Demandant ſhall be bound by the Body of the Act reſting in theſe Words, *viz. the Proclamations being made, the Fine to be a final End, and ſhall conclude as well Privies as Strangers to it*, adding thereto the Exception in the Act, or whether or no he ſhall be out of it by Reaſon of the Exception.

The ſecond was, admitting that *Stowel* the Demandant ſhall not be bound by the Body of the Act, but ſhall be out of it as being compriſed within the Exception, whether or no he has purſued the Time preſcribed afterwards by the Purview of the Act for thoſe who are excepted.

The third was, admitting that the Demandant is bound by the Body of the Act, and is not compriſed within the Exception, whether or no he ſhall be aided by the firſt Saving.

The fourth was, admitting that the Demandant is bound by the Body of the Act, in that he is neither compriſed within the Exception, nor ſhall be aided by the firſt Saving, whether or no he is within the ſecond Saving, and ſhall be aided thereby.

And the Equity of the Act was made a fifth Point of the Caſe. And ſome of thoſe who took the Law to be with the Demandant argued to ſome of the Points, and others of them to others, and ſome to all the Points. But I ſhall not recite at large the Arguments which were made on both Sides, for each of the Judges had a whole Day for his Argument in the Exchequer-chamber, and the Arguments were very long, and if I ſhould report all that was ſaid, it would make it too voluminous, which it is not my Deſign to do, but I ſhall here ſhew briefly the Reaſons and Sayings which I thought were the principal and moſt weighty.

And by thoſe who argued on Behalf of *Stowel*, ſome of whom inveighed againſt ſome of the Points, and others againſt others, and ſome againſt all, it was held and maintained that *Stowel* the Demandant was not bound by the ſaid Act, but was out of the Letter, or out of the Senſe of the Letter, of every Branch of it; and if he was within the Reſtraint of any Branch, that he was let at large by another Branch, and that he was at Liberty to enter and bring his Action as has done. And for the better underſtanding of the Act, and of the Reaſon of making it, they conſidered Fines as they ſtood at the Common Law, and the Force which the Common Law attributes to them, and the Incidents thereto, which conſiſts in three Points. Firſt, the Nature of a Fine and it's Puiſſance. Secondly, the Preſervation of ancient Rights by Claim. Thirdly, what Perſon might make Claim. For the Demandant.

And as to this, they ſaid that Fines have been of very great Antiquity at the Common Law, [a] for they have been as long as there has been any Court of Record. And by the Common Law they were the higheſt Aſſurance, and of the greateſt Force and Puiſſance. And ſo they are termed by the Statute *de modo levandi fines*. And the Reaſon thereof is, becauſe they make an End of the Law in bringing Quiet and Repoſe, for the Law has no other End but Repoſe, and the Law was ordained to put a Stop to Contention, and to make Peace; and this does a Fine, and from hence it has it's Name, as the Statute [b] *of Fines* ſhews, which ſays, *foraſmuch as Fines levied in our Court ought and do make an End of Suits, and therefore they are called Fines principally, &c.* And in the Beginning of the Fine it ſhews its Name and Quality, for it has theſe Words, *This is the final Agreement, &c.* ſo that in the Beginning and End there is Agreement and Peace. And the chief Cauſe why it makes Peace and Agreement is, [c] becauſe it binds all Strangers (except thoſe who have Defect), if they do not enter or make their Claim within the Year, and therefore it may well be called of great Puiſſance, [d] for there is no other Aſſurance of equal Puiſſance, except a Writ of Right, where the Trial is by Battle or the great Aſſize, and ſo the ſaid Statute *of Fines* ſays, *and therefore they are called Fines principally, where after waging of Battle and the great Aſſize in their Caſes ever they hold the laſt and final Place.* And *Saunders* ſaid [e] that a Recovery by Writ of Right, where the Trial is by Battle or the great Aſſize, was peremptory to all Strangers, if they did not enter, or bring their Action, or make their Claim within a Year after, except ſuch Strangers were within Age, or had other Defects as excuſed them from making their Claim within a Year after the Fine levied. And to this Purpoſe he cited *Bracton* not as an [f] Author in the Law, for he ſaid that *Bracton* and *Glanvil* were not Authors in our Law, but, he ſaid, he cited him as an Ornament to Diſcourſe where he agrees with the Law. [g] And *Bracton* ſays, *competit exceptio ex taciturnitate, et pro defectu clamei, quando finalis concordia levata eſt, vel recuperatio in breve de recto per magnam juratam.* And as a Proof that the Law was alſo ſo upon a Recovery by Default in a Writ of Right, where final Judgment is given, he cited the Saying of *Herle* in a *Formedon* in Reverter in [h] 5. *Ed.* 3. where he ſays, "If you diſſeize me of my Land, "and afterwards A. brings a Writ of Right againſt you, and you join the Miſe upon the meer "Right, and make Default after the Miſe joined, he ſhall recover to him and to his Heirs for "ever, quit of you and your Heirs for ever, and if I don't put in my Claim within the Year "and Day, I am barred for ever," for there he ſays, *vigilantibus et non dormientibus jura ſubveniunt.* So that, by *Herle*, Non-claim by a Year and Day upon Recovery by Default in a Writ of Right, where Judgment final is given, was a good Bar by the Common Law. But he ſaid that in theſe Caſes of a [i] Recovery in a Writ of Right, and alſo upon a [k] Fine executory levied, the Recovery and the Fine ought to be executed by Entry or Execution by Suit, for Tranſmutation of the Poſſeſſion is a Part of Notice to Strangers, and gives them an Opportunity of bringing their Action, or of making their Entry within the Year and Day afterwards, and unleſs the Recovery or Fine be executed, none ſhall be barred by Non-claim. [l] And to prove this he cited the Caſe in *T.* 7. *Ed.* 3. in a Writ of Right, where a Fine levied, and not executed, and Non-claim within the Year and Day after the Fine levied, was pleaded in Bar, and there it is debated whether or no it ſhall be a good Bar, and the Fine was *ſur conuſance de droit come ceo que il avoit de ſon done*, and the Land was rendered for Life to the Conuſor, and ſo it continued a Year after without any Tranſmutation of Poſſeſſion, and there it ſeems by the better Opinion that Nonclaim is no Bar, and it is there ſaid that if one recovers in a Writ of Right, according to the Opinion of ſome, a Privy and a Stranger ſhall avoid this Recovery, if Claim be not put in within the Year, but if the Tenant retains the Land all the Time, it is not neceſſary for a Man to put in his Claim. [m] And it was ſaid that one of the Cauſes why Nonclaim by a Year and a Day after a Recovery in a Writ of Right, where the Trial is by Battle or the great Aſſize, ſhould be a Bar, was, in Reſpect of the Notoriety of Battle or the great Aſſize, which is more public and notorious in the Country than Trials in other Actions. And in the other Caſe where Judgment final is given by Default, it was ſaid (but not preciſely) that in ſuch Caſe [n] Proclamation uſed to be made before Judgment, in Order that People might have greater Notice thereof. And for the Sake of this Notoriety the Statute *of Fines* ordains *that Notes and Fines hereafter to be levied in our Court ſhall be publicly and ſolemnly read, and that in the mean time all Pleas ſhall ceaſe: And this ſhall be at two certain Days in the Week, according to the Diſcretion of the Juſtices.* And this perhaps was grounded upon the Uſage (if there was any) of making Proclamations upon Default in a Writ of Right, to the Intent that the Country might have the ſpeedier Notice thereof. And *Catline* Chief Juſtice of *England*, and *Dyer* Chief Juſtice of the Common Bench agreed with *Saunders*, that by the Common Law Non-claim was peremptory to the Right of a Stranger, as well after Recovery in a Writ of Right, as in a Fine; and to that Purpoſe they cited divers Authorities out of *Bracton*, *Hengham*, and others. And *Dyer* ſaid, he imagined that

The Antiquity, Nature, and Puiſſance of Fines at the Common Law. See Pollexf. 158. Shep. Pract. Counſ. 104.

[a] Shep. Pract. Counſ. 47.

[b] 27 Ed. 1. cap. 1. Stat. 1.

[c] Shep. Pract. Counſ. 47.

[d] Pollexf. 158.

[e] Co. Litt. 254. b. 8 Co. 100. a. Pollexf. 158. 1 Finch 26. 2 Finch 53, 54.

[f] See Fitz. Gard 71, held by all the Court that *Bracton* was never taken for an Author in our Law, and accordingly *Catline* in citing him Poſt 358 (g), ſays he does not cite him as an Author, but only as an Ornament to his Diſcourſe. And the like was ſaid *per Shower arguendo* 1 Show. 121. See Forteſc. Rep. 419, 429.

[g] See Bract. fo. 435. b. Fleta lib 6. cap. 53.

[h] M. 5. Ed. 3. 50. pl. 60. Fitz. Faux. de recov. 1.

[i] S. P. 1 Co 96. b. 97. a. 8 Co. 100. a. Booth 101.

[k] S. P. 2 Vent. 335.

[l] T. 7. Ed. 3. 37. a. Fitz. Continual Claim 7. 1 Co. 96. b. 8 Co. 100. a. 2 Inſt. 517. Booth 140.

[m] 8 Co. 100. a.

[n] See Dy. 302. pl. 42.

public Proclamation was made in a Writ of Right upon Default before Judgment, but he had never ſeen an Authority thereof. And from this Uſage in a Writ of Right, he ſaid, he conjectured that the Uſe of making Proclamations in a *Formedon* upon Default or Reddition was firſt derived. [a] And hereupon he cited the Caſe in *T.* 7. *H.* 4. where in a *Formedon* againſt three they came in, and confeſſed the Action of the Demandant, wherefore Proclamation was made to any that would come and ſhew why the Demandant ought not to recover upon their Confeſſion; and thereupon one came in and ſhewed that he had enfeoffed the Tenants upon Condition of Payment of certain Money at a certain Day, which he had paid, and one of the Tenants made one of his Servants to bring this Action againſt them, in order to make him loſe his Land and his Money by Colluſion, and he prayed that no Judgment might be given, and upon this the Ter-tenants were examined, and upon the Examination the Matter was found; and *Richil* ſaid, "the Demandant "in this Writ ſhall not have Judgment before that *Gabriel* has blown his Horn." And the Tenants found Mainprize to attend the Judgment of the Court, if they could be found Maintainers of this Diſceit. And he ſaid that *Fitzherbert* and *Statham*, in their Titles *of Proclamation*, ſay that Proclamations ſhall be made in ſuch Caſes, and they add, "*Quære* by what Law." And ſo they who argued on the Part of the Demandant concluded that Fines were of the greateſt Antiquity, and next to a Recovery in a Writ of Right were of the greateſt Force and Puiſſance. And hereupon *Brown* ſaid, that by Reaſon of the Highneſs of a Fine, and of the Peace and Repoſe which it carries with it, it may be termed *Finis legis, et Fructus legis, et Exitus legis, et Effectus legis.*

[a] T. 7. H. 4. 19. b. Stath Proclamation 3. Fitz. 14. Bro. 2. M. 33. H. 6. 34. a. Booth 140.

The Preſervation of ancient Rights regarded by the Common Law, and the Time limited by it for Claim to be made.

But he and the others ſaid, that notwithſtanding it's Highneſs and Puiſſance, yet in the Conſideration of a Fine there is one Thing which is always to be obſerved and coupled with it. And that is, the former Rights which Men have to the Land, which the firſt Founders of our Law always regarded. So that notwithſtanding the Highneſs of the Fine, they made Proviſion for the Preſervation of ancient Rights, and it was never their Intent that by raiſing up the one the other ſhould be ſuppreſſed, but that both of them ſhould be guided by Reaſon, and be preſerved within the Limits thereof. And for this Cauſe they ordained a Means to preſerve the ancient Right, and that was, by Entry, Action, or Claim within a certain Time, viz. within a Year and a Day after the Fine levied, by which Entry, if it was lawful, or by Recovery by Action the Fine was utterly annulled, not only (as *Saunders* ſaid) againſt him who entered lawfully or recovered, but alſo againſt all thoſe who had a more ancient Right than he who entered or recovered. For, he ſaid, after a Fine levied the Poſſeſſion ought to continue a Year and Day according to the Purport of the Fine, and if it does not, but one enters or recovers, and ſo avoids the Poſſeſſion, then the Fine by the Common Law was avoided not only againſt him but againſt all others that had Right paramount, altho' they did not put in their Claim within the Year and Day after the Fine: And for Proof hereof he cited [b] 16. *Ed.* 2. which agrees herewith, as he ſaid. And *Dyer* afterwards affirmed this, and ſaid, as the Lord, who has annulled by Diſceit a Fine at the Common Law, has reſtored the Right to him who levied the Fine, ſo has he, whoſe Entry is lawful, annulled the Fine by his Entry within the Year and Day, and put at large the former Right of others, which without Claim or Action by them within the Year and Day would otherwiſe have been bound. And *Saunders* went further, and affirmed that if the Right paramount was actually bound, yet if the Eſtate which paſſed by the Fine be afterwards defeated, the Right paramount is reſtored. And hereupon he put this Caſe, viz. [c] he that abates after the Death of Tenant in Fee-ſimple makes a Feoffment upon Condition, and the Feoffee levies a Fine, and a Year and Day paſſes without Entry or Claim by the Heir, now the Conuſee and all who came under him were barred from pleading ſuch Fine before the Statute of Nonclaim; but if afterwards the Condition had been broken, by Reaſon whereof the Abator enters for the Condition broken, then the Heir may have an Aſſize of *Mortdanceſtor* againſt the Abator, and he has no Defence againſt him, for he cannot claim by the Conuſee, nor under his Eſtate, for he has defeated his Eſtate, and if he will plead in Bar of the Aſſize of *Mortdanceſtor* the Fine levied to the Conuſee, and ſay that he has his Eſtate, the Matter of the Avoidance of the Eſtate may be ſhewn in Avoidance of the Concluſion, for he cannot claim Privilege by an Eſtate which he himſelf has defeated. [d] And he ſaid that the Law ſince the Statute of 4. *H.* 7. is, that if the Eſtate contained in the Fine be defeated within the five Years, the Fine has thereby loſt it's Force, not only againſt him who defeated it, but againſt all others that had Right or Title paramount, and who did not put in their Claim within the five Years after the Proclamations, altho' it be ſo that he who defeated it brought his Action within the five Years, and had not Judgment and Execution until ſeven Years were paſſed after the Proclamations. And alſo he ſaid that continual Claim upon the Land, or amongſt the Neighbours out of the Land, where he dares not enter, ſhall diſturb the Fine if the Entry be lawful. And it was alſo ſaid on this Part, that before the Statute which ouſted Nonclaim, a Stranger who had Right might come in within the Year, and put in his Claim upon the [e] Record of the Fine, *quod Catline et Dyer conceſſerunt*, and they ſaid that the Entry was thus, viz. [f] *Talis venit et apponit clameum ſuum ad terras infra ſcriptas*, and it was written, as *Dyer* ſaid, in the Record of the Foot of the Fine, viz. under the Fine; and, he ſaid, he had ſeen that ſuch Entries were made in the Reigns of five Kings next before King *Edward* 3. And *Catline* alledged that he had ſeen divers Records of ſuch Entries, but he ſaid that the Day of the Entry of the Claim was not put in the Entry of ſome, ſo that it did not appear in the Records nor was it teſtified that it was entered within the Year and Day, but yet, he ſaid, it is to be intended that it was entered within the Year and Day, and it was not permitted to be entered after the Year and Day. And he cited the Words of *Bracton*, who writes that ſuch Claim ought to be made within the Year and Day, but he ſaid that he did not cite him as an [g] Author in our Law, but for Conſonancy and Order where

[b] H. 16. Ed. 2. Fitz. Continual Claim 10. 2 Inſt. 518. Vin. Abr. tit. Fine F. a. 3. pl. 2. Shep. Pract. Counſ. 47, 99.

[c] Weſt's Symb. pt. 2. fo. 69. a. Shep. Pract. Counſ. 99. Co. Read. on Fines 13. Vin. Abr. tit. Fine F. a. 3. pl 3. Sed contra 1 Leon. 84 *per Periam.* J.

[d] Weſt's Symb. pt. 2. fo. 73. a. Shep. Pract. Counſ. 99.

[e] But this is no ſuch Claim as ſhall avoid the Statute of 4. *H.* 7. 2 Leon. 53 *Brafier's* Caſe. 2 Inſt. 518.

[f] See Fleta lib. 6. cap. 53. 2 Inſt. 518.

[g] Ante 357 (f).

where he agrees with better Authorities. [a] And *Dyer* ſaid, in 16. *Ed.* 2. in a *Cui in vita* a Fine and Nonclaim was pleaded againſt the Woman Demandant, and ſhe alledged Claim entered by her in the Foot of the Fine; and there was a Variance in her Name, for the Name which ſhe now uſed was different from the Name in the Entry of the Claim, and yet ſhe there joined Iſſue that ſhe was the ſame Perſon who made the Claim upon the Record. And *Note*, the Lord *Dyer* defined Claim in this Manner, viz. Claim is a Challenge by a Man of the Propriety or Ownerſhip of a Thing which he has not in Poſſeſſion, but which is wrongfully detained from him. Upon the whole therefore there were [b] four Claims at the Common Law to avoid Fines, that is to ſay, two by Record, and two *in pais*. By Record, one was, a real Action brought within the Year according to the Truth of the Caſe, the other was, Entry of Claim in the Record of the Foot of the Fine. *In Pais*, one was, a lawful Entry into the Land by him that had Right, and an Expulſion of the Conuſee, or Ter tenant; the other was, continual Claim. Wherefore thoſe who argued on the Part of *Stowel* ſaid, that notwithſtanding the Puiſſance of Fines at the Common Law, yet Reſpect was had to ancient Rights, and the Law provided theſe Claims for the Preſervation of them.

[a] H. 16. Ed. 2. Fitz. Continual Claim 10.

[b] 2 Inſt. 518. Vin. Abr. tit. Fine G. a. pl. 1. Andrews Rep. 133. Curſon 146.

As to the third Point, viz. what Perſons ought to make Claim to avoid being concluded by the Fine, they ſaid that thoſe ought to make it who were Strangers to the Fine, and had [c] preſent Right, for inaſmuch as the Time of Entry, or Action, or Claim was but within the Year, he who within the Year had Cauſe thereof ought to make it, and none other. [d] And therefore if there be Tenant for Life, the Remainder for Life, the Remainder in Fee, if the firſt Tenant for Life aliens, and the Alienee levies a Fine, he in the Remainder for Life may enter, and defeat the Fine, and not he in the Remainder in Fee, and if he enters, this ſhall give Benefit to him in the Remainder in Fee, for againſt him the Fine ſhall be ouſted; and by the ſame Reaſon if he makes continual Claim, he in the Remainder in Fee ſhall ever after take Benefit by it, and ſhall avoid the Fine, as *Saunders* ſaid. [e] And, it was ſaid, if the Tenant for Life would not make Claim within the Year, but ſuffered the Year to paſs, he in the Reverſion or Remainder was bound at the Common Law, for all of them, that is, the particular Tenant, and they in the Remainder or Reverſion, had but a Year after the Fine levied. And *Catline* afterwards in his Argument affirming this ſaid, that it was a great Miſchief that by the Latches of Tenant for Life, or Tenant of other particular Eſtate, he that had the Remainder or Reverſion in Fee ſhould be bound for ever. [f] And he ſaid that this Miſchief was one of the great Cauſes of making the Act of 34. *Edw.* 3. *cap.* 16. which ouſted Nonclaim. And *Brown* ſaid that the Statute of *Weſtminſter* 2. *cap.* 1. provided for the Donor in Tail in this Caſe long before the Statute of 34. *Edw.* 3. for the Words of the Statute are, *nor ſhall it be neceſſary for ſuch Heirs, or thoſe to whom the Reverſion belongs, to put in their Claim.* So that this Statute provides that it is not neceſſary for Tenant in Tail to make Claim, *ex quo ſequitur* that Nonclaim ſhall not prejudice him, nor him in Reverſion, and if the Tenant in Tail dies within a Year after the Fine levied, he in the Reverſion by the ſaid Act has no Neceſſity to make his Claim. And ſo this Caſe was remedied, from whence it may be collected that before he ſhould have been bound.

Who ought to make Claim.

[c] 2 Inſt. 518.

[d] 2 Inſt. 518. Weſt's Symb. pt. 2. fo. 72. a. Curſon 139.

[e] 2 Inſt. 518. Shep. Pract. Counſ. 47.

[f] Co. Litt. 2 f 2. b. Poſt 360. (f), *per Catline.*

But *Brown* demanded, inaſmuch as Claim is neceſſary for the Salvation of former Rights, who ought to make Claim? And to this he ſaid, as alſo did *Walſh* and *Saunders*, and all that argued on the Part of the Demandant, that he who is of full Age ought always to make the Claim within the Year, for he has Underſtanding and Reaſon to know his Right, and to know whether his Entry be lawful, and to enter, or make continual Claim, or bring his Action according to his Right. And becauſe ſuch a one has Reaſon and Diſcretion, it is reaſonable that he ſhould be bound to a certain Time. But an Infant has no Reaſon nor Underſtanding, and therefore it would be utterly unreaſonable to bind one to a certain Time, who had not Diſcretion to know his Right, nor to underſtand what Action he ſhould bring, nor when or how he ſhould enter or make his Claim, for which Reaſon he and others that were in like Caſe were by the Common Law exempted from the Law of Non-claim. [g] And this was proved by the Implication of the ſaid Act of *Weſtminſter* 2. *cap.* 1. *de donis conditionalibus*, which ſays, *nor ſhall it be neceſſary for ſuch Heirs, or thoſe to whom the Reverſion belongs (altho' they ſhall be of full Age, in* England, *and out of Priſon) to put in their Claim*; by which Words *(altho' they ſhall be of full Age)* it is implied that if he was within Age, he was not driven by the Common Law to make his Claim. The like appears by the Statute [h] *de modo levandi fines*, which is as follows, viz. *And the Cauſe why ſuch Solemnity ought to be done in a Fine is, becauſe a Fine is ſo high a Bar, and of ſo great Force, and of ſo ſtrong Nature in itſelf, that it clearly concludeth not only ſuch as be Parties and Privies thereto, and their Heirs, but all other People of the World, being of full Age, out of Priſon, and of good Memory, and within the four Seas the Day of the Fine levied, * if they make not their Claim of their Action, within a Year and a Day by the Country.* And *Note*, where ſome Books of the ſaid Statute have the Words *(que le Clerk forcloſe, &c. Catline* ſaid that it ſhould be as above, *que el clere forcloſe*, that is, it clearly or utterly forecloſes or concludes; and he ſaid that the Words *(pur le pay)* are the ſame in Senſe with *pur le pais*, that is, that the Action ſhall be tried by the Country, viz. by 12 Men. Wherefore inaſmuch as the Statute ſays that a Fine clearly concludes all Men who are of full Age, out of Priſon, and of good Memory, and within the four Seas, therein it is implied that they who were within Age, or lay under the other Defects, were not bound to make Claim. And all this is grounded upon good Reaſon, [i] for an Infant being void of Senſe cannot know his Right, nor underſtand what Action is proper to be brought for it, nor can he make his Claim, or do other Acts which require Diſcretion. [k] And in the like Caſe is he who is of unſound Memory.

Who ought to make Claim.

[g] See Litt. § 441.

[h] Stat. 18. Ed. 1. Stat. 4.

* In the Original it is *fils ne mettront lour claim de lour Action pur le pay deins lan et le jour*, which Reading has been generally followed, but Mr. *Cay* in his Preface to the Abridgment of the Statutes propoſes another, which he ſays is a more probable Reading, thus, *fils ne mettront lour claim, ou al Record l'action, ou le pais, dein lan et le jour*, againſt the Conſtruction here after made by *Catline* upon the Words *pur le pay*.

[i] 8 Co. 100. a. b. Fleta lib. 6. cap. 54 § 1. Weſt's Symb. pt. 2. ſo. 67. b.

[k] Fleta lib. 6. cap. 54. § 1.

[a] And he that is in Priſon at the Time of the Fine levied, who by Intendment of Law is kept cloſe, and without Conference with others, or Intelligence of Things abroad, and who has not Liberty to go at large to make Entry or Claim, or to ſeek Counſel, [b] as alſo he that is beyond Sea at the Time of the Fine levied, who is preſumed not to have Knowledge of any Thing done in *England*, ought not in Reaſon to be bound by their Default of Claim, for they are as void, in Intendment of Law, of any Knowledge of the Fine levied, as an Infant or Man of unſound Memory are of Senſe and Reaſon, and therefore they ſhall not be bound to make Claim. [c] But *Dyer* ſaid that a Feme-covert is not mentioned in any of the Acts, but ſhe ſhould be bound by Nonclaim, for ſhe had a Huſband who might make Claim. And he ſaid that in one of the Precedents which he had ſeen, a Claim was entered in the Foot of the Fine by Baron and Feme. And *Saunders* ſaid, that an Infant and the others who were not bound to make Claim within a Year and Day, and their Heirs, were exempted from making Claim at any Time, for the Infant was not bound to make Claim within a Year and Day after he came of full Age, nor he of unſound Memory within a Year and Day after his Memory was reſtored, nor he in Priſon or beyond Sea after he became at large or within the Realm, but they were at large for ever by the Common Law, and bound to no Time. [d] And *Brown* ſaid, that if a Diſſeizor had levied a Fine before the Statute of Nonclaim, the Diſſeizee then being of full Age, and the Diſſeizee had died within a Year, before Entry or Claim made, or Action brought, and the Right had deſcended to his Son and Heir within Age, he was at large, and was not bound by it's having firſt attached in his Father; for the ſame Reaſon which would have exempted him from making Claim within a Year and Day (being an Infant), if he had had the Right at the Time of the Fine levied, exempts him (being an Infant) now that he has the Right by Deſcent within the Year and Day, for no Folly ſhall be imputed to his Father for not entering or making Claim, inaſmuch as he had Time to do it during the whole Year and Day, and he could not be ſaid to have committed Folly in ſurceaſing his Time until the whole Time was elapſed, becauſe he died before it was elapſed, and when his Right deſcended to the Infant, he was not bound to Time in this Caſe any more than in the other where he had the Right at the Time of the Fine levied, ſo that the Reaſon of the Common Law is the ſame in both the Caſes. And *Saunders* ſaid, if there was Tenant for Life, with Remainder for Life, and the Reverſion or Remainder in Fee to an Infant, the firſt Tenant for Life aliened, and a Fine was levied, now the Tenant for Life in Remainder ought to enter or make the Claim, but if he had died within the Year and Day, the Infant was at large, and ſhould not be bound, altho' the Year and Day had been paſſed without Entry, Action, or Claim by him, *cauſa apparet ex dicto Brown.*

Wherefore they who held the Law to be with *Stowel* concluded that Fines were of the greateſt Force by the Common Law, but yet not ſo great as to deſtroy former Rights, which were much regarded, and for the Preſervation whereof a Time was given, out of which Time Infants were exempted. And afterwards, viz. by the Act of 34. *Edw.* 3. *cap.* 16. Nonclaim was ouſted. *Saunders* ſaid that one of the great Cauſes thereof was the troubleſome Times of War, which hindered the People in thoſe Days from taking Notice of Fines, and from making their Claims. [e] And he ſaid that by Equity thereof the Law of Nonclaim is taken away in a Writ of Right, for there was the ſame Reaſon in both the Caſes, and the Law which in Words took away the one, in Senſe took away the other. [f] *Catline* held that the Unreaſonableneſs of the Law, in that they in Reverſion or Remainder were bound by the Latches or Maliciouſneſs of the particular Tenants for Life, who would not enter or make Claim within the Year and Day, was one of the great Cauſes of the Repeal of the Statute of Nonclaim. The Law of Nonclaim being ouſted, they who held the Law to be with the Demandant ſaid, that in Proceſs of Time a Defect was found in the Validity of Fines, for whereas they uſed to be the ſtrongeſt Aſſurance that People could have of their Inheritances, after the Statute which ouſted Nonclaim they loſt their Force, and became very weak, and in Effect nothing more than [g] Feoffments of Record, by Reaſon whereof the Security of Men's Inheritances was taken away, and the Foundation which eſtabliſhed them was broken up, which introduced great Strife and Contention amongſt the Subjects of the Realm, and which the Makers of the Act of 4. *H.* 7. intended to reform, as it appears by the Preamble of the ſaid Act, whereby it ſeems they had three Things in View. The firſt was, to enhance the Reputation of Fines, and to make them of a puiſſant Nature. Secondly, to preſerve ancient Rights, ſo that they were purſued within a certain Time. Thirdly, if the ancient Right at the Time of the Fine levied, or after within the Time limited, was in an Infant, or others who had not Reaſon or Knowledge of the Fine, or wanted Liberty, to favour them until ſuch Time as the Impediments were removed, and then to give them ſufficient Time to purſue their Right. In which three Points the Makers of the Act of 4. *H.* 7. ſeem to have purſued the Reaſon of the ancient Common Law in Fines before the Statute of Nonclaim was ouſted. And in ſo doing they built upon a firm Foundation. And for the better apprehending the ſame, every Branch of the Act is to be conſidered by itſelf, which being done, it will appear that *Stowel* now Demandant is out of the Letter, or at leaſt out of the Senſe of the Letter, of every Branch, and if he is within the Letter of any Branch, he is let at large by ſome other Branch, and ſo is at Liberty.

1 Point. Whether the Demandant ſhall be bound by the Body of the Act of 4. *H.* 7. *cap.* 24.

And as to the Body of the Act, (which is the firſt of the four Diviſions) it conſiſts in theſe Words of Ordinance, viz. *And the ſaid Proclamations ſo had and made, the Fine to be a final End, and conclude as well Privies as Strangers to the ſame, except Women covert, other than be Parties to the ſaid Fine, and every Perſon then being within the Age of* 21 *Years, in Priſon, or out of this Realm, or not of whole Mind at the Time of the ſaid Fine levied, not Parties to ſuch Fine.* Which Words are to be conſidered. And here it is to be obſerved, that this Ordinance is general, viz. *that the Fine ſhall*

[a] Co. Litt. 259. a. Fleta lib. 6. cap. 54. § 1. Vin. Abr. tit. Impriſonment D. pl. 2. Weſt's Symb. pt. 2. ſo. 68. a. Shep. Pract. Counſ. 77.

[b] Fleta lib. 6. cap. 54. § 3.

[c] Co. Litt. 262. b. 8 Co. 100. b. Weſt's Symb. pt. 2. fo. 68. a. See Hob. 95.

[d] S. P. Accord Poſt 365 (a), *per Brown et Saunders.* Sed Contra Poſt 372 (*) *per Dyer.*

[e] Booth 101. Sed Contra Co. Litt. 262. a.

[f] Co. Litt. 262. b. Ante 3 9 (f), *per Catline.*

[g] 1 Finch 254. 2 Finch 279, 280.

ſhall be a final End, and ſhall conclude as well Privies as Strangers; [a] which Words, if the Act had ſtopped there, would have concluded all, and the Act might have been called general in Letter, but afterwards it excepts Infants, and the others contained in the Exception. In which Caſe *Harper*, *Bendloe*, *Walſh*, *Brown* and *Saunders* alſo ſaid, [b] it is to be known that that which is excepted out of the Act is out of the Proviſion of the Act, and there is no Ordinance made in Relation to it; but it is as fully exempted out of the Act, as if the Act had never been made. [c] As a Feoffment of a Manor, except an Acre, makes the Acre never to paſs, as *Harper* ſaid. [d] And a Leaſe of all my Lands in *Dale*, except *White-Acre*, is as void for *White-Acre* as if no Leaſe had been made. And a Gift of my Horſes, except my black Horſe, is as void for my black Horſe as if no Gift had been made; for that which is excepted out of the general Words is in the ſame Caſe as if nothing had ever been ſpoken of it. And *Walſh* ſaid that there is a Diverſity between an Exception and a Saving, for an Exception exempts clearly, but a Saving goes to the Matters touched, and does not exempt. And ſo this general Purview, that the Fine ſhall conclude Strangers, except Women-covert, Infants, and Perſons out of the Realm, and of unſound Memory, is made only againſt others than thoſe that are excepted, and is of the ſame Effect, as to Strangers, as if the Act had ſaid that the Fine ſhall be a final End, and ſhall conclude all Strangers being diſcovert, of full Age, not in Priſon, and of ſound Memory, and none others, and againſt ſuch as are not in ſuch Degree it is a general Act, and againſt no other Strangers. Then here *Stowel* the Grandfather was a Stranger to the Fine, and of full Age at the Time of the Fine levied, *ergo* he was bound, but *Stowel* the Demandant was a Stranger to the Fine, and within Age at the Time of the Fine levied, *ergo* he is excepted, and is in the ſame Degree as if the Act had never been made; ſo that he is at Liberty and bound to no Time within Age or at full Age, if there had been no other Words afterwards in the Act, and therefore if *Stowel* now Demandant had had Right at the Time of the Fine levied, he had been left at large by this Exception, and might have entered or claimed the Land 40 or 50 Years after, if there had been no further Proviſion in the Act; for which Reaſon in order to bind to a certain Time Infants and others who were excepted, the Clauſe afterwards was made, which binds them to five Years next after their Imperfections or Impediments removed, within which if they don't purſue their Actions or enter, the laſt Clauſe concludes them. So that thoſe who are let at large by the Exception are reſtrained by the laſt Clauſe made touching them, which laſt Clauſe is entirely to the Diſadvantage of thoſe who are contained in the Exception.

[a] Dy. 3 pl. 3. Poſt 369 (h).

[b] Cart. 99. Curſon 337.

[c] Bro. Reſervation 46. Co. Litt. 47. a.

[d] Cart. 99. Curſon 337.

But, they ſaid, it has been objected by ſome of thoſe who argued on the other Side, that the Infants and others contained in the Exception ought to be taken for ſuch as had Right at the Time of the Fine levied, for, it has been ſaid, why ſhould they be excepted if they had no Right? For if they have no Right, they may be barred without any Fine with Proclamations, *viz.* by Traverſe of their Right, and the Statute was made to conclude thoſe that had Right, and were remiſs in making their Entry, Claim, or Suit, and none others, for it is not neceſſary to make a Law to bind thoſe who have no Right, and who may be eaſily barred for Default of Right, but the Act was made to conclude thoſe of their Right who had Right, and were remiſs, as is aforeſaid, and none others, out of which general Purview made to conclude thoſe who had Right they are excepted who are named in the Exception, and who had been touched by the Generality of the Purview, if no Exception had been made, which Perſons ſo excepted were intended by the Makers of the Act to have Right at the Time of the Fine levied; and this (ſay they) is proved by the Clauſe afterwards, which binds them to a certain Time, the Words whereof are, *that thoſe excepted having any Right or Title, or Cauſe of Action to any of the ſaid Lands or Hereditaments ſhall take their Actions or Entries within five Years next after they come and be of full Age of* 21 *Years, out of Priſon, uncovert, within this Realm, and of whole Mind*; which Word (*having* Right or Title) (ſay they) ought to be intended having at the Time of the Fine levied, and in Senſe amounts to the ſame as if it had been expreſſed "having at the Time of the Fine levied any "Right, or Title, or Cauſe of Action to the Lands, *&c.*" So that this Branch (ſay they) proves that the Exception was intended of ſuch Perſons, and no others, as had Right or Title at the Time of the Fine levied; and ſuch (ſay they) was not the Demandant here, for at the Time of the Fine levied, and alſo of the Proclamations made, the Right was in *Stowel* the Grandfather, and not in *Stowel* the Demandant, for the Right came to him afterwards, ſo that the Demandant is out of the Exception. In Anſwer to this Objection they urged, and eſpecially *Brown* ſtrongly, that the general Purview, which excludes Strangers, was not only made againſt thoſe who had Right, but againſt all others who would pretend Title, though they had no Right, for the Deſign of the Statute was to eſtabliſh general Peace and Quiet, and to bar as well a Pretence of Right, where there was no Right in Fact, as where there was one. For if one who has no Right will pretend an Action againſt the Conuſee of a Fine after the five Years, he ſhall plead the Fine with Proclamations againſt him as well as if he had had a Right, and ſhall not be driven to confeſs that there ever was a Right in him. So that the Right is never examinable where he pleads the Fine and Proclamations, but there he ſhall demand Judgment if againſt the Fine with Proclamations levied the Demandant ought to maintain his Action, and ſo he ſhall [e] rely upon the Concluſion without confeſſing any Right in the Demandant; and thus the Concluſion and Bar by the Fine is by the Intent of the Makers of the Act made univerſal, *viz.* as well againſt a pretended Right, where there is no Right in Fact, as where there was a Right, and it is loſt by Latches, and being ſo taken it is made more univerſal, and contributes more to the public Repoſe of the Realm. Wherefore the Purview was made againſt all Strangers generally, viz. *as well Infants as Men of full Age*, whether they had Right or not. And accordingly the Exception is made generally, *viz. except Women-covert, and every Perſon being within the Age of* 21 *Years, &c.* and it does not ſay "Women-covert, or Infants having Right at the Time of the Fine levied," but as general

[e] Palm. 227.

as the Purview was, ſo general is the Exception, that is to ſay, the Perſons of Infants are excepted generally, and not ſuch Infants only as have Right. And therefore *Stowel* now Demandant, who was a Perſon within the Age of 21 Years at the Time of the Fine levied, is abſolutely excepted out of the Purview, and conſequently out of the Body of the Act, for that which is excepted out of the Purview is not any Part of the Purview.

But, they ſaid, the Counſel on the other Side, (who argued that *Stowel* the Demandant, who is out of the expreſs Letter, is comprehended within the Purview) have ſought Help from the Intent of the Makers of the Act, which Intent is not found in the expreſs Letter of the Purview and Exception, but is gathered from Reaſon, and for the better Illuſtration thereof they have collected a Preſumption from another Clauſe, *viz.* from the Clauſe made touching thoſe who are excepted, where the ſaid Words are, *viz. having any Right or Title, or Cauſe of Action.* Whereupon *Brown* ſaid to thoſe of the contrary Opinion to him, remember this, and allow us the like reaſonable Intent, and Aid of other Clauſes to prove the Intent, where the expreſs Letter fails. And as to this laſt Clauſe, he ſaid, it is firſt to be remembered that all Infants, who had Right at the Time of the Fine levied, were excepted, and alſo all Infants who had not Right at the Time of the Fine levied were excepted. And this laſt Branch enacts, *that all Women-covert not Parties to the Fine, and every Perſon within Age, in Priſon, or out of the Realm, and not of whole Mind at the Time of the Fine levied and ingroſſed, and by the Act before excepted, having any Right or Title, or Cauſe of Action to the Lands, ſhall take their Actions or lawful Entry according to their Right and Title within five Years after they come and be of full Age of* 21 *Years, out of Priſon, diſcovert, &c.* So that it does not ſay, *having* at the Time of the Fine, but *having* generally, which ſhall be intended (as *Bendloe*, *Brown*, and *Saunders* ſaid) *having* at the Time of their Entry or Suit taken within the five Years, and not *having* at the Time of the Fine levied only. For it might be that an Infant had Right at the Time of the Fine levied, and had not Right when he came of full Age, and in ſuch Caſe the Statute does not intend to give him Entry or Action at his full Age. And if the Word *(having)* ſhould be intended at the Time of the Fine levied, then by the Words he ſhall have an Action or Entry which was lawful at that Time, which cannot be ſo intended, but *(having)* muſt of Neceſſity be underſtood, *having* at the Time of the Suit or Entry taken within the five Years, whether this Right was veſted in him at the Time of the Fine levied, or afterwards came to him within Age, as in our Caſe it did in Fact. And although Infants were excepted generally, that is to ſay, *as well thoſe who had Right at the Time of the Fine levied, as others who had no Right*, yet it was to no Purpoſe to bind any to the Time of five Years but thoſe who had Right at their full Age, and at the Time of the Action or Entry taken within the five Years, for the former Right which was in the Perſons excepted at the Time of the Fine levied was not ſo much the Cauſe of binding them to a certain Time, as the Right which they had at the Time of the Action or Entry taken within the five Years after their full Age, or Imperfections or Impediments removed, ſo that this Right which they then had, and none other, is the effectual Cauſe of binding them to Action or Entry within five Years next after their full Age, or the other Imperfections or Impediments removed; for which Reaſon there does not appear any Kind of Intent in this laſt Clauſe that the Perſons excepted ſhould have Right at the Time of the Fine levied, but there is great Reaſon to take the Word *(having)* according to its literal Senſe and Meaning, *viz.* at the Time of the Action or Entry taken. Wherefore there is no Word in the Exception, nor in the Clauſe for the Direction of the Perſons excepted, nor in any Clauſe afterwards, which induces us to think that it was the Intent of the Makers of the Act that the Perſons excepted ſhould be ſuch only as had Right at the Time of the Fine levied. But it is within the Words and Intent alſo of the Act, that they who had not Right at the Time of the Fine levied are excepted as well as the others, and that they, if the Right comes to them during their Nonage, ſhall have five Years after their full Age, as well as the others who had Right at the Time of the Fine levied, and which continued in them until their full Age. Whereupon it follows that *Stowel* the Demandant, who had not Right at the Time of the Fine levied, was excepted; and for the Right which came to him during his Nonage, he had five Years after his full Age to enter or bring his Action.

And further *Brown* argued and ſaid, that if no Infant is excepted but ſuch as had Right at the Time of the Fine levied, from thence it follows that *Stowel* the Demandant was not bound by the Purview before the Exception, becauſe he had not Right at the Time of the Fine levied, for the Act excepts none but thoſe who were bound before, for it is not the Nature of an Exception to except a Thing not comprehended before, and it would be in vain and idle to except one who was not bound before. And alſo it is to be intended that the Purview was not more full againſt any Strangers than the Exception is as to Infant Strangers. So that the Latitude of the Exception is meaſured by the Latitude of the Purview, for it was the Intention of the Act to exempt out of the whole Purview Infants and the others contained in the Exception, inaſmuch as they could not know how to enter or bring their Action by Reaſon of their Want of Diſcretion, and other Defects, *ex quo ſequitur* that if no Infant is excepted but ſuch as had Right at the Time of the Fine levied, then the Purview, which was not larger than the Exception, was againſt none but thoſe who had Right at the Time of the Fine levied. And then inaſmuch as *Stowel* the Demandant was not excepted, becauſe he had no Right at the Time of the Fine levied, *ergo* he was not bound by the Purview, which was only againſt thoſe who had Right, and therefore *Stowel* now Demandant is at large. So that by neceſſary Conſequence the Argument and the Concluſion thereof is retorted upon him who alledges that *Stowel* the Demandant, who was a Stranger, and had not Right, was not excepted, for from thence it will follow that he was not bound by the Premiſſes of the Act. And therefore, as it ſeemed to him, *quâcunque viâ data*, *viz.* whether *Stowel* the Demandant is excepted or not, he is not bound. For if he was bound by the

Purview, he is afterwards excepted, and if he was not bound by the Purview, there is no Neceſſity for him to be excepted, as he is left at large. So that he is out of the Body of the Act conſiſting of the Purview and the Exception, that is, he is out of the Letter and Intent thereof by both the Arguments, whether he is compriſed within the Exception or not, and ſo he is at large, and has Time to enter within five Years after his full Age.

2 Point. Admitting that the Demandant is not bound by the Body of the Act, becauſe compriſed within the Exception, whether or no he has purſued the Time preſcribed by that Branch of the Act, which binds the Perſons excepted to 5 Years after their Imperfections removed?

Then as to the ſecond Point, *viz.* admitting that *Stowel* now Demandant is compriſed within the Exception, whether or no he has purſued the Time preſcribed within the Branch afterwards made touching the Perſons excepted, which Branch binds them to take their Actions or lawful Entry according to their Right and Title within five Years next after they come and be of the Age of 21 Years, out of Priſon, uncovert, within this Realm, and of whole Mind; and if they neglect ſo to do, that they ſhall be concluded for ever by the ſaid Fine. And as to this, it appears plainly by the Pleading that he has purſued the Time limited in the ſaid Clauſe. For at the Time of the Fine levied he was of the Age of 3 Years and a few Months; at the Time of the Death of his Grandfather, which was the 25th Day of *Auguſt anno* 33. *Hen.* 8. he was of the Age of 6 Years, at which Time the Right firſt veſted in him, and he continued within Age until the 25th Day of *Auguſt anno* 4 *Mary*, when he came of full Age; and the 22d Day of *October* then next following, which is within 5 Years after his full Age, he entered, whereupon he has brought this Action, ſo that without Queſtion he has fully purſued the Tenor of that Branch.

3 Point. Admitting that the Demandant is bound by the Body of the Act, and not compriſed within the Exception, whether or no he ſhall be aided by the firſt Saving.

And as to the third Point, *viz.* admitting that the Demandant and his Grandfather alſo is bound by the Body of the Act, and that the Demandant is not compriſed within the Exception, whether or no he ſhall be aided by the firſt Saving. And as to this, *Walſh*, *Brown*, and *Saunders* held that *Stowel* the Demandant ſhall be aided by the Senſe and reaſonable Conſtruction of the Words of the firſt Saving. And firſt of all they ſaid, that Acts of Parliament are Laws poſitive which conſiſt of two Parts. [a] The firſt is, the Words of the Act, the other is the Senſe, for the Letter without the Senſe does not make the Law, but the Letter and the Senſe together, and every one that would be acquainted with the Law poſitive ought to underſtand them both. And the Way to apprehend the Senſe is to conſider the common Law, which is the Ancient of every poſitive Law (as *Brown* ſaid), and has a Place in the Expoſition of the Law poſitive; and thereby the Miſchiefs and Inconveniences, which are in the Letter, are to be conſidered and avoided by the Application of Reaſon, and by putting ſuch [b] Conſtruction upon the Letter of the Law poſitive as ſhall exclude all Rigours and Miſchiefs, and ſtand with Equity and good Reaſon. Then here the Words of the Act are, *that the Fine ſhall conclude as well Privies as Strangers*, ſuch is the Letter. But who is a Privy, and who is a Stranger, the Letter does not ſhew, as *Brown* ſaid, but this the common Law, which is a Maſter in Expoſition, ſhews us, *viz.* [c] he is a Privy who is not Party, and between whom and the Party there is Privity of Blood, as the Heir: For properly thoſe who levy the Fine are diſtant Parties, and their Heirs are Privies, and the Fine now concludes Privies, for all Privies were not concluded before, as the Heirs in Tail, but Parties were concluded by a Fine at common Law, and therefore it was not neceſſary that the Letter ſhould extend to them. [d] And Strangers are thoſe who are not Parties to the Fine, nor Privies, as *Stowel* the Grandfather here was, who is a mere Stranger to the Fine, and to the Blood of the Parties to the Fine, and therefore he is included and touched by the Body of the Act. Yet, Sir, there is a Saving *to him and his Heirs, ſuch Right, Claim, and Intereſt as they had to or in the ſaid Lands at the Time of ſuch Fine engroſſed, ſo that they purſue their Title, Claim, or Intereſt by Way of Action or lawful Entry within five Years next after the Proclamations had or made.* And therefore although the Fine is made a final Concluſion to Strangers, yet the Makers of the Act had Regard to former Rights, and ordained Remedy for the Preſervation of them, which was agreeable to the Nature and Conſideration of a Fine at the common Law before the Statute of Nonclaim, *viz.* in giving Time to make Claim thereto. So that it ſeems the Reaſon of the common Law is the Foundation of this Act, and therefore the Fine after the Proclamations is become of great Force and Puiſſance, but nevertheleſs the former Right is ſaved. And to ſuch Intent was the firſt Saving made, by which the Right which is confeſſed to be in *Stowel* the Grandfather is ſaved not only to him but to his Heirs alſo, ſo that they purſue their Title, Claim, or Intereſt by Action or lawful Entry within five Years after the Proclamations had or made. And ſo it is to be noted that Time is given to him and to his Heirs to purſue the Right within five Years. So that he and his Heirs have Election given them to commence the Purſuit of their Right at what Day they pleaſe within the five Years, and it ſhall not be accounted the Folly of him or his Heirs if they protract the Time until the laſt Year, or the laſt Day, becauſe the Act gives them Election at what Time to purſue it within the five Years, ſo that no Folly or Latches can be imputed to *Stowel* the Grandfather or to his Heirs, until the whole five Years are elapſed. And then when *Stowel* the Grandfather is dead in the mean Time by the Hand of God, and the Right is deſcended to his Heir, who is under the Age of 6 Years, it was not the Intention of the Makers of the Act that ſuch Heir ſhould be driven to make his Claim by Action or Entry, for at ſuch Age he has no Underſtanding nor Diſcretion to know his Right, nor to make Entry, or commence Suit, and ſuch Perſons were never intended by the Makers of the Act; but the Saving is general to him and to his Heirs, wherein *Stowel* the Demandant is included, becauſe he is Heir to him who had the Right. But there is a Condition in the Saving, *viz. ſo that they purſue their Title, &c.* which Word *(they)* is as much as that he and his Heirs ſhall purſue their Title, *&c.* within five Years; and there the Heirs intended are ſuch as are of full Age, of whole Mind, uncovert, at large, out of Priſon, and within the Realm, for ſuch had the full Uſe of Reaſon, and were free from any Impediments, and Folly might be imputed to them in not purſuing their Right, and the Makers of the Act never intended to bind any who had Right, but thoſe only to whom Latches of Suit or Entry might be imputed. And Latches of Suit or Entry cannot be imputed to an Infant, whom God has not endowed with Underſtanding or Reaſon, for

[a] Hardr. 208. Ante 82 (d). Poſt 465 (a). 467 (f).

[b] Poſt 364 (z).

[c] O. Bendl. 177.

[d] O. Bendl. 177.

if

if he ſhould take an Action, his Right and his Action might be ſuch as a Writ of Right, and the like, which he could not proſecute, nor compel the other Party to anſwer to during his Nonage, but the Parol ſhould demur, and then it would be in vain to force one to take an Action during his Nonage, which he cannot proſecute, nor compel the other Party to anſwer to during his Nonage, and ſuch never was the Intent of the Makers of the Act: But the Heirs meant by the Act ſhall be taken in a reaſonable Senſe for ſuch as are of full Age, and void of the other Imperfections or Impediments, and this as ſtrongly as if the Words had been expreſsly thus, *viz.* ſo that the Parties who have Right and their Heirs of full Age, of whole Mind, and void of the other Defects or Impediments purſue their Title, *&c.* within five Years, *&c.* [a] For, as it has been ſaid before, ſuch Conſtruction ought to be made of the Words of Acts of Parliament as may beſt ſtand with Equity and Reaſon, and moſtly avoid Rigour and Miſchief. And if the Word *(Heirs)* ſhould be ſo expounded here as to comprehend Infants perhaps but of a Year old or under, who cannot ſpeak, and to impute Latches to them, ſo that they ſhall loſe their Right for Default of Suit or Claim during the Time that they are void of Reaſon and Underſtanding by the Inſtitution of God himſelf, would be very hard and inconvenient. And hereupon *Saunders* ſaid that by the Act of *Weſtminſter* 2. *cap.* 25. *if one named a Diſſeizor in Aſſize vouches a Record, and fails at the Day, he ſhall be impriſoned for a Year*, [b] yet if an Infant named a Diſſeizor vouches a Record and fails, he ſhall not be impriſoned, as it is adjudged in our Books, notwithſtanding he is contained in the Letter of the Statute, as *Stowel* the Demandant is here in the Name of Heir, but foraſmuch as he has not Diſcretion, the Expoſitors of the Law heretofore have taken it that an Infant was not intended in ſuch Caſe, although he was comprehended in the Letter as well as another, and accordingly it has been adjudged. [c] So, he ſaid, if an Infant is a Bailiff or Receiver, and he accounts before Auditors aſſigned, and is found in Arrears, the Auditors cannot commit him to the next Goal, and yet the Statute of *Weſtminſter* 2. *cap.* 11. is general in ſuch Caſe, *viz.* that they may commit all Bailiffs and Receivers, but an Infant who has not Diſcretion is not intended by the reaſonable Senſe of the Letter, nor is he bound by the Act. [d] So *Walſh* and he alſo ſaid, that if an Infant be convicted of the Raviſhment of another's Ward, he ſhall not be impriſoned for the King's Fine, and yet the Statute of *Merton cap.* 6. is general in this Caſe, *viz. whatſoever Layman ſhall be convict thereof, he ſhall be impriſoned.* And hereupon *Walſh* ſaid that if a Woman conſents to a Raviſher, the next of Blood to whom, *&c.* ſhall have Title to enter, *&c.* by the Statute of 6*Rich.* 2. *cap.* 6. yet if a Feme-infant be raviſhed, and ſhe conſents to the Raviſher before the Age of 12 Years, the Heir or next of Blood to whom the Land ought to come, *&c.* ſhall not enter, and yet ſhe is within the Letter, *viz. if Ladies, Daughters, and other Women conſent*, but ſhe being of that Age is under the Age of Conſent, becauſe ſhe is without Diſcretion; ſo that though ſhe is within the Purview of the Act by the Generality of the Words, yet ſhe is let out of it by the Help of the reaſonable Conſtruction made of them. And ſo here the Word *(Heirs)* ought to be intended Heirs of full Age, for if we conſider the Nature of the Act which they are to do, *viz.* to purſue their Action or Claim, it will ſhew us the manifeſt Neceſſity of making a reaſonable Expoſition, that is, it will inform us that where Acts of Parliament injoin the doing of any Thing which requires ſound and perfect Reaſon in the Execution of it, as the proſecuting of Suits does, the Makers of the Act did not intend it to be done by them who have not perfect Reaſon, for if ſo, their Law would be utterly againſt Reaſon, for to inſiſt that an Infant or Man of unſound Mind, who have no Reaſon, but live in Ignorance invincible (as *Saunders* termed it) ſhall uſe Reaſon, or elſe that they ſhall loſe their Inheritance, would be very unreaſonable, which is never to be preſumed in the Legiſlature. So that Diſcretion in the Expoſition of a Statute always mitigates the Violence of the Letter, as *Walſh* termed it. [e] But an Infant ſhall be bound by the Statute of *Ceſſavit* and of [f] Waſt, and the like, although thoſe Statutes are general, for Ceſſer is an Injury to the Lord, and Waſt is injurious to the Leſſor, and he himſelf acquired the Eſtate; and *Walſh* ſaid that the Law preſumes that he, who has Policy to acquire a Thing, has Reaſon to defend the ſame Thing. [g] And ſo, he ſaid, if an Infant Lord who has Title to enter for Mortmain does not enter within the Year, or does not enter into the Land of his Villain before the Villain has aliened the Land, he ſhall be bound by Latches, for there he had but a Title to a Thing which never was in him, and it is not like our Caſe here, where the Demandant had a Right by Deſcent upon a Diſſeizin and Wrong done to his Anceſtor, which Right is favoured by all Laws, and eſpecially by this Act *of Fines*, which provides for it in a ſpecial Manner, and does not exclude any one from the Benefit of it, unleſs there be Latches in him, which cannot be imputed to an Infant who has not Underſtanding to judge of the Time. And it was ſaid that in the Caſes upon the Statutes before recited, where Infants who were within the Generality of the Letter have been taken out of the Letter by the Senſe and Meaning thereof, the Judges who ſat upon the ſaid Caſes took the common Law for their Guide, which is a Maſter in Expoſition, the Reaſon whereof they purſued as near as they could. And hereupon a great Number of Caſes at the common Law were cited, where the Inheritances of Infants are favoured, and they ſhall not be prejudiced by Latches; [h] as Deſcents ſhall not take away their Entry, [i] nor ſhall Warranty bind them, where it may be avoided by Entry, and many other Caſes were cited which it is not my Deſign to recite. And alſo many Caſes were cited where the Latches of Infants and other Acts ſhall bind them; [k] as for Waif, Eſtray, Goods taken of them and offered to Images, or wrecked, or taken by Enemies, and not retaken before Sun-ſet, or ſold in Market-overt, or Acts done by them by reaſon of their Office, [l] as a Gift of Goods as Executor, [m] or Acts done by an Infant King, or for Neceſſity, [n] as an Obligation for Meat and Drink, and a great Number of other Caſes, between which and the Reaſon of this Caſe many Diverſities were made. But this Caſe reſts upon the Preſervation of the Inheritance of a Right deſcended, which is favoured by the ſame Statute of 4. *H.* 7. And therefore Latches ſhall not be imputed to an Infant, nor ſhall he be prejudiced thereby by the Intent of the Makers of the Act, which Intent they collected from Reaſon; and therefore

[a] Ante 363 (b). *Per Brown*

[b] M. 36. Ed. 3. Fitz. Aſſize 443. Bro. 459. Diſſeizin 97. Failer, &c. 13. T. 4. H. 7. 11. b. *Per Haws.* Bro. Coverture 44. Parlement 41 Abridgment of Aſſizes 146. a. Dr. & Stud. lib. 2. cap. 46. fo. 274. 2 Inſt. 414. Hob. 95. 96. 1 H. H. P. C. 20. 3 Bac. Abr. 131. Vin. Abr. tit. Diſſeizin K. 2. pl. 6. 7. tit Enfant G. pl. 13.

[c] 4 Bac. Abr. 649.

[d] 1 H. H. P. C. 21. 1 Show. 84. 3 Bac. Abr. 131.

[e] Bro. Coverture 68. Dr. & Stud. lib. 2. cap. 46. fo. 275. Dy. 104. pl. 13. Co. Litt. 380. b. 2 Inſt. 401. 8 Co. 41. b. 1 Show. 31. Vin. Abr. tit. Enfant B. 2. pl. 6. Sed contra 1 Show. 83, *Per Eyre* J.

[f] Godb. 365.

[g] Vin. Abr. tit. Enfant B. 2. pl. 7.

[h] 27 Aſſ. pl. 32. Bro. Deſcent 21. T. 35 H. 6. 63. a. *Per Priſot.* Dr. & Stud. lib. 1. cap. 17. fo. 51. Litt. § 408.

[i] T. 35. H. 6. 63. a. *Per Priſot.* Bro. Garranties 4. Fitz. Entry congeable 11. Co. Litt. 380. a. 1 Co. 140. a. Poph. 71. 3 Keb. 410.

[k] Vin. Abr. tit. Enfant B. 2. pl. 8.

[l] T. 25 Ed. 3. 88. pl. 21. P. 21 Ed. 4. 24. b. *Per Litt.* Dr. & Stud. lib. 2. cap. 28. Perk. § 14. Co. Litt. 172. a. Poph 130. Vin. Abr. tit. Enfant J. pl. 6.

[m] See Ante 213 (a), and the Books there cited.

[n] P. 18 Ed. 4. 2. a. *Per Vavijor.* Dr. & Stud. lib. 2. cap. 28. Perk. § 14. 2 Finch 103. Co. Litt. 172. a. 9 Co. 87. a. Poph. 151. 2 Rol. R. 45, 144, 271. Cro. E. 920. Cro. J. 494. 1 Leon. 114. Godb. 219. Cart. 215. Palm. 528. 1 Sid. 112. 1 Rol. Abr. 729. pl. 3, 4, 5, 7. 3 Bac. Abr. 133, 134. Vin. Abr. tit. Enfant C. and G. 2. Contra H. 21. H. 6. 31. b. *Per Paſton.*

therefore they took it that the Heirs intended in the Purſuit of the Right ſhall be Heirs of full Age. And hereupon *Brown* and *Saunders* ſaid, that in ſuch Conſtruction the Senſe of the Common Law touching Fines before the Statute which ouſted Nonclaim ſhall be followed, which was the Foundation of this Act. For at the Common Law Fines were of as great Eſtimation and Force as they are at this Day by this Act, and as at the Common Law the Preſervation of ancient Rights was conſidered, ſo that they were purſued within a certain Time, ſo are they by this new Statute. [a] And at the Common Law if he who had the former Right had been of full Age at the Time of the Fine levied, and had died within the Year, his Heir being within Age, the Heir within Age ſhould not be bound to that Year: For the Common Law will not enforce the Heir within Age to make any Suit or Claim, and without Suit or Claim it will not bind him, and therefore in ſuch Caſe he was not bound to the Time of a Year. And if it ſeemed reaſonable to the Founders of our Law that the Law ſhould be ſo in Fines at the Common Law, it is good for the Expoſitors of this Act to approach as near as they can to the Reaſon of the Common Law, which is the beſt [b] Interpreter of the Words of poſitive Laws, and eſpecially in this Caſe, where the Common Law and the Reaſon thereof touching Fines was the Foundation of this Act, which is made in a Manner to revive the Common Law. So that it ſeemed to them and to the reſt who argued on this Part, that the Word *(Heirs)* limited in the Statute for the Purſuit of the Right ſhall be intended Heirs of full Age, and that ſuch Senſe of the Word is moſt conſonant to Equity and good Reaſon, as well as to the Common Law before the Statute, and that by ſuch Conſtruction the Miſchief and Rigour which would otherwiſe follow will be avoided, and that they might well enough have made ſuch Conſtruction of the Word, if there had been nothing elſe in the Statute in Favour of it.

[a] S. P. Ante 360 (d). *per Brown.* Sed Contra Poſt 372. (*). *per Dyer.*

[b] Co. Litt. 272. b. 3 Co. 13. b. 77. b. 78. a. 85. b. 2 Inſt. 148. 1 Freem. 57. *per Atkins* J. 1 Saund. 240. 10 Mod. 245. 11 Mod. 150. 1 P. Wms. 252. 4 Bac. Abr. 647. Vin. Abr. tit. Statutes E. 6. pl. 12. Ante 10 (h).

But they ſaid further, [c] that when one Branch in an Act is obſcure, it is uſual for thoſe who expound the Act to examine the other Branches: For we may often find out the Senſe of a Clauſe by the Words or Intent of another Clauſe. And ſo here the Intent of the Legiſlature in this Point, viz. that the Heir intended by the Act for the Purſuit of the Right ſhall be of full Age, may be well perceived by other Branches. And hereupon it is to be obſerved, that out of the general Purview, which is, *that the Fine ſhall be a final End, and ſhall conclude Strangers*, Infants and the others compriſed in the Exception, if they have preſent Right, are excepted for their Diſabilities and Impediments, and are allowed the Time of five Years after their Diſabilities and Impediments removed. And if the Makers of the Act had ſuch Intent to except them for their Diſabilities, where their Right was preſent, does not the ſame Intent hold Place where the Right, which is not bound until five Years paſſed, comes to ſuch diſabled Perſons within the five Years? Yes certainly, for the Right within the five Years, and their Diſabilities within the five Years, is the Cauſe which moved the Makers of the Act to except them until their Diſabilities and Impediments were removed. And if they make Allowance for the Diſabilities and Impediments to thoſe who had Right at the Commencement of the five Years, they ought to make Allowance for them until the End of the five Years, for there is the ſame Reaſon in both the Caſes. And *Brown* ſaid, can any Man preſume that the Makers of the Act were ſo great Niggards of Time, that they would not allow until the End that which they allowed at the Beginning? No certainly, for the former Right, and the Impediments and Defects which were in them that had the Right, is the Matter which they regarded. And then inaſmuch as the Fine is no Bar until the End of the five Years, the Diſabilities and Impediments which are in them that have the Right in any Part of the five Years are as much to be reſpected as the Imperfections and Diſabilities which are in them that have the Right at the Time of the Fine engroſſed, or at the Commencement of the five Years. And the Proviſion which is made in the ſecond Saving touching the future Right for ſuch as have the ſaid Imperfections or Impediments, if the Right or Title firſt accrues to them, ſhews alſo how careful the Makers of the Act were to provide for ſuch Infants and others as had thoſe Imperfections or Impediments. And none can imagine that they who excepted Infants and the other diſabled Perſons out of the Purview at the Beginning, and provided for them in the End, viz. in the ſecond Saving, would be regardleſs of them in the middle, viz. in the firſt Saving, and therefore the Heirs there ſpoken of, who are bound to the Purſuit of the Right, are Heirs of full Age, of whole Mind, uncovert, out of Priſon, and within the Realm, and none others. And as a further Proof hereof *Brown* alledged another Thing which he had obſerved in the ſecond Saving touching the future Right, viz. *if the Perſon to whom the Right firſt accrues be covert, within Age, in Priſon, out of the Realm, or not of whole Mind, that then their Right ſhall be ſaved to them and to their Heirs until they come of full Age, out of Priſon, within the Realm, uncovert, and of whole Mind, ſo that they and their Heirs take their Actions or lawful Entry within five Years next after they come and be of full Age, out of Priſon, within the Realm, uncovert, and of whole Mind*; by which Clauſe, he ſaid, it is enacted that if one in whom the future Right firſt veſted be within Age, or has the other Impediments, and afterwards he comes of full Age, or the other Impediments are removed, and two or three Years afterwards he dies, his Heir being within Age, or having the other Impediments, ſuch Heir, after he comes of full Age, or after the other Impediments are removed, ſhall have five Years, for the Words are, *ſo that they and their Heirs take their Action or Entry within five Years next after that they, &c.* which is as much as to ſay, next after that he and his Heirs are of full Age, out of Priſon, within the Realm, uncovert, and of whole Mind, ſo that in ſuch Caſe the Heir ought to have five Years after he is of full Age, and free from the other Impediments, as well as his Anceſtor is to have it by the expreſs Letter of the Act. Whereupon he concluded that inaſmuch as the Makers of the Act intended in ſuch Caſe that the Heir ſhould have five Years after his full Age, where his Anceſtor was of full Age, for the Salvation of the future Right veſted in his Anceſtor, and that he ſhould not be bound to the five

[c] 4 Bac. Abr. 645. Vin. Abr. tit. Statutes E. 6. pl. 89.

Years next following the Time in which the five Years commenced in the Anceſtor, *a fortiore* they intended that *Stowel* the Demandant ſhould not be bound to the five Years next after the Time in which the five Years commenced in his Anceſtor for the preſent Right, which is of greater Value and Eſtimation than the future Right.

[a] Vin. Abr. tit. Fine W. 4. § 7. fo. 262. Weſt's Symb. pt. 2. fo. 67. b. Shep. Pract. Counſ. 58, 77.

And he and *Saunders* alſo ſaid, that if a Stranger to the Fine who is of ſound Mind [a] becomes *non ſanæ memoriæ*, [b] or is impriſoned the third Year after the Proclamations made, and ſo continues until the five Years are expired, and afterwards he becomes of ſound Mind, or is out of Priſon, he ſhall not be concluded by the Fine, for Latches in proſecuting his Right cannot be imputed to him who wants Memory or Liberty, and therefore ſuch Perſon was not comprehended in the Intent of the Statute. But in this Caſe if a Stranger to the Fine in the third Year had gone [c] beyond Sea, or had taken [d] Huſband, and ſo had continued until the five Years were paſſed, there he ſhould be bound, for the going beyond Sea, or taking Huſband are voluntary Acts, but Inſanity of Mind and Impriſonment are againſt the Will of the Party. And therefore they ſaid that the Letter ought to be conſtrued in a reaſonable Senſe.

[b] Weſt's Symb. pt. 2. fo. 68. a. Shep. Pract. Counſ. 58, 77.

[c] Ibid. 58, 77, 78. Weſt's Symb. pt. 2. fo. 68. a. But ſays it ſeems otherwiſe if he be ſent beyond Sea in the King's Service by his Command.

And they who argued on this Part ſaid, that if one ſhould only adhere to the Letter of this Statute, and not have Recourſe to a reaſonable Senſe or Intent beyond the expreſs Letter, we ſhould by ſuch Kind of Expoſition introduce many Abſurdities. [e] And thereupon *Brown* ſaid, if an Infant who has preſent Right, and who is excepted, dies within Age, his Uncle being his Heir and of full Age, by the Letter of the Statute the Uncle ſhall not have five Years, but ſhall be bound, for the Act is, *that Infants and their Heirs ſhall take their Action or Entry within five Years next after that they be of the full Age of* 21 *Years*, and the Infant himſelf never came to the Age of 21 Years, ſo that by the Letter he is out of the Clauſe, but yet he is not ſo by the Intent. [f] And in ſuch Caſe if the Infant excepted having Right had entered within Age, and by his Entry had avoided the Fine, and afterwards had come to full Age, and after his full Age had permitted the Conuſee to be five Years in Poſſeſſion without Entry or Action made or brought by him, now by the Letter of the Act he who was the Infant ſhould be barred, and the Conuſee ſhould retain the Land, for the Act ordains, *that the Infant ſhall take his Action or lawful Entry within five Years after that he comes of full Age*, and this he has not done, but inaſmuch as within Age he took his lawful Entry, and ſo avoided the Fine for ever, he is at Liberty 20 Years after his full Age to enter or bring his Action by the Intent of the Makers of the Act. And ſo he and *Saunders* ſaid that the Exception is of Perſons being within the Age of 21 Years at the Time of the Fine levied.

[d] Weſt's Symb. pt. 2. fo 68. a. Shep. Pract. Counſ. 58, 77.

[e] Shep. Pract. Counſ. 70.

[f] Ibid.

[g] 4 Bac. Abr. 648. Vin. Abr. tit. Fine W. 4. § 7. fo. 263. Weſt's Symb. pt. 2. fo. 67. b. 69. a. Shep. Pract. Counſ. 70. 78.

[g] But if the Diſſeizee dies, his Wife enſeint with a Son, the Diſſeizor levies a Fine, and afterwards the Son is born, now he is not excepted by the Letter of the Act, for the Act excepts no Infant but ſuch as at the Time of the Fine levied were within the Age of 21 Years, and none is within the Age of 21 Years but ſuch as is *in rerum natura*, and in this Caſe the Son was not born, nor *in rerum natura* at that Time, nor can it be ſaid that he was within the Age of 21 Years at the Time of the Fine levied, for his Age is accounted from the Time of his Birth, and he was not born at that Time, ſo that he is out of the Letter, but yet he is within the Intent, and ſhall be aided by the Exception. [h] For every Thing which is within the Intent of the Makers of the Act, altho' it be not within the Letter, is as ſtrongly within the Act as that which is within the Letter and Intent alſo. [i] And of the Perſons excepted the Letter binds none to five Years after their full Age but thoſe who were within Age at the Time of the Fine levied and engroſſed, which are two ſeveral Times, for there may be ten Years and more between the levying and the engroſſing, yet he who is born after the Fine levied, and who was an Infant at the Time of the engroſſing, is not at large, but is bound to Entry or Action within five Years after his full Age, as *Saunders* ſaid, as well as he who was *in rerum natura*, and an Infant at the Time of the Fine levied and engroſſed. So that the Senſe of the Text, and the Intent of the Legiſlature avoids all Abſurdities.

[h] Godb. 308. 4 Bac. Abr 648. Vin. Abr. tit. Statutes E. 6. pl. 80.

[i] Shep. Pract. Counſ. 70, 78.

[k] Shep. Pract. Counſ. 70.

[k] And if a Diſſeizor levies a Fine which is engroſſed, and the Diſſeizee, who was at full Age at the Time of the Fine levied, dies after four Proclamations made, and before the fifth Proclamation, his Son and Heir being within Age, and continuing within Age all the five Years, now he ſhall be bound by the Letter of the Act, for the Letter does not except him becauſe he had no Right at the Time of the Fine levied: But yet it is clear (as *Saunders* ſaid) that inaſmuch as the five Years did not commence in his Father, nor any Part of them attached in the Father, he the Son is excepted in the Intent, for the Intent of the Exception was to except thoſe who had Right, and who were Infants at the Commencement of the five Years. [l] So is it (as he ſaid) if the Diſſeizee was of whole Mind at the Time of the Fine levied and engroſſed, and after the fourth Proclamation and before the fifth he becomes *non ſanæ memoriæ*, or is impriſoned, and ſo continues all the five Years, and afterwards becomes of whole Mind or out of Priſon, he ſhall have five Years after this by the Intent of the Exception and of the Clauſe afterwards touching the Perſons excepted, altho' the Text itſelf does not warrant it. And many other Caſes were put by *Walſh* upon this and other Acts of Parliament, chiefly to prove that the Judges have from Time to Time conſtrued Statutes in a benign Senſe in Order to ſoften the Rigour of the Text.

[l] Shep. Pract. Counſ. 70, 71, 77.

Whereupon they concluded that the firſt Saving, viz. *to Strangers and their Heirs, ſo that they purſue their Title and Claim, &c.* which is as much as to ſay, ſo that the Strangers and their Heirs purſue, &c. ought to be ſo underſtood that the Heirs, who are to purſue the Right, ſhall be of full Age, ſo that they may know their Right, and in what Manner they are to enter or ſue for it; and that this Conſtruction is not taken by Equity (which is a Thing out of the Letter), but is declarative of the direct Senſe of the Word *(Heirs)* bound to the Purſuit, which Declaration is an Expoſition of the Senſe of the Letter, and no Part of Equity; and that *Stowel* the Demandant being the Heir, but not of full Age, was not bound to the five Years attached in the Father, but was at large. But all of them (as I underſtood them) argued that he was bound to Time by the Intent of the Act, viz. (as *Saunders* ſaid) that he ſhall have five Years *de novo*, and that he

was

was bound thereto by the Equity of the Purview, which binds the Perſons excepted to five Years, for the ſame Reaſon holds in both the Caſes.

As to the ſecond Saving, which is the fourth Point, *Harper*, *Bendloe*, *Walſh*, and *Saunders* ſaid, that admitting that *Stowel* the Demandant is bound by the Body of the Act, and is not aided by the Exception, nor by the firſt Saving, yet the ſecond Saving ſhall aid him, and he is within the Benefit of it. For this ſecond Saving ſaves *to all other Perſons ſuch Right as ſhall firſt accrue, remain, deſcend, or come to them after the Proclamations made, by Force of any Gift in Tail, or by any other Cauſe or Matter had or done before the Fine levied, ſo that, &c.* and if ſuch Perſons at the Time of ſuch Right deſcended, &c. be within Age, then the Right is reſerved until they come of full Age, ſo that they take their Entry within five Years after their full Age. Whereupon two Things are to be conſidered, firſt, if the Right here is ſuch as brings the Demandant within the Words of this Branch; ſecondly, if the Demandant is ſuch a Perſon as is intended by this Branch.

4 Point. Admitting that the Demandant is bound by the Body of the Act, and not comprised in the Exception, nor aided by the firſt Saving, whether or no he ſhall be aided by the ſecond Saving.

And the Right here is ſuch a Right as is mentioned in the Branch, for the Right came to the Demandant by Deſcent, viz. from his Grandfather to him; and it firſt deſcended to him after the Fine, for it deſcended to no other Perſon after the Proclamations made before it deſcended to *Stowel* the Demandant; and it deſcended by Cauſe or Matter done before the Fine levied, for the Diſſeizin was done before the Fine levied, whereby (as *Walſh* termed it) the Poſſeſſion and the Right were ſevered, for thereby *John Zouch* had taken away the Poſſeſſion from *Stowel* the Grandfather, which he had by Deſcent or Purchaſe, and had left the Right in him, which Right being in *eſſe* before the Fine levied, by Force of Matter or Cauſe before the Fine levied, is after the Proclamations firſt deſcended to the now Demandant. So that every Word of the Statute is ſatisfied, and he being an Infant ought to have five Years after his full Age by the Words of the Branch; and altho' the Right immediately after the Proclamations was in *Stowel* the Grandfather, who was of full Age, yet this is no Impediment to the Demandant's taking Benefit of the Clauſe, for he is the firſt to whom it deſcended, and there was no Deſcent of the Right to the Grandfather, but the Deſcent came firſt to the Demandant after the Proclamations. So that the Right is in the Demandant in other Manner than it was in his Grandfather, and therefore he is within the Words. And the full Age of his Grandfather is no Cauſe to exclude him from the Benefit which the Words in this Branch give him having the Right of the Grandfather in other Form, but he ſhall have five Years after his full Age. And hereupon *Bendloe* put this Caſe, viz. [a] two Jointenants are diſſeized, whereof one is within Age, the Diſſeizor levies a Fine with Proclamations, four Years paſs after the Proclamations, and afterwards the Jointenant of full Age dies before the five Years paſſed, the other being within Age, the Infant Survivor ſhall have five Years after his full Age, as well for the Moiety which was in his joint Companion, who was of full Age, as for the other Moiety, for the Right of that Moiety which was in his Companion of full Age firſt accrued to him after the Proclamations made, by Force of Cauſe or Matter, viz. the Jointenancy, made before. So that he is within the Words and Intent of the Branch, notwithſtanding that the Moiety was in his Companion before, for it is in him now in another Form. And ſo here the Right is in the Demandant in another Form than it was in his Grandfather, that is to ſay, by Deſcent, and if it is in another Form, then it is intended by this Branch. And *Walſh* in his laſt Argument ſaid, [b] that if a Man diſſeizes a Feme ſole, and afterwards takes her to Wife, and they have Iſſue, and the Huſband is diſſeized, the Diſſeizor levies a Fine with Proclamations, the Huſband dies four Years after the Proclamations, and before the fifth Year is paſſed, the Iſſue being of full Age, and afterwards the Mother dies, and the fifth Year paſſes, now the Iſſue is bound as Heir to his Father, for in this Reſpect he and his Father had but five Years together; but yet as Heir to his Mother he ſhall have five Years to be accounted from the Time of the Death of his Father, for notwithſtanding it is one ſame Land, yet the Heir has ſeveral Rights, one as Heir to the Father, which is the latter Right, and the other as Heir to the Mother, which is the firſt Right, and in Reſpect of theſe he has ſeveral Times. And in his firſt Argument he put this Caſe, [c] if the Huſband makes a Feoffment of the Land of his Wife upon Condition, and the Condition is broken, and afterwards the Feoffee levies a Fine with Proclamations, and the Huſband dies in the fourth Year after the Proclamations, having Iſſue by the Wife, and afterwards the Wife dies, and the fifth Year paſſes, the Heir is barred of his Entry for the Condition broken as Heir to his Father, but as Heir to his Mother he ſhall have five Years from the Death of his Father for her Right, *cauſa qua ſupra*. So he and the others on this Part ſaid, [d] if *J. S.* be Tenant *pur auter vie*, the Remainder to another for Life, the Remainder to the ſaid *J. S.* for his own Life, or in Fee, and is diſſeized, and the Diſſeizor levies a Fine with Proclamations, and the five Years paſs, now *J. S.* is bound for his preſent Eſtate; but if *Ceſtuy que vie* and he in Remainder die, he ſhall have other five Years afterwards for the other Eſtate which he had for his own Life or in Fee, for it is another Eſtate, and it firſt remained to him after the Death of him in Remainder, by Reaſon of Matter or Cauſe, viz. the Eſtate, before made. So that be the Eſtate or the Right one or divers, if it comes in another Manner, as it does here, (for it came to the Demandant by Deſcent, which is in another Manner than it was in his Anceſtor) and the Party is he to whom it comes firſt in ſuch Manner, it is ſaved by the Exception, if he be ſuch a Perſon as is intended in the ſecond Saving.

[a] Vin. Abr. tit. Enfant B. pl. 9. Shep. Pract. Counſ. 71.

[b] O. Bendl. 175. Weſt's Symb. pt. 2. fo. 70. a. Shep. Pract. Counſ. 53, 56.

[c] Vin. Abr, tit. Fine F. a. 4. pl. 2. Weſt's Symb. pt. 2. fo. 70. a. Shep. Pract. Counſ. 53.

[d] O Bendl. 174, Sed Contra Poſt 372 (g), *per Weſton et Catline.* Weſt's Symb. pt. 2. fo. 69. b. Shep. Pract. Counſ. 80.

And as to this, the Words are, *ſaving to all other Perſons ſuch Action, &c.* Now in Order to know who is another Perſon, and who not, the Premiſſes of the Act are to be conſidered. And it is to be obſerved, that the Purview (as they who argued on the other Side ſaid) is general, viz. to all Perſons, and they alſo ſaid that the Exception of Infants is but of thoſe Infants who have Right at the Time of the Fine levied. And *Stowel* the Demandant was not ſuch an Infant, for then he had no Right. And his Grandfather who was of full Age was within the Purview, and

the firſt Saving aided him and his Heirs, ſo that they made Purſuit within five Years, but the Heirs who are to purſue the Right are intended Heirs of full Age, and ſuch only are comprehended herein, as it has been ſaid, and *Stowel* the Demandant being Heir is out of it, becauſe he is within Age; ſo that he is other than is contained in the Exception, and other than is contained in the firſt Saving. And then foraſmuch as the Right is deſcended to him firſt after the Fine engroſſed and the Proclamations made, which Right deſcended or came by Cauſe of Matter had or done before the Fine, viz. the Diſſeizin, and he is another Perſon than is comprehended in the Exception, or in the firſt Saving, he muſt by the expreſs Words be aided by this ſecond Saving. And altho' the Heir within Age cannot properly be called another Perſon when he is of full Age, yet here the Matter being conſidered, he may be called another by the Intent of the Makers of the Act, inaſmuch as he has the Right of the Father in another Manner than the Father had it, that is to ſay, by Deſcent. For in the Caſes put [a] by *Walſh*, the Heir who is barred as to the Right of the Father may be called another Perſon as to the Right of the Mother, with Reſpect to the Intent of the Makers of the Act, for they name one ſame Perſon as another Perſon, where he has another Right or another Eſtate. [b] As if one has an Eſtate for the Life of A. Remainder to him for the Life of B. Remainder to him for the Life of C. and he is diſſeized, and the Diſſeizor levies a Fine with Proclamations, now for the preſent Right he has five Years by the firſt Saving; and if after the five Years A dies, he ſhall have other five Years for the next Remainder, by the ſecond Saving, which gives them to other Perſons who have future Right, and if after the five Years B dies, he ſhall have other five Years for the ſecond Remainder. And *Brown* aſſented thereto, and cited this Text of the Civil Law, viz. *quando duo jura in una perſona concurrunt, æquum eſt ac ſi eſſent in diverſis*; and ſo when there are three ſeveral Rights in one ſame Perſon, he ſhall have the like Benefit of them as three Perſons ſhould have, if the Rights were diſtinct in them, for the Makers of the Act conſidered the ſeveral Rights, and in Reſpect of the ſeveral Rights which are diſtinct in one ſame Perſon, the Party, as to the ſecond or third Right, may be called another Perſon; and as he is one ſame Perſon in himſelf, ſo may he be in Reſpect of the ſeveral Rights. And ſo here the others who argued on this Part ſaid, that the Heir of *Stowel* the Grandfather who is within Age, and to whom the Right which the Grandfather had is deſcended, by which Deſcent the Right is in another Degree than it was in the Grandfather, may be called another Perſon than the Heir of *Stowel* the Grandfather of full Age, and therefore he is comprehended in the ſecond Saving.

[a] Ante 367 (b) and (c).

[b] Vin. Abr. tit. Fine F. a. 4. pl. 1. Weſt's Symb. pt. 2. fo. 69. b.

And hereupon they concluded, that the Purview and the Exception being added together, the Demandant is not compriſed in the Purview, but is out of it by the Exception; and that he has purſued the Time preſcribed in the Purview of the Act for the Perſons excepted; and tho' he ſhould be bound by the Body of the Act, and ſhould not be compriſed in the Exception, that yet he ſhall be aided by the firſt Saving; and if not, that he ſhall be aided by the ſecond Saving. And if he cannot be aided by any of the Clauſes, *Saunders* ſaid that yet he ſhall be aided by the Equity of the Act, and he put ſeveral Caſes upon the Equity of Statutes, viz. three upon the ancient Statutes, and three upon the new. And ſo they ſaid that upon the whole Matter the Demandant ſhall have Judgment.

That the Demandant ſhall be aided by the Equity of the Act.

[c] Theol. Dig. lib. 1. cap. 5. §13. 7 Co. 22. b. 23. a. *Calvin's* Caſe. Cart. 187. 1 Finch 54. 2 Finch 77, 78. Crompt. J. C. 65. b. 140. b. Vin. Abr. tit. Ireland D. pl. 1.

And *Saunders* ſaid in this Caſe, [c] that *Ireland* and *Scotland* are other Realms, but that *Scotland* was held of the Crown of *England*, and was within the Fee and Seigniory of the King of *England*, and that he who is in either of theſe two Realms ſhall be ſaid to be out of the Realm, and ſhall be within the Exception. And he alſo ſaid, that Ideots, Lunatics, and thoſe who have Lethargy, ſhall be comprehended in the Words of *unſound Mind*, as well as Madmen.

E contra for the Tenant.

And on the other Hand *Puttrel* and *Carus* Serjeants, and *Southcote*, *Weſton*, *Whidon*, *Dyer* and *Catline* Juſtices argued that the Demandant ſhould be barred. And they ſaid that Peace and Concord is the End of all Laws, and that the Law was ordained for the Sake of Peace. And *Dyer* ſaid that for Peace *Chriſt* deſcended from Heaven upon the Earth, and his Law, which is the New Teſtament, and the old Law, which are the divine Laws, were given only for Peace here and elſewhere. And *Weſton* cited *St. Auguſtine*, who ſays, *et concordiâ ſtat et augetur reſpublica, et diſcordiâ ruit et diminuitur*. And *Catline* ſaid that Peace is deſcribed in this Manner, *Pax, mater alma opulentiæ, vehitur curru; Currus, ubi pax vehitur, dicitur unanimitas; Auriga, qui currum regit, dicitur amor; Duo equi currum trahentes ſunt concordia et utilitas; Comites pacis ſunt juſtitia, veritas, diligentia, induſtria omnium artium parendarum.* Which Deſcription is made up of the Nature, Properties, and Advantages of Peace, and of the Incidents thereof, and therefore Peace which is attended with ſo many Conveniences ought to be preſerved beyond all other Things. And hereupon *Dyer* ſaid, that one of the Articles which the King at his Coronation ſwears to his Subjects to perform and keep, is, that he will preſerve the Peace, for a more beneficial Thing he cannot grant to them. And therefore thoſe Laws which bring the greateſt Peace are the moſt eſtimable.

And ſuch was this Law touching Fines, which ſecured and quieted the Inheritances of People, and fixed them upon a certain Foundation. And *Carus* ſaid that ſuch Laws were the moſt worthy, for, he ſaid, Certainty is the Mother of Repoſe, and Incertainty is the Mother of Contention. And to avoid Contention in Inheritances Fines were deviſed by the Founders of our Law at the Beginning, for there is no Part of our Law of greater Antiquity. And hereupon *Glanvil* was cited by *Catline*, [d] who (as he ſaid) was a Judge of this Realm a long Time ago, for he died in the Time of King *Richard* 1. at the the City of *Acres* in the Borders of *Jury*, attending upon King *Richard* in his Voyage to that Place; and in his 8th Book he treats of Fines, where he ſays, [e] *contingit autem aliquandò loquelas motas in Curia domini Regis per amicabilem compoſitionem et finalem concordiam terminari, ſed ex licentia Regis vel ejus juſticiariorum.* To the ſame Purpoſe he cited *Bracton* alſo, who ſays, *Finis eſt extremitas uniuſcujuſque rei, hoc eſt, idem in quo unaquaque res terminatur, et ideo dicitur finalis*

[d] See Pref. to 8 Co. fo. 19, &c.

[e] Glanv. lib. 8. cap. 1. fo. 61. b.

lis concordia, quiâ imponit finem litibus. And he cited many Fines of Antiquity, *viz.* ſome [a] before the Conqueſt, touching the Poſſeſſions of the Abbey of *Crowland*, and divers ſince the Conqueſt, proving the Continuance of Fines down from the Conqueſt until the Time of *Edw.* 1. in whoſe Reign Statutes were made concerning Fines. And he ſaid that *Glanvil* ſhews the Reaſon why Fines bore their Name, for he ſays, [b] *dicitur talis concordia finalis, eo quod finem imponit negotio, adèo ut neutra pars litigantium ab eo de cætero poterit recedere*; which agrees with the Definition given by the Statute *of Fines* made a long Time afterwards, which ſays, [c] *quia fines finem litibus debent imponere et imponunt, et ideo fines vocantur, maximè cum poſt duellum et magnam aſſizam in ſuo caſu ultimum locum finalem teneant imperpetuum, &c.* Wherefore inaſmuch as *fines finem litibus imponebant*, and, as *Glanvil* ſays, *finem imponit negotio*, they were of the greateſt Highneſs, Force, and Puiſſance, as the Statute terms them, and therein they brought great Advantages to the People of this Land in ſecuring their Inheritances. And to this Purpoſe, as well as to prove that the Statute which ouſted Nonclaim, by which Fines were enfeebled, created much Diſquietude and Contention in Inheritances throughout the Realm, many Things were urged by him and the Lord *Dyer*, and by the others that argued on this Part. [d] For they ſaid that the Act which ouſted Nonclaim was the Cauſe of univerſal Trouble throughout the Realm, to avoid which, and to reſtore Fines to their former Puiſſance, the Statute of 4. *H.* 7. was made, which is to be weighed and obſerved in every Part: And upon due Conſideration had thereof it ſeemed to them that *Stowel* the Demandant ſhall not take Benefit of his Nonage, but that he ſhall be concluded by the Purview of the Act, and that he is not let at large by any Branch afterwards.

[a] That Fines were levied before the Conqueſt, ſee Pref. to 8 Co. fo. 16. 2 Inſt. 511. Weſt's Symb. pt. 2. ſo. 1. a. Curſon 110, 111. Manby 7. Vin. Abr. tit. Fine A. pl. 4.

[b] Glanv. lib. 8. cap. 3. Co. Litt. 120. b. 121. a.

[c] Ante 357.

[d] 1 Leon. 84. *Per Periam* J. Pollexf. 499.

And for the better Apprehenſion of the Purview, the Preamble of the Act is to be conſidered, which *Dyer* termed a [e] Key to open the Minds of the Makers of the Act, and the Miſchiefs which they intended to redreſs. And the Preamble ſays, *the King conſidering that Fines ought to be of the greateſt Strength to avoid Strifes and Debates, and to be a final End and Concluſion, and of ſuch Effect they were taken before a Statute made of Non-claim, and now it is uſed to the contrary, to the univerſal Trouble of the King's Subjects, willeth therefore that it be enacted, &c.* which Preamble ſhews that it was the Opinion of the Makers of the Act, that Fines ought to be of the greateſt Force, in order to avoid Contention, and therefore the Purview ought to be moſt largely extended to fulfil that Intent. And ſuch is the Office of Expoſitors of Acts to follow the Intent of the Makers expreſſed to them in plain Terms. The Preamble alſo ſhews that of ſuch Effect they were before the Act of Nonclaim, whereby the Makers allow and approve of the ancient Fines which were peremptory to the Right of others. And further the Words declare that now it is uſed to the contrary, to the univerſal Trouble of the King's Subjects, which Words *(univerſal Trouble)* ſhew us that the Members of this Parliament had an earneſt Deſire to reform and remove this general Diſquietude, and this is an Authority for us to purſue this Deſire in the Conſtruction of the Purview, and to take it moſt ſtrongly againſt the Cauſes of that Trouble, and that is, againſt the former Right, and againſt thoſe who had it.

[e] Co. Litt. 79 a. 4 Inſt. 330 Godb. 338. Curſon 15. 4 Bac. Abr. 645. Vin. Abr. tit. Statutes E. 6. pl. 100. Vide W. Jones 164.

And purſuant hereto is the Purview, which ordains, *the Proclamations being made, the Fine to be a final End, and to conclude Privies as well as Strangers to it*, this is the Body of the Act, which Words are to be weighed and conſidered. And they are as ſtrong and effectual as any Words can be, for if the Fine ſhall be a final End, then all former Rights and Titles are gone, for it cannot be called final, if any other is at Liberty to ſet up his former Right againſt the Conuſee, and to diſpute it with him. And the other Words *(that it ſhall conclude as well Privies as Strangers to it)* tend to the ſame Effect, [f] for the Word *(conclude)* is derived (as *Catline* ſaid) from the *Latin* Word *concludo*, which is compounded of two Words, *viz. con* and *claudo*, which Word *claudo* ſignifies to encloſe, or to ſhut up, or to end, as *diem clauſit extremum*, he has cloſed up, ſhut up, or ended his laſt Day: And *con* ſignifies together, ſo that the Words *(conclude* Privies and Strangers) in Signification are as much as to ſay, cloſe up together, ſhut up together, or extinguiſh the Right of Privies and Strangers. So that there is full Proviſion in the Purview to take away and put an End to all former Rights, and to commence new. And *Catline* compared the Fine upon this Act to *Janus*, who, he ſaid, was *Noah*, but the *Romans* occaſionally called him *Janus*, and uſed to paint him with two Faces, one looking backwards, in Reſpect that he had ſeen the former World which was loſt by the Flood, and the other looking forwards, in Reſpect that he begun a new World commencing at the Flood, and proceeding from thence forwards, for which Reaſon they called him *Janus bifrons*. And alſo he carried a Key in his Hand, ſignifying by that Key his Power to renew the new World by his Generation. So here this Act creates as it were a Flood, by which all former Rights before the Fine ſhall be drowned by Nonclaim, for Nonclaim is the Flood, and the Fine begets a new Generation, which is the new Right, for the Fine makes a new Right, and is the Beginning of a new World, which proceeds from the Time of the Fine downwards. And *Dyer* and all the others who argued on this Part ſaid, [g] that the Intention of this Act was not ſo much to preſerve former Rights, as to extinguiſh them, and that the Makers of the Act were Enemies to the former Right, and Friends to the new, becauſe the ancient Right ſtirred up many Suits and Contentions. And foraſmuch as they intended to avoid univerſal Trouble (as the Preamble ſpeaks) and to make Peace, which is to be preferred before all other Things, and foraſmuch as they have made the Proviſion general, *viz. that the Fine ſhall be a final End, and ſhall conclude as well Privies as Strangers*, [h] if the Act had ſtopped there, it would have bound as well Infants, Feme-coverts, and the others named in the Exception, as People of full Age, and who were void of ſuch Defects. For Infants do not make the Majority of the People, [i] and that is a reaſonable Law which provides for the greater Number, although ſome particular Perſons ſuffer by it. And hereupon *Catline* recited this Saying of *Cato*, *viz. vix ulla lex fieri poteſt quæ omnibus commoda ſit, ſed ſi majori parti proſpiciat, utilis eſt.* And ſo by the Generality of the Purview, founded upon ſo reaſonable a Cauſe, Infants and all the others contained in the Exception had been bound, if there had been no Exception: And ſo it was taken by the

[f] Co Litt. 37. a.

[g] 1 Leon. 84. 85. Comb. 79. Poſt 538 (a).

[h] Dy. 3. pl. 3. Ante 361 (a).

[i] Dr. & Stud. lib. 1. cap. 12. fo. 39. Poſt 371 (b).

the Makers of the Act, for otherwiſe the Exception would have been made in vain, as *Weſton* ſaid. And it was ſaid that all other Infants but thoſe contained in the Exception are bound by the Generality of the Purview. [a] And hereupon *Catline* ſaid that if an Infant levies a Fine, after the Proclamations paſſed he ſhall not have a Writ of Error, although he is within Age, becauſe he is not aided by the Exception, for no Infant is excepted but an Infant not Party to the Fine, and an Infant Party to the Fine is within the Purview which binds Privies, which Word *(Privy)* may in Senſe comprehend a *Party* alſo, and the Purview being general binds Infants, as it has been ſaid. But *note*, this Caſe was put to the contrary by *Southcote*, and by *Walſh* in his ſecond Argument, for they held that he was excepted out of the Generality of the Purview by the Intent of the Makers of the Act.

[a] Contra Co. Read. on Fines 8. Co. Litt. 131. a. 2 Sid. 94. See Shep. Pract. Counſ. 71.

And as to the Exception, all of them who argued on this Part held that the Infants and others contained therein are ſuch as have Right at the Time of the Fine levied, and no others. [b] For an Exception is always an Exemption of that which is contained before in general Words, and if it is not contained in the Generality, it cannot be excepted in the Specialty. For *Weſton* ſaid, if one makes a Feoffment of a Manor, except ſuch an Acre which is not Parcel of the Manor, this is a void Exception. So if one makes a Leaſe of all the Land which deſcended to him on the Part of his Father, except the Land which deſcended to him on the Part of his Mother, this is not a good Exception, becauſe the Thing excepted was not contained in the Demiſe, and ſo the Exception is not uſed in its proper Nature. So here the Purview is againſt thoſe that have Right, and to except ſuch Infants as have no Right would be an idle Exception, and a Miſtake of the proper Nature of the Word, which is a Thing of too great Indignity to be conceived of the Members of that Parliament, who were wiſe and learned Men. And therefore the Generality of the Purview explains the Thing excepted.

[b] Dy. 59. pl. 11. 2 Rol. R. 361. Godb. 425. Bridgm. 136. Weſt Symb. pt. 2. fo. 8. b.

And as to what has been ſaid on the other Side, [c] *viz.* that the Purview was made as well againſt thoſe who had no Right, as againſt thoſe who had, and ſo ſhall the Exception alſo be; Sir, this cannot be well affirmed that the Act was made againſt two Sorts of Perſons, *viz.* againſt thoſe who had Right, and againſt thoſe who had no Right, but only againſt thoſe who had Right. For every one who lays a Claim to Land, and for the Recovery thereof ſues an Action, or makes an Entry into it, affirms by ſuch Act that he has Right, and againſt him the Fine with Proclamations may be pleaded, and it is not examinable whether he has Right, or not, but if he ſays that he has Right, it is ſufficient, and then the Conuſee ſhall conclude him by Nonclaim within the Time. As if a Fine is levied to one with Proclamations, and he enjoys the Land five Years quietly without Claim, and afterwards one brings againſt the Conuſee a Writ of Entry upon a Diſſeizin in the *Poſt* for a Diſſeizin done to him upon Title paramount the Fine, as he pretends, where in Fact he never was diſſeized, nor had Title or Right to the Land, there the Conuſee ſhall plead the Fine with Proclamations againſt him without anſwering to his Title, or examining his Right, for whether he had Right or not, he is concluded by his Latches of Claim within the five Years. So that Right or no Right is not the Matter, but Claim of the Right or Nonclaim within the five Years is the whole Matter, where this Concluſion is pleaded: And hereupon Iſſue is to be joined, which being tried upon ſuch Iſſue one Way or other makes an End of the Matter. For if it be found for the Demandant that he made Claim within the five Years, he ſhall recover, whether he had Right or not; and if it be found againſt him, he ſhall be barred, whether he had Right or not. And where the Conuſee or his Aſſignee pleads ſuch Concluſion in Bar, this is a *nient dedire* of the Right of the other, but that ſuch Right is gone by Nonclaim. And ſo the Purview is made only againſt thoſe Perſons who have a former Right, and the having of a former Right is every Challenge of ſuch former Right by Action or other Claim where ſuch Concluſion is pleaded; for the Right is not denied by the Party who relies upon the Concluſion. And therefore it cannot be well ſaid that the Purview is againſt thoſe who had Right, and alſo againſt thoſe who had no Right, inaſmuch as in every Caſe where ſuch Concluſion is pleaded a Right is claimed by the one Party and not denied by the other, but the Purview is only againſt thoſe who claim a former Right. And every one is confeſſed by *nient dedire* to have a former Right who claims it, and againſt whom ſuch Concluſion is pleaded, and the Purview is not againſt thoſe who had nothing or claimed nothing in the Land at the Time of the Fine levied, or upon Cauſe ariſing before the Fine. And hereupon *Catline* ſaid, [d] that if a Tenant in ancient Demeſn levies a Fine at the common Law, and five Years paſs after the Proclamations, the Lord of ancient Demeſn ſhall have a Writ of Diſceit 20 Years afterwards, and ſhall annul the Fine, and the Tenant ſhall be reſtored to the Land, for the Purview does not extend to him, for he claims no Title or Right to the Land at the Time of the Fine levied, but to his Seigniory and Services iſſuing out of the Land, for which Reaſon he is out of the Purview. So that the Purview extends only to thoſe who claim Title or Right, or had Right in Poſſeſſion, Reverſion, or Remainder to the Thing compriſed in the Fine at the Time of the Fine levied, or afterwards upon Cauſe ariſing before: And the Exception of Infants and the other Perſons compriſed in the Exception is intended of ſuch Infants and Perſons as had Right at the Time of the Fine levied, and no others. And *Stowel* the Demandant, who was an Infant at the Time of the Fine levied, is not ſuch an Infant as is there intended, becauſe he had no Right at the Time of the Fine levied, but his Grandfather then had the Right, againſt whom the Purview holds Place, and not againſt the Demandant himſelf. And ſo they all held that he was out of the Benefit of the Exception, and that the Words *(having any Right or Title)* in the Clauſe after touching the Perſons excepted are to be intended having Right or Title at the Time of the Fine levied, as well as at the Time of the Claim by Action or Entry made. And therefore they all agreed that *Stowel* the Demandant is not within the Benefit of the Exception, becauſe he had no Right at the Time of the Fine levied.

[c] Ante 362.

[d] 1 And. 74. 4 Inſt. 270. Weſt's Symb. pt. 2. fo. 7. a. b. 70. a. Shep. Pract. Counſ. 51, 81. And where it is ſaid to the contrary in 2 Inſt. 519 that the Lord is barred of his Writ of Diſceit, this is to be intended (according to T. Raym. 462) another Fine, and not the ſame which was firſt levied. Vin. Abr. tit. Fine W. 4. pl. 1. in notis. Y. 3. pl. 7. in notis.

And as to the firſt Saving, it is to be obſerved that the Saving is general, but it is with Condition, which Condition in Reaſon and Senſe ought to be taken as general as the Saving is. And the

the Saving is, *to all Perſons and their Heirs (other than are Parties to the ſaid Fine) ſuch Right, Claim, or Intereſt as they had to the ſaid Tenements at the Time of the Fine engroſſed, ſo that they purſue their Title, Claim, or Intereſt by Action or lawful Entry within five Years next after the Proclamations made*, which Word *(they)* contains the Perſon who had Right and his Heirs (as is aforeſaid.) [a] So that we ſee the Saving is general to him and to his Heirs, which implies every Heir inheritable whatſoever, whether he be within Age, covert, out of the Realm, or of unſound Mind, or whether he be of full Age, and void of ſuch Impediments. And the *(ſo that)* added afterwards is a Condition, *viz. ſo that they purſue, &c.* which is as much as to ſay, ſo that he and his Heirs purſue, *&c.* And Heirs there are meant generally, that is, every Heir whatſoever inheritable, whether he be within Age, covert, out of the Realm, or of unſound Mind, or whether he be of full age, and void of ſuch Impediments. For if it ſhould ſave the Right as well to the Heir within Age, or who had the ſaid Defects, as to the Heir of full Age, who was void of ſuch Defects, ſo that the Heir of full Age or void of ſuch Defects purſued his Title within five Years, this Sentence would go lame upon one Foot, and would not be as large as the Saving is, but it would leave the Heir within Age, or who had the ſaid Defects, at large, without binding him to any Time of Purſuit: And if the Intention of the Makers of the Act had been ſuch that the Heir within Age, or who had the other Defects or Impediments, ſhould not be bound to the Purſuit within Age, or during the Time of his Defects, then they would have provided that the Heir of full Age, and who was void of ſuch Defects, ſhould be bound to the Purſuit after that he had come of full Age, or was void of ſuch Defects or Impediments, as they did with Regard to thoſe who had preſent Right at the Time of the Fine levied, or a future Right afterwards. But that was not their Intention, and the Reaſon is, becauſe they had no other Deſign but that the Heir within Age, or who had the other Defects, ſhould be bound by the Condition of the Saving, as well as he had the Benefit of the Saving. And whoſoever conſiders that this Act was made for the general Tranquillity and Quiet of Inheritances throughout the Realm, which are more to be favoured than the Nonage of an Infant in a Caſe which rarely happens, will not think this a hard or rigid Conſtruction. [b] And although ſometimes a Caſe happens for which there is no Remedy, yet that does by no Means impeach the Reaſonableneſs or Juſtice of the Law, ſeeing the greater Number of People are provided for by it. And *Catline* and *Weſton* ſaid, that if every Infant ſhould have five Years *de novo* after his full Age, the Matter might poſſibly be delayed many hundred Years. For if *Stowel* the Demandant ſhould have other five Years after he came of full Age, he might perhaps die within thoſe five Years after his full Age, his Heir being within Age, who ought to have other five Years, which Heir alſo might die within the five Years after his full Age, his Heir being within Age, and in this Manner it might be continued for many hundred Years, and then the Right would come to be tried when it was out of the Memory of any Man living, and yet in ſuch a dark Caſe a Jury would be under a Neceſſity of giving a Verdict. And ſuch Darkneſs and Ignorance would be the Means of introducing Perjury and many other Miſchiefs, which the Makers of the Act intended to prevent by removing the Cauſe of them, *viz.* by limiting a certain Time for the firſt Right, which they did not intend ſhould be exceeded, although ſome particular Perſons might ſuffer by it. And hereupon *Catline* recited the Miſchief which was in the Words of the Statute of Limitations of 32. *H.* 8. *cap.* 2. by the Words whereof [c] if the Incumbent of an Advowſon had lived 60 Years, and had died, and a Stranger had preſented, or if one had had a Seigniory by Knight's-Service, and had not been ſeized thereof for 60 Years by Reaſon that the Tenant lived ſo long, or for other Reaſon, and the Tenant had died, his Heir within Age, and another had ſeized him, and entered into Land, in the one Caſe he could not have a *Quare impedit* or *Darrein Preſentment*, and in the other Caſe he could not have a Writ of Right of Ward, or Raviſhment of Ward; and yet in theſe ſpecial Caſes the Miſchief was great by Reaſon of the Perſons living ſo long, nevertheleſs this Miſchief was not remedied by the Expoſition of the Words of the Act, nor by the Equity of the Act, until the Statute of 1 *Mary cap.* 5. redreſſed it. And the Reaſon was, becauſe the Act of 32. *H.* 8. was founded upon the like Reaſon with this Act, *viz.* to limit all Men to a certain Time, for the Tranquillity and Repoſe of the Publick, in which Caſe [d] no Time ſhall be gained by Expoſition or Equity beyond the expreſs Words of the Act. And if Infants had not been excepted in the ſaid Act of 32. *H.* 8. which ordains that Actions ſhall be brought within a certain Time before the Act takes Effect, they would have been bound by the Generality of the Purview as well as others of full Age. So here the five Years attached in *Stowel* the Grandfather ought to be purſued as well by his Heir, whether he be of full Age or within Age, as they ſhould have been by himſelf if he had ſurvived the five Years. And *Catline* alſo alledged the Miſchief which was in the Words of this very Statute of 4. *H.* 7. which ordains *that the Proclamations ſhall be made the ſame Term that the Fine is engroſſed, and the three Terms thence next following*, and if one of the ſaid three Terms had been adjourned, the Proclamations had been ineffectual in the whole, and it could not be ſupplied the laſt Term after by the Expoſition of the Words, nor by the Equity of the Statute, for Remedy whereof the Act of 1 *Mary cap.* 7. was made. And ſo it appears that a Time limited by an Act ought to be purſued, and being once attached in Part it ought to be continued. [e] And hereupon *Dyer* ſaid, that if upon the Exigent it is returned that the Party is *quarto exactus*, and that there is one County wanting, and upon this another Writ iſſues *allocato comitatu*, this fifth County ought to be that which is next after the fourth, for if it be not, but if the Day of the fifth County is the Day of the Return of the Exigent, or is paſſed before the Date of the ſecond Writ, or if upon other Accident the County at which he is outlawed be not the next after the fourth, it has been held by us in the Common-Bench to be Error, for a Time commenced ought to be continued without Intermiſſion. So the five Years commenced in *Stowel* the Grandfather of full Age cannot admit of any Intermiſſion, but they ſhall be accounted continually from the firſt Day of them. And he denied the Law to be

[a] Vin. Abr. tit. Fine W. 4. § 3. fo. 261.

[b] Dr. & Stud. lib. 1. cap. 12. fo. 39. Ante 3[1]9 (1).

[c] Vin. Abr. tit. Limitation A. pl. 7.

See Co. Litt. 115. a.

[d] Cro. C. 83.

[e] 1 Finch 339.

as it was before affirmed by *Brown*, *viz.* * that if a Fine was levied before the Act of Nonclaim, and one of full Age had Right at the Time of the Fine levied, and he had died within the Year, and the Right had deſcended to his Heir within Age, he ſaid that he ſhould be bound to that Year commenced in his Father, and that his Nonage ſhould not avail him in that Caſe, inaſmuch as his Anceſtor was of full Age. And he ſaid that in many Caſes at the common Law Nonclaim ſhould loſe the Right. [a] As Nonclaim of a Villain by a Year and a Day who has fled into ancient Demeſn ſhall take away the Seizure of the Villain, and *nativo habendo*; but if the Lord makes his Claim every Year, he ſhall have a *nativo habendo*. [b] And Nonclaim of Liberties before Juſtices in *Eyre* ſhall loſe the Liberties, for it is at the King's Grace to grant Replevin of them, and not Matter of Right. And the Wood of another in the King's Foreſt, being ſeized into the Hands of the King for Nonclaim within a Year and a Day, ſhall be forfeited to the King, as appears by the Treatiſe called *Ordinatio Foreſtæ*. [c] And Nonclaim by the *mulier* upon the Baſtard, who dies ſeized, ſhall take away the Right. [d] And if an Appeal of Murder be not brought within a Year and a Day, it ſhall be loſt for ever. [e] And a Copyhold not claimed within a Year and a Day after the Death of the Anceſtor ſhall be loſt for ever by the Cuſtom of many Manors, and ſuch Cuſtom ſhall be good. And he put many other Caſes where Nonclaim ſhall be peremptory to the Right, and he ſaid, if in theſe Caſes Nonclaim within a Time limited ſhall by the common Law be peremptory, and loſe the Right, and in them the Party ſhall not be aided by Infancy, *a fortiore* where an Act of Parliament limits a Time, for the public Repoſe of the Realm, and in Order to avoid univerſal Trouble to the Subjects of the Realm, as the Preamble ſays, ſuch Time ought to be peremptory, and ought not either by Expoſition or Equity to be favoured and enlarged for an Infant or any other beyond the ſtrict Extent of the Words; for the public Repoſe is more to be regarded than the private Convenience of any particular Perſon, whether he be an Infant, or of unſound Mind, or in other Degree.

* Contra Ante 360 (d). 365 (a).

a P. 7. H. 6. 32. a. F. N. B. 79. a. Dy. 60. pl. 23. Co. Litt. 254. b. 5 Co. 107. b. Kitch. 112. Cowel's Inſt. 104. 1 Finch 26. 2 Finch 38.

b M. 15. Ed. 4. 6. pl. 12. Bro. QuoWarranto 11 Crompt. J. C. 144. b.

c Ante 57 (b). and the Books there cited.

d H. 2. H. 7. 10. pl. 5. Co. Litt. 254. b.

e Contra 1 Show. 86, *Per Dolben* J.

Wherefore he and all the others who argued on this Part agreed that the Heirs compriſed in the firſt Saving, and bound to the Purſuit of the Right, ſhall be taken as general as the Saving is, and ſhall comprehend Heirs within Age, covert, in Priſon, of unſound Mind, or beyond the Sea, as well as other Heirs void of theſe Imperfections or Impediments, and that the Demandant ſhall not have Benefit of his Nonage by this firſt Saving, but that by his Nonclaim within the five Years attached in Part in *Stowel* the Grandfather he ſhall be barred, if the ſecond Saving does not aid him.

[f] And the Caſe of the dying ſeized of Baſtard *eigne* during the Nonage of *mulier puiſne* was touched by many of the Juſtices in the Argument of this Caſe. And *Carus* and *Dyer* held that the Right of the *mulier* within Age is bound by the Deſcent, becauſe in this Caſe the Law is a binding Law, that is to ſay, it binds the Right for ever. And *Southcote* and *Saunders* held the contrary, becauſe the Right of the *mulier* ſhall never be bound but where there was a dying ſeized, and where the dying ſeized comes by Default of Entry and by the Latches of the *mulier*, which Latches is excuſed by Reaſon of the Infancy of the *mulier*.

f That the Right of the *mulier* within Age is bound, Co. Litt. 244. a. 8 Co. 101. a. 1 Rol. Abr. 625. pl. 4. That it is not, 31 Aſſ. pl. 18, 22. Bro. Age 37. Diſcent 26. Entry congeable 68. 36 Aſſ. pl. 26. Fitz. Baſtardy 17. Bro. Diſcent 29. Entry congeable 75. H. 33. Ed. 3. Fitz. Verdict 48. Bro. Diſcent 49.

As to the ſecond Saving, all of them who argued on the Part of the Lord *Zouch* held clearly that the Demandant is not aided thereby for divers Cauſes. One Cauſe is, for that this Saving is to other Perſons, which Word *(others)* is excluſive of thoſe who are compriſed in the Exception and in the firſt Saving. And ſuch is not the Demandant here, for *Stowel* the Grandfather and his Heirs were compriſed in the firſt Saving, becauſe *Stowel* the Grandfather had Right at the Time of the Fine engroſſed, which Right is ſaved to him and to his Heirs upon Condition, *viz.* *ſo that they purſue their Right within five Years after the Proclamations made*, which is not done, as is aforeſaid. Then when the ſecond Saving is to others, this is to be underſtood, to others than to thoſe who had preſent Right at the Time of the Fine engroſſed, and their Heirs. And if the Title of *Stowel* the Demandant is no other but as Heir to the Grandfather who had not the preſent Right at the Time of the Fine engroſſed, then is he excluded out of this ſecond Saving by the Word *(others)*, for he is not another Perſon. And although his Perſon, *viz.* his Body, is diſtinct from the Perſon of his Grandfather, yet inaſmuch as the firſt Saving was to his Grandfather and to his Heirs, and he is Heir to the Grandfather by Blood, and Heir to the Right alſo, he was compriſed in the firſt Saving, and is excluded out of this ſecond Saving. And *Weſton* and *Catline* were of Opinion againſt *Walſh* and divers other Juſtices, as is ſaid before, in this Caſe, *viz.* [g] if Tenant *pur auter vie*, Remainder for Life over to another, Remainder in Fee to the Right Heirs of Tenant *pur auter vie*, be diſſeized, and the Diſſeiſor levies a Fine with Proclamations, and five Years paſs, and afterwards *ceſtuy que vie* dies, and afterwards he in Remainder for Life dies, *Weſton* and *Catline* held that he who was Tenant *pur auter vie* ſhall not have other five Years after the Death of Tenant for Life in Remainder to purſue his Right for the Fee ſimple, becauſe he is not another Perſon, but one ſame Perſon, and if he had entered or recovered the Land during his firſt Eſtate, his Remainder had been reſtored thereby, and inaſmuch as he is there bound by the Words of the Act for his ſecond Eſtate, becauſe he is not another Perſon, it ſeemed to them not conſonant to the Intent of the Makers of the Act to enlarge the Time to him for his other Eſtate, but to abbreviate it, foraſmuch as their Intent was more favourable to the new Eſtate than to the former Right. And ſo here *Stowel* the Demandant being compriſed in the firſt Saving is not compriſed in the ſecond Saving, but the Word *(others)* excludes him from the Benefit of this ſecond Saving.

g Ante 367 (d). Shep. Pract. Counſ. 80.

Alſo the Word *(firſt)* joined to the ſubſequent Words will exclude him from the Benefit of this Saving, which Word *(firſt)* ſeemed to them all to be put in the Statute to great Purpoſe. [h] And *Dyer* ſaid that the Statute of 1. *R.* 3. *cap.* 7. touching Fines has all the Words of the Purview and the Body of this Act of 4 *H.* 7. except the Word *(firſt)*, which is added, as a Thing thought to be very neceſſary, to this Act of 1 *H.* 7. more than is in the ſaid Act of 1 *R.* 3. And this Word ought to be added to each of the four Words, *accrue*, *remain*, *deſcend*, *or come*. And the four Words

h T. Jones 238.

Words are by the Letter limited *after the Fine engroſſed and Proclamations made, by Force of any Gift in Tail, or by any other Cauſe or Matter had or done before the Fine levied.* So that he who would take Benefit of this Saving ought to prove four Things, viz. that he is another Perſon, and that the Right firſt came to him, and that it came after the Fine engroſſed and Proclamations made, and that his Right or Title is by Cauſe or Matter before the Fine levied. So that the Foundation of his Title ought to be before the Fine, and ought firſt to come after the Proclamations. As for Example (upon the Word *accrue) Weſton* ſaid, [a] if the Father dies ſeized, his eldeſt Son being in Religion, and the youngeſt is diſſeized, and a Fine is levied with Proclamations, and five Years paſs, and afterwards the eldeſt is deraigned, he ſhall be aided by this ſecond Saving, *cauſa qua ſupra.* [b] So *Dyer* ſaid, if the Mortgagee is diſſeized, and a Fine is levied by the Diſſeizor, and five Years paſs after the Proclamations, and afterwards the Mortgagor pays or tenders the Money, he ſhall by this ſecond Saving have five Years after his Payment or Tender, for his Title firſt accrued to him after the Proclamations by the Payment or Tender, upon Cauſe or Matter before the Proclamations, viz. by the Condition made before the Fine. [c] And if the Huſband levies a Fine with Proclamations, and five Years paſs after the Proclamations, and afterwards the Huſband dies, the Wife by this ſecond Saving ſhall have five Years after the Death of the Huſband to purchaſe her Writ of Dower, for her Title came after the Proclamations made, viz. by the Death of her Huſband, upon Cauſe before the Fine, viz. the Intermarriage with the Huſband and his Seizin: For three Things are the Cauſe of the Wife's Dower, viz. the Intermarriage, the Seizin of the Huſband in Deed or in Law, and his Death, two of which, viz. the Intermarriage and the Seizin, were before the Fine levied, and the third, viz. the Death, was after the Proclamations.

As to the Word (*accrue*).

[a] Weſt's Symb. pt. 2. fo. 69. a. Shep. Pract. Counſ. 50, 74.

[b] 2 Bac. Abr. 532. Weſt's Symb. pt. 2. fo. 68. b. Shep. Pract. Counſ. 74, 79.

[c] S. P. Accord Dy. 72. pl. 3. H. 4. H. 8. Roll 344. Dy. 214. pl. 28. Moor 153. pl. 154. Co. Litt. 326. a. 2 Co. 93. a. 10 Co. 49. b. 99. a. Gouldſb. 148. pl. 71.

1 Rol. R. 160. 2 Rol. R. 409. Shep. Pract. Counſ. 52, 74, 79. 2 Bac. Abr. 92, 140. Vin. Abr. tit. Fine W. 4. § 4. fo. 262.

* *But Note (Reader) that in my Opinion in this laſt Caſe the Wife ſhall not be bound to five Years after the Death of the Huſband, but ſhe is at large and not touched by the Purview of the Act. For the Purview is againſt thoſe who have Right at the Time of the Fine levied, or have future Right afterwards upon Cauſe ariſing before, to which future Right Wrong was done before the Fine, or by the Fine. So that the Statute always intends that a Wrong was done to the preſent Eſtate or to the future Eſtate by the Fine levied. But here in the Caſe of Dower the Title is wholly accrued after the Fine, viz. by the Death of the Huſband, for until his Death no Title was conſummate, nor Wrong done by the Conuſee in detaining the Land from the Wife. And the other two Points are of no Moment without the third, viz. the Death of the Huſband, nor are they ſuch Cauſe or Matter as the Statute intends. So that all the three Points are but one Cauſe or Matter, and not ſeveral. And therefore the Fine does not reach to ſuch Title as is accrued after the Fine, and (as the Law ſays) upon Cauſe wholly after the Fine; and this is conſiſtent enough with the Fine.* [d] *As if the Tenant ceſſes one Year, Part of which was before the Fine and the Proclamations paſſed, and another Year, which ends after the Proclamations, theſe two Years are but one Cauſe or Matter which gives the* Ceſſavit, *and not two Matters, and therefore the Lord ſhall have his* Ceſſavit 20 *Years after the Proclamations, and ſhall not be bound to five Years, for the Purview was not againſt the Lord in ſuch Caſe, becauſe he had no Right to the Land at the Time of the Fine, nor was his Title to the Land in* eſſe *at the Time of the Fine levied, altho' the Ceſſer cemmenced before the Fine levied, but his Title ſhall be ſaid to accrue wholly after the Fine, viz. at the End of the two Years. And ſo it ſtands well with the Fine, for which Cauſe the Lord is at large, and not bound to five Years to bring his* Ceſſavit. *So it ſeems to me to be in the Caſe of Dower, and of the Mortgage alſo, for altho' the making of the Condition is the Cauſe of the Re-entry, yet it is not any Part of the Matter or Cauſe intended by the Statute, but ſtands well with the Fine, and the Payment makes the Title, which is after the Fine, ſo that at the Time of the Fine there was no Wrong done to the Mortgagor, nor to the Eſtate which he claimed, and therefore he ſhall be at large, and not bound to five Years.*

Nota bene by the Reporter.

* Weſt's Symb. pt. 2. fo. 69. a. b. But this Opinion of the Reporter's is contradicted in the Books cited above at (c).

[d] Weſt's Symb. pt. 2. fo. 69. b. Shep. Pract. Counſ. 74.

And *Dyer* ſaid further, (as to the Word *remain)* [e] if Land is given to the Father and to the Heirs Females of his Body begotten, the Remainder to his Son in Fee, and the Father levies a Fine with Proclamations, and afterwards dies without Heir Female of his Body, there the Son has five Years to make his Claim after the Death of the Father, by this Branch: For he is another Perſon to whom the Land firſt remained after the Fine engroſſed and Proclamations made, by Force of Matter before, viz. the Eſtate, by which the Remainder was limited upon the Eſtate Tail made. [f] So, it was ſaid, if Tenant for Life, the Remainder in Fee, is diſſeized, and the Diſſeizor levies a Fine with Proclamations, and five Years paſs, and afterwards the Tenant for Life dies, he in the Remainder ſhall have other five Years to be accounted from the Death of the Tenant for Life, *cauſa qua ſupra.* But *Catline* denied the Law to be as it was put by *Walſh* in a Caſe upon this Matter: For *Walſh* had ſaid, if Tenant for Life with Remainder in Fee makes a Feoffment, and the Feoffee levies a Fine with Proclamations, and five Years paſs, now he in the Remainder is bound touching his Entry for the Forfeiture during the Life of the Tenant for Life, for his preſent Right of Entry was ſaved by the firſt Saving, ſo that he had purſued his Claim within five Years, which he has not done: But, he ſaid, [g] if the Tenant for Life dies, now he in the Remainder ſhall have other five Years for his *Formedon* in Remainder, for it is a new Title and Right, and he could not have his *Formedon* in Remainder before, and it was at his Election whether he would take Advantage of the Forfeiture or not, and becauſe a new Right is come to him by the Death of the Tenant for Life, he ſhall have other five Years by this ſecond Saving; which *Catline* utterly denied, and ſaid that it was no new Right which firſt accrued after the Death of the Tenant for Life, for it is one ſame Fee-ſimple to which he had Right as well before the Death of the Tenant for Life, as after his Death, and inaſmuch as it was his Time to have executed it in his Life, and he has not done it, but has ſuffered the five Years to paſs, he is concluded by the Act, and not ſaved by the ſecond Saving, for his Right did not accrue or remain firſt after the Death of the Tenant for Life,

As to the Word (*remain*).

[e] O. Bendl. 175. Shep. Pract. Counſ. 73, 79.

[f] Poſt 374 (a). Weſt's Symb. pt. 2. fo. 68. b. Shep. Pract. Counſ. 73, 74.

[g] S. P. reſolved *Laune v. Toker* 3 Co. 78. b. 79. a. Cro. E. 220, 254. Cro. C. 157. 3 Keb. 38. *arguendo.* Weſt's Symb. pt. 2. fo. 69. b. *dubitatur.* Shep. Pract. Counſ. 72, 74, 79.

Liſe, inaſmuch as he might have entered before. And ſo the Word *(firſt)* excludes him from the Benefit of the ſecond Saving. And as the Law is in the Caſe before [a] where Tenant for Life with Remainder over was diſſeized, and a Fine levied, *ut antea*, ſo, it was ſaid, ſhall it be of the Reverſion, [b] if the Reverſion had continued in the Leſſor, he ſhould have five Years after the Death of the Tenant for Life. [c] But *Catline* ſaid, if the Reverſion or Remainder depends upon an Eſtate for Years, and not upon an Eſtate of Freehold, then he in the Reverſion or Remainder ſhall not have Aid of this ſecond Saving. [d] And he ſaid, if Tenant for Years, or Tenant by Statute-merchant or *Elegit* be ouſted, and afterwards a Fine is levied with Proclamations, as well the Termor, or Tenant by Statute-merchant or *Elegit*, as he in the Reverſion alſo ought to make their Claim within the firſt five Years, for in ſuch Caſe [e] he in the Reverſion may enter upon the Diſſeizor as well as the particular Termor, and therefore they are all compriſed in the firſt Saving, and he in the Reverſion ſhall not have five Years after the Term ended, as he ſhall have where the particular Eſtate is a Freehold, in which Caſe he in the Reverſion cannot enter during the Eſtate of Freehold. And from this Caſe of a Termor his Intent appears that a Termor for Years ſhall be bound by this Statute as well as one that has a Freehold, becauſe the Savings ſave all Intereſts, [f] which Word *(Intereſt)* may comprehend a Term, and ſhews that the Generality of the Purview extends to it, as it ſeemed to him.

[a] Ante 373 (f).
[b] 1 Show. 43. Weſt's Symb. pt. 2. fo. 68. b. Shep. Practt. Counſ. 77, 79.
[c] 9 Co. 105. b. by the Reporter. 1 Show. 41. But ſee *Whaley v. Tancred* T. Ray. 219, adjudged contrary, and that there is no Difference, as to this Point, between a Leſſee for Life and a Leſſee for Years. S. C. 2 Lev. 52 3 Keb. 38.
[d] 5 Co. 124. a. 9 Co. 105. b. 2 Inſt. 517. 1 Mod. 217. 1 Show. 41. 2 Bac. Abr. 534 Shep. Practt. Counſ. 50, 75.
[e] Co. Litt. 250. b.
[f] 5 Co. 124. a 9 Co. 105. a. Co. Litt. 345. b. Cro. J. 60.

As to the Word *(deſcend)*.

And as to the Word *(deſcend)*, *Dyer* ſaid, [g] if Tenant in Tail diſcontinues, and the Diſcontinuee levies a Fine with Proclamations, and five Years paſs, and Tenant in Tail dies, the Iſſue ſhall have other five Years, for he is the firſt to whom the Land deſcended after the Proclamations, by Force of the Gift in Tail made before the Fine levied. [h] But if Tenant in Tail be diſſeized, and afterwards the Diſſeizor levies a Fine with Proclamations, and five Years paſs without Claim, and afterwards the Tenant in Tail dies, in this Caſe he and *Catline* alſo ſaid that the Iſſue in Tail is bound for ever, for there the Tenant in Tail had the preſent Right at the Time of the Fine levied, and the firſt Saving compriſed him and his Heirs in Tail, and inaſmuch as they did not purſue their Right within the five Years according to the Condition of the firſt Saving, the Tail is bound for ever. But *Southcote* and *Weſton* were of a contrary Opinion, for they ſaid that every Iſſue in Tail ſhall have five Years, for a new Right is come to every one of them *per formam doni*, which Right (as they took it) the Makers of the Act intended to preſerve, [i] and to this Purpoſe the Words *(by Force of any Gift in Tail)* were put in the ſecond Saving. But this Opinion of theirs was utterly diſallowed by the ſaid Chief Juſtices, who ſaid that the Word *(firſt)*, which ought to be added to the Word *(deſcend)* (and then it will be *(ſhall firſt deſcend)*, will not ſuffer every Deſcent to have five Years. [k] And *Catline* ſaid that a Right or Title may be ſaid to be deſcended, where he who has a Right to a Reverſion or Remainder in Tail dependant upon an Eſtate for Life dies, and this deſcends to his Iſſue, and afterwards the Tenant for Life dies, he ſhall have five Years by this ſecond Saving: And thus the Words *(firſt deſcend)* ſhall be fully ſatisfied. [l] And *Weſton* and *Dyer* ſaid, if a Man has Iſſue a Son and a Daughter, and the Son purchaſes Land and dies, and the Daughter enters, and is diſſeized, and the Diſſeizor levies a Fine with Proclamations, and five Years paſs without Claim, if after this the Father has another Son (as he may have ten Years afterwards or more) who is Heir to the Brother, he ſhall have other five Years by this ſecond Saving, for he is the Perſon to whom the Right firſt deſcended after the Fine engroſſed and Proclamations made. [m] So, *Dyer* ſaid, if a Man of unſound Mind makes a Feoffment in Fee, and the Feoffee levies a Fine with Proclamations, and he of unſound Mind dies, now his Heir ſhall have five Years from the Time of his Death, for he is the Perſon to whom the Right firſt deſcended after the Fine engroſſed and Proclamations made.

[g] P. 19. H. 8. 7. a. 1 Rol. R. 162. 3 Co. 87. a. b. Pollexf. 500. Weſt's Symb. pt. 2. fo. 68. b. Shep. Practt. Counſ. 75, 79.
[h] Weſt's Symb. pt. 2. fo. 67. b. Shep. Practt. Counſ. 75, 76.
[i] T. Jones 242.
[k] Shep. Practt. Counſ. 76.
[l] Weſt's Symb. pt. 2. fo. 69. a. Shep. Practt. Counſ. 57, 76.
[m] Shep. Practt. Counſ. 57, 76.

As to the Word *(come)*.

And as to the Word *(come)*, *Dyer* ſaid, [n] if Tenant in Tail levies a Fine with Proclamations, and five Years paſs, and afterwards he dies without Iſſue, the Donor is the Perſon to whom the Right firſt came after the Fine engroſſed and Proclamations made, upon Cauſe had before the Fine, and therefore he is aided by this ſecond Saving, and may have his *Formedon* in Reverter within five Years after the Death of the Tenant in Tail. And in all theſe Caſes, it was ſaid, there is a new Right or Title accrued, remained, deſcended, or come after the Proclamations, which was not in any other before, upon Cauſe ariſing before the Fine. But in our Caſe altho' *Stowel* the Demandant is the Perſon to whom the Right firſt deſcended, yet this is not upon any Matter or Cauſe had or done before the Fine, as the Makers of the Act intended, for the Diſſeizin which was before the Fine is not the Matter or Cauſe which made *Stowel* to have the Right, for if there had been no Diſſeizin he would have had the Right and the Poſſeſſion, for he had it by Deſcent or Purchaſe before. But they intended ſome ſpecial Matter which ſhould be the efficient Cauſe of having the Right, and ſuch a Right too as never was in any other before it was in him; and there is none ſuch in this Caſe, for the Right was firſt in the Grandfather, and the Right deſcended, which is meant by this Branch, is a Right deſcended which was not in any other in ſuch Manner at the Time of the levied. For this Right here was ſaved in *Stowel* the Grandfather and in his Heirs by the firſt Saving, and if it ſhould alſo be ſaved in the Heir by the ſecond Saving, becauſe it firſt deſcended to him, then the one Saving would be ſuperfluous and in vain. And this was not the Intention of the Makers of the Act, for they never intended to aid thoſe by the ſecond Saving who were compriſed and aided by the firſt Saving, nor *e contra* to aid thoſe by the firſt Saving who are aided by the ſecond, but their Intention was to comprehend in one Saving thoſe who were out of the other Saving. Wherefore all of them who argued on this Part agreed that the Demandant was not aided by the ſecond Saving, for he is not another Perſon, nor is the Right which

[n] Weſt's Symb. pt. 2. fo. 68. b.

is

is here deſcended to him ſuch a Right as the Makers of the Act intended, nor is the Cauſe or Matter before the Fine ſuch as they intended.

And as to the Point of Equity, all of them alſo who argued on this Part agreed that *Stowel* the Demandant ſhould not be aided at all by Equity, inaſmuch as the Univerſality of Mankind is more the Object of the Purview than Individuals, that is to ſay, it reſpects the Peace of all Men in general more than the Advantage of Infants or other private Perſons, and alſo inaſmuch as this Act is a poſitive Law for the Time, and therefore when it has particularly limited divers Times to Perſons in divers Degrees, to make an Alteration in that Time would be more contrariant than agreeable to the Minds and Intention of the Makers of the Act. [a] And *Catline* ſaid that *Ariſtotle* defines Equity thus, *Æquitas eſt correctio juſtæ legis qua parte deficit quod generatim lata eſt.* But, he ſaid, this Law here is ſpecial, and limits a Certainty of Time in every Point, and it is defective in no Part as to Time, for which Reaſon the Time limited ſhall not be altered or enlarged by Equity.

[a] Ariſt. Ethic. lib. 5. cap. 10. 2 Brownl. 306. 1 Finch 40. 2 Finch 56. 4 Bac. Abr. 649. Poſt 465.

And in this Caſe they who argued on the Part of Lord *Zouch* agreed [b] that if one had three or four of the Defects and Impediments, as if a Woman who has preſent Right, or when the future Right falls, is covert, and within Age, and not of whole Mind, and in Priſon, and one, or two, or three of theſe Defects or Impediments are removed, as if the Huſband dies, and ſhe is of full Age, and let out of Priſon, the five Years appointed to her by the Statute ſhall not commence until the laſt Defect or Impediment is removed, and when ſhe is void of all the Impediments or Defects, then the five Years ſhall commence. [c] And if the Perſon, whoſe Defects or Impediments are once removed, within a Month after falls into any of the Defects or Impediments again, as if he is impriſoned, or becomes of unſound Mind, and continues ſo all the five Years, or at the End of the firſt Month of the five Years dies, his Heir within Age, the five Years before commenced ſhall proceed, and Nonclaim within the ſame five Years ſhall bind the Party and his Heirs, as well as if he had been void of all the Defects or Impediments during the whole five Years.

[b] Vin. Abr. tit. Fine F. a. 5. pl. 1. Weſt's Symb. pt. 2. fo. 68. a. Shep. Pract. Counſ. 76, 78. 1 Leon. 215, *per Anderſon* C. J.

[c] Vin. Abr. tit. Fine F. a. 5. pl. 2. Weſt's Symb. pt. 2. fo. 68. a. b. Shep. Pract. Counſ. 76, 78.

And in this Caſe it was affirmed by many of the Juſtices, and denied by none of them that I heard, [d] that altho' the Perſons compriſed in the Exception were not under ſuch Defects or Impediments at the Time of the Fine levied, but became ſo againſt their Will after the Fine levied, and before the laſt Proclamation, and were in ſuch Degree at the Time of the laſt Proclamation, they ſhall not be bound to five Years next after the laſt Proclamation, but they ſhall have five Years next after their Impediments or Imperfections removed.

[d] Vin. Abr. tit. Fine F. a. 5. pl. 3.

And *Bendloe* ſaid in this Caſe, that the Savings in the Act extend as well to Succeſſors, altho' they are not named, as to Heirs. And divers Caſes were put touching the Succeſſors of Biſhops, Deans, and Parſons, and in the meſn Vacation touching Men of Religion, *(all which I have omitted out of this Report, becauſe, as I apprehend, the Purview does not extend* [e] *to bind ſuch, nor ſhall their Succeſſors be intended ſuch Privies as are meant by the Statute, nor ſhall they be bound by any Fine levied by their Predeceſſors, or by the Negligence or Latches of their Predeceſſors. For none can imagine that the Makers of the Act intended by the Latches or Act of the Biſhop to bind the Succeſſion without the Aſſent of the Chapter, or of the Parſon without the Aſſent of Patron and Ordinary. For which Reaſon, it ſeems, the Omiſſion of Succeſſors out of the Act was done of Purpoſe, and not thro' Negligence or Forgetfulneſs. And if the Law ſhould be taken for certain that upon a Fine levied by the Predeceſſor of a Biſhop, Dean, Prebendary, or Parſon, and Proclamations made, or that upon a Diſſeizin done to a Biſhop, Dean, or Prebendary, and ſuch others, their Succeſſors ſhall be bound by a Feoffment of the Termors or otherwiſe, and by a Fine afterwards levied, and by Nonclaim of the Biſhop, Dean, or ſuch other for five Years, this would ſoon grow into great Practice, and thereby Holy Church would loſe more Poſſeſſions than it could gain in theſe Days.*

Nota bene by the Reporter.

[e] 11 Co. 71. a. Crompt. J. C. 20. b. Weſt's Symb. pt. 2. fo. 66. b. Shep. Pract. Counſ. 50, 104. Poſt 538 (c).

After theſe Arguments made, Judgment was prayed in the Common Bench for the Lord *Zouch* in the ſaid Term of *St. Hillary* in the 11th Year of the Reign of Queen *Elizabeth*. And *Harper* then one of the Judges of the ſame Bench retained his former Opinion, viz. that the Law was with *Stowel* the Demandant, and of the ſame Opinion with him was *Saunders* only, and no others. For *Walſh*, *mutata opinione*, aſſented that Judgment ſhould be given againſt *Stowel*. And he ſaid to me afterwards, that upon better Conſideration it ſeemed to him that the Act, which had limited a Time for the Right, had made the Right of *Stowel* the Demandant ſubject to a Condition, viz. that he ſhould purſue his Claim within the five Years attached firſt in his Grandfather, from which his Nonage ſhould not diſcharge him any more than in this Caſe, viz. [f] if a Man makes a Feoffment in Fee upon Condition to be performed on the Part of the Feoffee and his Heirs, there if the Feoffee dies, his Heir within Age, he is bound to perform the Condition during his Nonage, as well as if he was of full Age. So here the time limited to the Right of the Demandant makes his Right conditional, and his Nonage ſhall not diſcharge him from it; and this was the Reaſon why he aſſented to the Judgment, as he told me. Wherefore he and all the other Judges, viz. *Carus*, *Southcote*, *Weſton*, *Whidon*, *Dyer* and *Catline*, were of Opinion that *Stowel* the Demandant ſhould be bound to the five Years attached in his Grandfather, and conſequently that Judgment ſhould be given againſt him. And of this Opinion I heard that *Corbet* Juſtice was, (who died before he had delivered his laſt Argument) as appeared by his Argument written with his own Hand, which was found after his Death in his Study, as I was informed. Wherefore the ſame Term of *St. Hillary* Judgment was given that *Stowel* the Demandant ſhould be barred, which Judgment was as follows.

Hill. Term 11 *Eliz.*

[f] 31 Aſs. pl. 17. Fitz. Condition 15. Bro. 114. Coverture 71. 2 Rol. R. 403. 2 Lev. 22. 1 Mod. 86, 87.

At

The reſt of the Record.

At which Day here came as well the aforeſaid *John Stowel* now Demandant as the aforeſaid *George* by their Attornies aforeſaid. Whereupon the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it ſeems to the Juſtices here that the aforeſaid Plea of the aforeſaid *John Stowel* now Demandant above by replying pleaded is inſufficient in Law to maintain the aforeſaid *John Stowel* now Demandant to have his Action aforeſaid againſt the aforeſaid *George*, as the aforeſaid *George* above has alledged. Therefore it is conſidered that the aforeſaid *John Stowel* now Demandant take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim. And that the aforeſaid *George* go thereof without Day, &c.

Judgment.

And the Lord *Dyer*, in his laſt Argument made in this Caſe, ſpoke to the Manner of pleading the Concluſion made by the Statute, that is to ſay, whether it be neceſſary for the Tenant, who pleads the Fine in Bar, to aver that the ſaid *John Zouch* Knight was of full Age, of ſound Mind, out of Priſon, and within the Realm, or not. For he ſaid that in [a] 8 *R.* 2. the Tenant in Aſſize pleaded in Bar a Fine levied before the Statute of Nonclaim, and ſaid that the Plaintiff was a Year and a Day after the Fine levied out of Priſon, of full Age, and within the four Seas, and did not put in his Claim, &c. and the Plaintiff ſaid that he was at that Time in *Scotland* the whole Year and Day of which he ſpoke, *without that* that he was in *England*; and becauſe *Scotland* is another Land and another Realm by itſelf, the Iſſue was held ſufficient enough for this Purpoſe. [b] And, he ſaid, hereby it appears that *Scotland* is another Realm. [c] But, he ſaid, it ſeemed to him in the Caſe here not to be neceſſary for the Tenant, who pleads the Fine in Bar, to aver that the Party was of full Age, or out of Priſon, or within the Realm, and of ſound Mind, but this ſhall be ſhewn on the other Side, if there is any ſuch Imperfection or Impediment, becauſe the Body of the Act is general, viz. *that the Fine ſhall be a final End, and ſhall conclude as well Privies as Strangers to it*, and as general as the Purview is, ſo generally the Party, who is to take Advantage by the Fine, ſhall plead it. And if the other Party or his Anceſtor is one of the Perſons excepted, he ought to plead the Exception, becauſe it is for his Advantage. And he reſembled this to the Pleading of a Deviſe of Land by Force of the [d] Act, for the Deviſee ſhall plead the Deviſe generally, viz. that ſuch a one was ſeized of the Land in Fee, and held it in [e] Socage, and deviſed it to him by his laſt Will in Writing. For the Proviſion of the Act is general, viz. *that every Perſon ſhall have full Authority to deviſe, &c.* and yet there is a Branch in the Act afterwards, *that Wills made by Femes-covert, or Perſons within Age, Ideots, or not of whole Mind, ſhall not be taken to be effectual:* But inaſmuch as this is not in the Body of the Purview, but is in a Branch afterwards, the Deviſee needs not to aver that the Deviſor was of full Age and void of the other Imperfections, but the other Party who is to take Advantage of it ſhall plead it. [f] But, he ſaid, if one will plead a Feoffment or Grant of *Ceſtuy que Uſe*, there he ought to plead that he was of full Age, of whole Mind, and at large, and not in Dureſs, as it is held in 16. *H.* 7. And he ſaid that the Queſtion was moved before in 6. *H.* 7. whether or no the Party ought to ſhew it, but it was not there adjudged, but in 16. *H.* 7. the Point was reſolved by the Juſtices. And the Reaſon is, becauſe the Purview of the Act of 1 *R.* 3. *cap.* 1. is, *that all Feoffments, Grants, &c. made by any Perſon being of full Age, of whole Mind, and at large, and not in Dureſs, to any Perſon ſhall be good and effectual*; ſo that the Purview does not warrant any Feoffment or Grant but of ſuch Perſons as are void of ſuch Defects. And therefore he that will take Benefit by ſuch Conveyances ought to ſhew that the Perſon who made them was void of ſuch Defects, or elſe he is not authoriſed to make them. [g] But otherwiſe it is where the Purview is general, and a Reſtraint to ſome comes afterwards by Way of Exception, (as it is in this Statute of Fines) or by another Branch, as it is in the Statute of Deviſes of Land. And ſo, by him, there is a manifeſt Diverſity.

[a] M. 8. R. 2. Fitz. Continual Claim 13. Crompt. J. C. 65. b. 140. b.

[b] Ante 368 (c). Vide Dy. 304. pl. 51.

[c] S. P. cited and affirmed 1 Leon. 18, *per Wray* C. J. Palm. 255. 2 Mod. Entr. 325. b. pl. 4.

[d] Stat. 32. H. 8. cap. 1.

[e] If the Tenure is not ſhewn to be by Socage, *Quære* if the Court ſhall intend it to be ſo, Dy. 329. pl. 16.

[f] M. 16. H. 7. 2. pl. 4. Bro. Feoffm. al Uſes 65. Pleadings 171. M. 6. H. 7. 6. pl. 1. Fitz. Verdict 15. Bro. Feoffm. al Uſes 24. P. 4. H. 7. 8. b, Bro. Ibid. 42. Pleadings 124. Vin. Abr. tit. Uſes W. a. *in notis*. But 1 Leon. 18, this Point is denied to be Law by *Wray* C. J. And note, the Opinion of *Wray* agrees with that of *Keble*. M. 16 H. 7. 2. pl. 4. P. 4. H. 7. 8. b.

[g] T. Raym. 167, *per Twiſden* J. Ld. Raym. 421, *arguendo*.

Here follow the Verſes mentioned before, *fo.* 356.

Elizabeth nonum regni dum tranſigit annum,
Gentis et Anglorum regia ſceptra tenet,
Anthonium rapiunt Maii mala ſidera *Brownum*,
Legum qui vivus gloria magna fuit,
Abdita qui norat reſerare Oracula juris
Subtili ductu, et *Neſtoris* eloquio.
Ingenio pollens, animoque diſertus et ore,
Vix ulli poterant uberiora dari.
Is fœlix nimium, ſi tam longæva fuiſſent
Quam fuerant animi dona ſtupenda ſui.
Abreptum fato hunc *Eſſexia* planxit alumnum,
Legis et ereptum ſedula turba gemit:
Planxerunt illi, plangat ſimul Anglia tota,
Nempe animos triſtes perdita gemma facit.

A Report of a Judgment given by the Barons of the Exchequer *in* Eaſter *Term in the* 12*th Year of the Reign of Queen* Elizabeth *upon an Exhibition to the Court of* Exchequer, *by Sir* Henry Nevil *Knight, of a Deed of Grant of the Office of Keeper of a Park, and of an annual Rent-charge for the Exerciſe of the ſame out of Land which afterwards came to the Hands of the Queen, which Grant was made to him and to his Father, who was attainted of Treaſon, for Term of their Lives, and upon a Petition to have the Arrears due thereupon paid to him. And the Record hereof was entered in the Remembrances of the Exchequer, among the Records of* Michaelmas *Term* 3 Eliz. *Roll on the Side of the Treaſurer's Remembrancer. And was as follows.*

BE it remembered, that *Henry Nevil* Knight came here before the Barons of this Exchequer the 20th Day of *October* in this Term in his own proper Perſon, and exhibited to the Court here a certain Writing of one *William* by divine Permiſſion late Archbiſhop of *Canterbury* of the Office of Keeper and Guardian of the Park of *Aldington* otherwiſe *Alington*, and of the Deer in the ſame Park, in the County of *Kent*, and alſo of an annual Rent of three Pounds and ten Pence Sterling for the Exerciſe of the Office aforeſaid yearly to be had, levied, and perceived of the Manor of *Aldington* otherwiſe *Alington*, made to the aforeſaid *Henry Nevil* Knight, by the Name of *Henry Nevil* Eſquire, and to one *Edward Nevil* Knight afterwards and late attainted of High Treaſon now deceaſed, for Term of their Lives, and of the longeſt Liver of them, bearing Date the 15th Day of *November* in the 22d Year of the Reign of the late King *Henry* 8. ſealed with the Seal of the ſaid late Archbiſhop, and afterwards and before the Attainder of the ſaid *Edward Nevil* Knight, *viz.* the firſt Day of *December* in the ſame 22d Year of the ſaid late King *Henry* 8. *William* then Archbiſhop then ſurviving and being in full Life and Archbiſhop of *Canterbury*, by *Thomas* then Prior of *Chriſt-Church* in *Canterbury*, and by the Chapter of the ſame Place by their Writing ſealed under their common Seal at the City of *Canterbury* in their Chapter-houſe there ratified, approved, and confirmed. And the ſame *Henry Nevil* prays that that Writing may be here inrolled of Record. Which ſaid Writing the Barons here received, and commanded it to be read, and to be inrolled in the Order of the Words contained in the ſame Writing. And the Tenor of the ſame Writing follows in theſe Words. *Mich. Term 3 Eliz. Exhibition.*

" To all the faithful in *Chriſt* " to whom this preſent Writing ſhall come, *William* by divine Permiſſion Archbiſhop of *Canter-* " *bury*, Primate of all *England*, Legate of the Apoſtolic See, Greeting, in the Author of Safety. " Know ye that we for the good and acceptable Service which our beloved *Edward Nevil* Knight " and *Henry Nevil* Eſquire, one of the Sons of the aforeſaid *Edward Nevil* Knight, have mani- " feſtly done and ſhall daily hereafter do to us, and for other urgent Cauſes us to theſe Preſents " ſpecially moving, of our meer Motion have given and granted, and by theſe Preſents do give " and grant, to the ſame *Edward Nevil* Knight, and to *Henry Nevil* Eſquire. And to the longer " Liver of them, the Office of Keeper and Guardian of our Park of *Aldington* otherwiſe *Aling-* " *ton* and of our Deer there in the County of *Kent*, with their Appurtenances. To have, hold, " and exerciſe the Office aforeſaid by themſelves or by their ſufficient Deputy or Deputies, for " whom they will anſwer, for Term of Life of the aforeſaid *Edward Nevil* Knight and of *Henry* " *Nevil* Eſquire and of the longer Liver of them. And by theſe Preſents we make, conſtitute, " and ordain the ſaid *Edward* and *Henry Nevil* to be the Keepers of our Park and Deer aforeſaid. " Alſo we have granted and by theſe Preſents do grant for us and our Succeſſors to the ſame *Ed-* " *ward Nevil* Knight and *Henry Nevil* Eſquire, for the Exerciſe of the Office aforeſaid, and for " their other Coſts, Charges, and Expences to be had in the Premiſſes, one annual Rent of three " Pounds and ten Pence Sterling yearly. To have, levy, and perceive the aforeſaid annual Rent " of three Pounds and ten Pence every Year during the whole Lives of the ſaid *Edward Nevil* " Knight and *Henry Nevil*, and of the longer Liver of them, of our Manor of *Aldington* other- " wiſe *Alington* aforeſaid, at the Feaſts of *Eaſter* and of *St. Michael* the Archangel, by equal Por- " tions to the ſame *Edward* and *Henry Nevil* and to the longer Liver of them annually to be paid. " And if and as often as it ſhall happen that the ſaid Rent of three Pounds and ten Pence or any " Part thereof be in Arrear in Part or in all unpaid after any Term at which it ought to be paid, " that then and ſo often it ſhall be lawful for the aforeſaid *Edward* and *Henry*, and for the longer " Liver of them, and their Aſſigns, into the ſaid Manor to enter and diſtrain, and the Diſtreſs ſo " taken there to drive away from thence, and to impound and keep in their Poſſeſſion, until they " ſhall be fully ſatisfied for the annual Rent aforeſaid and the Arrears thereof. In Witneſs " whereof to theſe Preſents we have put our Seal, given the 15th Day of *November* in the 22d " Year of the Reign of King *Henry* 8. and in the 27th Year of our Tranſlation. And we *Tho-* " *mas* by divine Permiſſion Prior of *Chriſt's-Church* in *Canterbury*, and the Chapter of the ſame " Place do all and ſingular the Things above written and contained, as much as to us belongs, " by Authority of our Chapter, ratify, approve, and for Term of Life of the above written *Ed-* " *ward Nevil* Knight and *Henry Nevil* and the longer Liver of them, by the Tenor of theſe Pre- " ſents, confirm. In witneſs whereof our Common Seal is put to theſe Preſents: Given in our " Chapter-houſe the firſt Day of *December* in the 22d Year of the Reign of King *Henry* 8."

Which ſaid Writing being read, the aforeſaid *Henry Nevil* Knight ſays that he is unpaid of the aforeſaid annual Rent of three Pounds and ten Pence yearly, from the Feaſt of *St. Michael* the Archangel in the *fifth* and *ſixth* Years of the Reign of the late King and Queen, *viz.* for three whole Years ending at the Feaſt of *St. Michael* the Archangel in the *third* Year of the Reign of the Lady *Elizabeth* now Queen, and that the aforeſaid Manor of *Aldington* otherwiſe *Alington* with the Appurtenances has remained and been in the Hands and Poſſeſſion of the ſaid Lady the Queen now ever ſince the aforeſaid Feaſt of *St. Michael* the Archangel in the ſaid *fifth* and *ſixth*

Years and now is and remains in the Hands of the ſaid Lady the Queen now. And he prays that the Writing aforeſaid by the Court here may be allowed, and that nine Pounds, two Shillings, and Sixpence of the Arrears of the aforeſaid annual Rent of three Pounds and ten Pence yearly for the aforeſaid three Years ending at the ſaid Feaſt of *St. Michael* the Archangel in the aforeſaid third Year of the ſaid Lady the Queen now may be paid to the ſame *Henry Nevil* Knight, and alſo that the aforeſaid annual Rent of three Pounds and ten Pence yearly from the aforeſaid Feaſt of *St. Michael* the Archangel in the aforeſaid third Year of the ſaid Lady the Queen now may be annually paid to the ſame *Henry Nevil* Knight during the Life of the ſame *Henry*.

Anſwer. And *Gilbert Gerard* Eſquire Attorney-General of the ſaid Lady the Queen now, who proſecutes for her, being preſent here in Court, and being aſked by the Barons touching the Premiſſes, for the aforeſaid Lady the Queen now ſays, that the aforeſaid Writing in Form aforeſaid recited ought not to be allowed, and that neither the aforeſaid nine Pounds, two Shillings, and Sixpence of the aforeſaid Arrears of the aforeſaid annual Rent of three Pounds and ten Pence yearly for the ſaid three Years ending at the Feaſt of *St. Michael* the Archangel in the aforeſaid third Year of the ſaid Lady the Queen now, nor the aforeſaid annual Rent of three Pounds and ten Pence yearly from the aforeſaid Feaſt of *St. Michael* the Archangel in the aforeſaid third Year of the

Demurrer. ſaid Lady the Queen now, to the aforeſaid *Henry Nevil* Knight in Form aforeſaid ought to be paid. Becauſe he ſays that the aforeſaid Writing above recited, and the Matter in the ſame Writing contained and ſpecified, and the aforeſaid Matter by the ſaid *Henry Nevil* Knight in Form aforeſaid alledged, is inſufficient in Law to charge the aforeſaid Lady the Queen now either with the Payment of the aforeſaid nine Pounds, two Shillings, and Sixpence for the aforeſaid three Years ending at the Feaſt of *St. Michael* the Archangel in the aforeſaid third Year, or with the aforeſaid Payment of the aforeſaid annual Rent of three Pounds and ten Pence yearly from the aforeſaid Feaſt of *St. Michael* the Archangel in the ſame third Year, to the aforeſaid *Henry Nevil* Knight in Form aforeſaid. And therefore he prays Judgment for the ſaid Lady the Queen.

Joinder. And the aforeſaid *Henry Nevil* Knight ſays that the aforeſaid Writing above recited, and the Matter in the ſame Writing contained, and the aforeſaid Matter by him in Form aforeſaid alledged, is ſufficient in Law to charge the aforeſaid Lady the Queen now with the Payment of the aforeſaid nine Pounds, two Shillings, and Sixpence of the aforeſaid annual Rent of three Pounds and ten Pence for the aforeſaid three Years ending at the aforeſaid Feaſt of *St. Michael* the Archangel in the aforeſaid third Year of the ſaid Lady the Queen now, and alſo with the Payment of the aforeſaid annual Rent of three Pounds and ten Pence yearly from the aforeſaid Feaſt of *St. Michael* the Archangel in the ſame third Year, to the ſame *Henry Nevil* in Form aforeſaid. And he prays as he above prayed. And becauſe the Court will have Deliberation in the Premiſſes before further, *&c.* Day is given to the aforeſaid *Henry Nevil* in the State wherein it now is from the Day of the *Holy Trinity* in fifteen Days, to hear and do what, *&c.*

The CASE. A. grants the Office of Keeper of a Park, and a Rent of 3 l. 10 d. for the Exerciſe of it out of a Manor, to two for their Lives, one of them is attainted of Treaſon, the Manor comes into the King's Hands, the King ſhall not have the Office nor the Rent. S. C. cited 2 Rol. R. 340. Godb. 323, 418, 419. 5 Mod. 60. Crompt. J. C. 161. b. 3 Bac. Abr. 743. Vin. Abr. tit. Officers M. pl. 3.

THE Effect of the Record is as follows, *viz.* Sir *Henry Nevil* Knight comes before the Barons of the Exchequer, and exhibits to the Court a Deed bearing Date the 15th Day of *November* in the 22d Year of the Reign of King *Henry* 8. made to him and to one Sir *Edward Nevil* Knight afterwards and lately attainted of High-Treaſon, by *William* late Archbiſhop of *Canterbury*, of the Office of Keeper and Guardian of the Park of *Aldington* otherwiſe *Alington*, and of the Deer in the ſame Park, in the County of *Kent*, and of an annual Rent of 3 *l.* 10 *d.* for the Exerciſe of the ſame Office yearly to be had, levied, and perceived of the Manor of *Aldington* otherwiſe *Alington*, for the Term of their two Lives. Which Deed afterwards, and before the Attainder of the ſaid Sir *Edward*, *viz.* the 1ſt Day of *December* in the 22d Year of the Reign of the ſaid late King *Henry* 8. and in the Life of the ſaid Archbiſhop, was confirmed by the Prior of *Chriſt-Church* in *Canterbury*, and by the Chapter of the ſame Place by their Deed. Which Deed the ſaid Sir *Henry Nevil* prays to be inrolled of Record; and the Barons received the Deed, and read it, and commanded it to be inrolled. And the Deed was according to the Effect aforeſaid, *viz.* that the ſaid Archbiſhop, for the good and acceptable Service which the ſaid Sir *Edward* and *Henry* one of the Sons of the ſaid Sir *Edward* had diverſly done, and thereafter ſhould daily do, and for other Cauſes, granted to the ſaid Sir *Edward* and *Henry*, and to the longer Liver of them, the ſaid Office of Keeper and Guardian of the ſaid Park and of the Deer there: To have, hold, and exerciſe the ſaid Office by themſelves or by their ſufficient Deputy or Deputies, for whom they will anſwer, for Term of their two Lives, and for the Life of the Survivor of them. And further he granted to them for the Exerciſe of the ſaid Office, and for their Charges and Expences in the Premiſſes, an annual Rent of 3 *l.* 10 *d.* for the Lives of them and of the Survivor of them, payable out of the Manor at *Michaelmas* and at the *Annunciation* of our Lady by equal Portions, with Clauſe of Diſtreſs in the ſaid Manor, if the Rent ſhould be in Arrear. Under which was contained the Confirmation of the Prior and Chapter aforeſaid. Which Deed being read, the ſaid Sir *Henry* ſays that the ſaid Rent was in Arrear and not paid to him for three Years ending at the Feaſt of *St. Michael* the Archangel in the third Year of the Reign of the preſent Queen: And that the ſaid Manor was all thoſe three Years, and yet is, in the Hands of the ſame preſent Queen.. And he prays that the Court will allow the Deed, and that 9 *l.* 2 *s.* 6 *d.* of the Arrears of the ſaid Rent for the ſaid three Years may be paid to him the ſaid Sir *Henry Nevil*; and that the ſaid annual Rent of 3 *l.* 10 *d.* from the ſaid Feaſt of *St. Michael* the Archangel in the 3d Year of the Reign of the ſaid preſent Queen may be paid to him the ſaid Sir *Henry* during his whole Life. And hereupon the Queen's Attorney ſays, that the ſaid Deed ought not to be allowed, and that neither the Arrears now demanded, nor the Rent for the Time to come, ought to be paid to Sir *Henry Nevil*, becauſe he ſays that the Deed and the Matters aforeſaid are not ſufficient to charge the Queen with the ſame. And upon this he has demurred in Law, and Sir *Henry* alſo.

And

And the Doubt conceived was upon the Attainder of Sir *Edward Nevil* one of the joint Grantees, *viz.* if the King ſhould have the Office by the Attainder, or if it is an Office of Skill or Confidence, ſo that for this Cauſe it ſhall not be forfeited, or if it ſhall not be forfeited as being an Office of Service, becauſe the King cannot be a Servant, nor do Service to any other, or admitting that the Law will give the Office to the King after the Attainder and during the Life of Sir *Edward Nevil*, in what Situation it ſhall ſtand after his Death.

Another point was, if the Rent-charge being a Rent *de novo* commencing lately by Grant, and iſſuing out of Land, ſhall be in the ſame Degree with the Office; or if it ſhall be forfeited to the King, although it be ſo that the Office ſhall not be forfeited by Law.

And the Matter was often moved on Behalf of Sir *Henry Nevil* by an Apprentice of the Middle-Temple, to whom it ſeemed that neither the Office nor the Rent-charge was forfeited to the King in the Lifetime of Sir *Edward*, nor after his Death. For, he ſaid, it is firſt of all to be obſerved that to the Office of Keeper of a Park two Things are requiſite. The firſt is, Skill, for a Keeper of wild Beaſts ought to be acquainted with their Nature, according to which he is to order and manage them, for if he does not know their Nature, he cannot tell what Sort of Food is fitteſt for them, and ſo of Shade, and Covert for their Repoſe, and other Neceſſaries; nor can he tell how to order them after they have been chaſed, or how to bring them back again into the Park after they have eſcaped or have been chaſed out, and many other Things there are belonging to them of which he would be ignorant. And alſo he ought to be ſkilled in the Method of taking them, or killing them by Nets, Arrows, Dogs, and other Engines. So that a Keeper of them ought to have Skill. [a] And beſides this it is neceſſary for him to be diligent; and it is to be preſumed that the Grantor of ſuch an Office had great Confidence in the Diligence of the Grantee, or elſe he would not have committed to his Care the wild Beaſts, which are Things that require ſtrict Diligence and Attendance. [b] For which two Cauſes the Law will not permit the Grantee of ſuch an Office to grant it over to another, for if it ſhould, then perhaps the Grantee would grant it over to ſuch a one as had neither Skill nor Diligence, which would be very prejudicial to the Grantor, and therefore the Law will not permit him ſo to do. [c] And ſo is it in other like Caſes, as of a Stewardſhip, Bailiwick of Huſbandry, and the like, which require Skill and Diligence, and which are granted in reſpect of the Fitneſs and Capacity which the Grantor has conceived in the Perſon of the Grantee to excerciſe ſuch an Office. And therefore in the Act of 5. *Edw.* 6. *cap.* 16. which inflicts a Penalty upon thoſe who buy or ſell the Offices of Confidence or Attendance there recited, which could not lawfully be bought or ſold, there is a *Proviſo* that the Act ſhall not extend to any Office of Parkerſhip, or Keeper of any Park, which *Proviſo* implies that the Makers of the Act took it, that if the *Proviſo* had not been made, the buying and ſelling of ſuch Office might have been taken within the Equity of the Act, although it was not within the Words, becauſe it concerns Skill and Confidence, as the Offices there recited do, and as ſuch that it might not be granted over any more than the other Offices there mentioned, and ſo might be taken by Equity within the Puniſhment of the Act, if the *Proviſo* had not been made. From whence it may be collected that the Makers of the Act intended that ſuch Office of Parkerſhip could not be granted over, and although it could not, yet they would not have the Penalty to extend to it. [d] But if a Man grants the Office of Keeper of a Park to another and to his Heirs in Fee-ſimple, there the Grantee may grant this over, and that this was the Intent of the Grantor may be ſo collected from the Generality of the Perſons comprehended in the Eſtate in Fee-ſimple; for as well Heirs-Females as Males, and Heirs-Ideots and Infants who ought to have Guardians are compriſed in it, and Strangers alſo. [e] For a Man ſhall be Tenant by the Curteſy, where ſuch an Office deſcends to his Wife by whom he has Iſſue, [f] and a Woman ſhall be endowed in ſuch Caſe. So that by the Generality of the Perſons comprehended in ſuch general Grant this and all other Offices of Confidence may be granted over by the reaſonable Conſtruction of the Law, and they may be [g] forfeited alſo. [h] And herein he allowed the Caſe in 1. *H.* 7. where the Office of Foreſter of ſuch a Place with all the Lands belonging to it was granted to one in Tail, Remainder to the King in Fee, and there the Grant and the Remainder were held good, for the Grantor was an Officer in Fee. [i] But where it is granted only for Life, there no other is comprehended in the Grant but the Grantee himſelf, ſo that he cannot make a Deputy, unleſs he has Words extending to it, much leſs can he grant it over. And if the Grantees in our Caſe cannot grant this Office over, by the ſame Reaſon they cannot [k] forfeit it by Attainder, if both of them had been attainted, [l] for if it ſhould be forfeited by Attainder, and the King ſhould have it, and he ſhould grant it to another, ſuch other might be deſtitute of Skill and Diligence, whereby the Grantor would receive as much Prejudice as he would do by a Grant made by the Grantee to another who was not fit for the Purpoſe. And therefore ſuch Offices as are granted to any one in Reſpect of Skill or Diligence are appropriated only to the Perſon of the Grantee. And herein the Law is to be commended, in that it will not veſt in another a Title to ſuch an Office without the Aſſent of the Grantor. For which Reaſon if the Grantee be attainted of Felony or Treaſon, or detained in Priſon, or gone beyond Sea, or become *non ſanæ memoriæ*, or be under any other like Incapacity, ſo that he cannot exerciſe the Office, no other ſhall do it without the Aſſent of the Grantor. [m] But for the Nonfeaſance thereof it ſhall be forfeited to the Grantor by a Condition annexed to it by Law. [n] So that the Grantor, or he to whom the Service ought to be done, ſhall appoint another, and no Stranger ſhall come in without his Aſſent, and therefore the Act of the Grantee, whether it be by his Grant or by his means, ſhall not put a ſtrange Officer upon the Grantor. * And if the Grantee for Life of ſuch an Office be attainted of Felony or Treaſon, and afterwards has a Charter of Pardon, he ſhall be an Officer as he was before, if ſo be that in the mean time he has not by his Abſence or Default of Attendance prejudiced the Grantor, nor thereby forfeited the Office to the Grantor.

[a] Ley 76.

[b] H. 21. Ed. 4. 20. pl. 28. Fitz. Grant 28. Bro. 108. Deputy 15. Perk § 99. Hardr. 352. 1 Finch 13. 2 Finch 17. Crompt J. C. 161. a. b.

[c] 1 Finch 13. 2 Finch 17.

[d] Davis 35. b. 9 Co. 48. b. Dy. 1. b. in Marg. 2 Finch 73. Crompt J. C. 161. a. b.

[e] Vin. Abr. tit. Curteſy E. pl. 3.

[f] Co. Litt. 32. a. Hardr. 352. Kitch 321. 2 Bac. Abr. 124.

[g] 2 Hawk. P. C. 454. § 27.

[h] T. 1. H. 7. 28. b. Crompt J. C. 161. b.

[i] Davis 35. b. Crompt J. C. 161. b.

[k] S. P. 1 Finch 12. 2 Finch 14. See 2 Hawk P. C. 454. § 27, *dubitatur*.

[l] Crompt J. C. 161. b.

[m] S. P. 1 Finch 86 124. 2 Finch 106, 163. Litt. § 378. But ſee Co. Litt. 233. a. Poſt 380, that there muſt be ſome ſpecial Damage occaſioned by the Non-uſer. See Vin. Abr. tit. Officers O. per totum.

[n] Crompt J. C. 161. b.

* Godb. 418.

[b] Godb. 323. 2 Rol. R. 340.

And although the Law be otherwiſe in the King's Caſe, *viz.* [b] that where the King grants ſuch an Office to one for Life, and the Grantee is attainted of Felony or Treaſon, the Office ſhall be forfeited to the King for ever, ſo that if he afterwards obtains a Pardon he ſhall never have the Office again, yet this is not like to the principal Caſe here. For there the King's Park is diſcharged of the Officer, and if it was any other Officer, as a Steward of his Manor, or Conſtable of his Caſtle, there the Manor and the Caſtle are diſcharged of ſuch Office, and of all Authority of the Perſon attainted. So that the Matter there tends to the Exoneration and Diſcharge of the Office, and not to the Removal of the Office from one to another, as our Caſe is. And ſo there is no Tranſmutation of the Poſſeſſion of the Office, but an Exoneration of the Poſſeſſion of it; and the King ſhall not be deprived of the Choice of his Officer, for he may make a new one. And therefore whether it be forfeited by a Condition in Law for the Non-attendance when the Grantee was attainted, or whether it be forfeited by the Attainder, and not by a Condition in Law, it all tends to one End as to the King, for he may make a new Officer, and no Stranger ſhall come in without the King's Conſent. But in the principal Caſe, if both the Grantees had been attainted, there if the Office ſhould be forfeited to the King by Law, there would be a new Officer to the Archbiſhop without his Aſſent, who would be a Stranger to the Archbiſhop, and perhaps ignorant of the Art of managing the Beaſts, and not diligent, by which the Archbiſhop would be prejudiced; ſo that it is not like the King's Caſe.

But perhaps it may be objected, that if the Officer for Life ſhould forfeit to the King, and the King ſhould grant it over, the firſt Grantor would not receive any Prejudice from it, for if the Grantee of the King be miſconuſant of the Art of ordering the Beaſts, or does not give due Attendance, for ſuch Cauſes the firſt Grantor may enter, by Reaſon of a Condition in Law annexed to the Office, ſo that the Prejudice which may poſſibly come to the firſt Grantor in ſuch Caſe is no Obſtacle to the Forfeiture of the Office by Attainder; Sir, as to this it is to be obſerved that the Grantor ſhall not avoid the Officer by Reaſon of the Condition in Law, until he has firſt re-

[c] Co. Litt. 233. a.

ceived [c] Prejudice by the Non-uſer, or Miſ-uſer, or other Default of the Officer, and the Law will not force [d] him firſt to ſuſtain a Prejudice, and then to avoid the Officer, for the Avoidance of the Officer is no Amends for the Offence done. But when the Party himſelf who has the Park appoints the Officer, and no other for him, it is preſumed that he will appoint ſuch a one as will not offend, for he puts Confidence in his Art and Induſtry. And ſo he is not as likely to have Prejudice in the one Caſe as in the other; and if he ſhould have Prejudice, there is greater Reaſon why he ſhould ſuſtain it when he himſelf has choſen ſuch an Officer, than that the Grantee ſhould have full Scope and Liberty given him by Law to make ſuch Forfeiture, by Reaſon whereof a Stranger may become Officer, and prejudice the Grantor. Wherefore that Objection has no Weight in it.

[d] See Hob. 12, *Holder v. Taylor.*

Then here if both the Grantees ſhould not forfeit the Office to the King if both of them had been attainted, much leſs ſhall Sir *Edward Nevil*, who is but one of the Grantees, forfeit it to the King by his Attainder, for before the Attainder both of them might occupy the Office, and each of them by himſelf, and when one of them was attainted, the other might occupy it in his Lifetime, as well as he might before his Attainder, for his Act ſhall not prejudice his Companion, inaſmuch as the Eſtate which they had was a freehold, and Sir *Henry* was an Officer to the Archbiſhop before the Attainder, and ſo he was after it, and when the Father was put to Death, Sir *Henry* remained an Officer always as he was before, and ſo the Archbiſhop is ſerved with his Officer.

[e] Crompt J. C. 161. b.

[e] And tho' the Law be ſo that after the Attainder of Sir *Edward Nevil* and during his Life the Office ſhould be forfeited, ſo that during that Time the King might make an Officer, yet when Sir *Edward* was dead, Sir *Henry* ſhall have the Office again. For it is to be conſidered that the Office is a Thing entire, ſo that one Moiety of it cannot be forfeited to the King, and the other Moiety continue in Sir *Henry*, as it may be of Land or ſuch like which may be ſevered, but the King ſhall have the whole for the Time or nothing at all. So that there ſhall not be any Tenancy in common made here, for the Office is but one Thing to be exerciſed by the Body of a Man. And therefore if the King ſhall have any Thing by the Attainder, it ſhall be the whole for the Time, but when the Perſon attainted dies, then Sir *Henry* has the ſole Intereſt in the whole as Survivor, inaſmuch as the Jointure was not nor could be ſevered by any Act in the Life of his Father. And then although in Things entire the King ſhall be preferred for the Time, yet when the Perſon attainted dies, his Eſtate is ended, and conſequently the Eſtate of the King alſo, and the entire Office ſhall

[f] Crompt J. C. 161. b.

be in Sir *Henry* as Survivor, and he may occupy it without any [f] Petition or other Suit to the King, becauſe the Eſtate which the King had is abſolutely ended, and the Thing does not continue in the King, for which Reaſon none ſhall be driven to make Petition to the King for a Thing which he has not, and which does not continue in him nor in any other by his Grant or Conveyance: Wherefore the Office being entire ſhall after the Death of Sir *Edward* be in Sir *Henry*. [g] But if the King grants any Office, whatſoever it be, which requires Confidence or Diligence, to two Men, and one of them is attainted, there perhaps the whole Office is forfeited to the King. For of an entire Thing the King ſhall have the whole or nothing, for he ſhall not make one to occupy in common with the other. And inaſmuch as it comes to the Point that in the Life of the Perſon attainted the whole or nothing ſhall be forfeited, the King perhaps ſhall be ſaid to have the whole rather than nothing, and if after the Attainder he ſhall have the whole during the Life of him that is attainted, nothing ſhall ſurvive to the other when the Perſon attainted is put to Death, for nothing ſhall accrue to the other as Survivor by the Death, where nothing remained in Jointure at the Time of the Death of the Perſon attainted, for the King was entitled to the whole in his Lifetime. And the Cauſe why the King ſhall have the whole there is, becauſe the Office is a Thing executory

[g] 3 Bac. Abr. 743.

againſt

againſt the King, and there the King ſhall not have the Office, but it ſhall ceaſe; ſo that the Forfeiture tends to the Exoneration of the King. And if the Survivor ſhould have Remedy, he muſt have it there by Petition, inaſmuch as the Thing is not in *eſſe*, but is ceaſed, and none has it for the Time, and in order to revive it, Petition muſt be made, which perhaps will not lie inaſmuch as the thing is entire. But in the other Caſe the Office does not ceaſe, but is always in *eſſe* and executory againſt the Archbiſhop, and there never was any Determination, but rather a Removal of it, and foraſmuch as it is always in *eſſe*, the Survivor may occupy it without Petition to revive it. So that there is a great Diverſity between the two Caſes. And therefore if it ſhould be admitted (as it cannot well) that the King ſhall have the Office after the Attainder, and during the Life of the Perſon attainted, yet after his Death Sir *Henry* ſhall be Officer to the Archbiſhop. And when the Manor and the Park afterwards came to the Crown, he remained Officer as before, and is now Officer to the Queen, to whoſe Hands the Manor and Park are come.

And as to the other Reaſon, *viz.* that the Office ſhall not come to the King by the Attainder, becauſe it is an Office of Service, and the King cannot do Service to the Archbiſhop who is a Subject, he did not rely much upon it, for the firſt Reaſon made an End of the whole. *And as to this, note well the ſaid Caſe in* 1. H. 7. *which is verbatim as follows, viz.* " *a man granted the* " *Office of Service and Foreſterſhip of ſuch a Place, with all the Lands belonging to it, to one in Tail,* " *the Remainder to the King in Fee:* Brian, *this Office cannot paſs to the King, for he cannot be an* " *Officer to any Man.* Et tota Curia contra eum, [a] *for although he cannot have the Office ſo as to ex-* " *erciſe it, yet he may have it ſo as to give it to another: And the Office may be forfeited.*" *Theſe are the very Words of the Caſe. From whence it ſeems that the ſaid other Reaſon would not have been ſufficient. And note the Words that* (the Office may be forfeited), *whereby note that it was an Office of Inheritance.* *Nota bene* by the Reporter.

[a] S. P. Co. Litt. 3. b. 8 Co. 55. b. 2 Bulſt. 4. 1 Show. 279. 1 Finch 124. 2 Finch 163.

And as to the other Point, he ſaid that although the Rent-charge is a Rent *de novo* commencing by Grant, yet it is ſo appropriated to the Office that it ſhall not be ſevered from it as long as the Office continues; ſo that if the Office ſhall not be forfeited, the Rent which is annexed to it ſhall not be forfeited. [b] For if one grants Eſtovers to another to be burnt in ſuch a Houſe, they are appurtenant to the Houſe. And ſo if Common is granted in ſuch a Place to one for his Cattle levant and couchant in his Farm of *Dale*, the Common is made appurtenant to it; ſo that he who afterwards has the Houſe, by whatever Title he comes to it, ſhall have the Eſtovers, and he who afterwards comes to the Farm ſhall have the Common. [c] And the Eſtovers cannot be ſevered from the Houſe, [d] nor the Common from the Farm, but by Extinguiſhment; for if he who has the Houſe will grant the Eſtovers to another, reſerving the Houſe to himſelf, or the Houſe to another, reſerving the Eſtovers to himſelf, the Eſtovers ſhall not be ſevered from the Houſe thereby, becauſe they ſhall be ſpent in the ſame Houſe. And ſo here the Fee is granted for the Exerciſe of the Office, and in Reſpect of the Fee the Office was received, ſo that the Fee and the Office are Concomitants, and the one purſues the other. [e] And, he ſaid, he had ſeen a Report that an Annuity was granted to one learned in the Law, *pro conſilio ſuo impendendo*, and the Grantee was attainted of Treaſon, and afterwards had his Pardon, and the Queſtion was, whether or no the King ſhould have the Annuity, and it was held clearly that the King ſhould not have it, becauſe it was granted *pro conſilio impendendo* by the Perſon of him that was attainted, and his Counſel was the Cauſe of the Grant, and therefore it was annexed to the Perſon who was to give the Counſel, and no other ſhould have it. [f] And upon this Point he cited the Caſe in 5 *Ed.* 4. *fo. ult.* where the Office of King of Heralds was granted to *Garter*, *cum feodis et proficuis ab antiquo*, *&c.* and alſo 10 *l.* was granted to him *pro officio illo*, *&c.* and there was a general Reſumption *anno ſecundo*, and a *Proviſo* for Annuities and Penſions; and there the Queſtion was, if this 10 *l.* be a Fee of the Office, or an Annuity, and *Choke* ſaid, " if the Office be gone, the Annuity is ex-" pired," *quod fuit affirmatum per omnes Juſticiarios: Brian* there ſaid, " that the Office was at " Will, and the Annuity for Term of Life:" And *Danby* ſaid, " that yet it is determinable by " the Determination of the Office." And touching this Caſe of *Garter* he alſo cited that which is in 7 *Edw.* 4. 22. [g] where it appears that the King had granted to *Garter* to be King of Heralds, with the Fees and Wages belonging thereto, *&c.* and further granted to him *ex uberiore gratia ſua*, 10 *l.* for Term of his Life *ratione et cauſa officii*, *&c.* And it was moved whether or no this ſhould be an Annuity, and the Juſtices held that it was in Nature of an Annuity determinable upon the Office, *&c.* And there *Choke* ſaid, that he was once of Counſel with one *J.* who had an Annuity granted to him by the King in theſe Words, to *J. clerico coronæ ad terminum vitæ ſuæ*, and afterwards he was diſcharged from the Office, *&c.* And the Opinion of the Juſtices then was, that the Annuity was determined, for it ſhall be intended that the Annuity was granted by Reaſon of the Office, *viz. quamdiu fuerit clericus coronæ.* From which Caſes it appears that although the Fee be newly granted, yet it is annexed to the Office, notwithſtanding he has one Eſtate in the Office, and another in the Annuity; and it is determinable with the Office, and by the ſame Reaſon it continues with the Office as an Incident inſeparable. And ſo in the principal Caſe this Rent-charge which was granted for the Exerciſe of the Office ſhall continue with the Office, if the Office is not forfeited. And therefore the Arrears ought to be paid to Sir *Henry Nevil.*

[b] F.N.B. 181. n. Co. Litt. 121. b. 5 Co. 17. b. 24 b. 1 Rol. Abr. 60. pl. 3. 1 Finch 12. 2 Finch 15.

[c] M. 5. H. 7. 7. pl. 15. Fitz. Grants 38. Bro. 130. Chimin 14. Common 28. Perk. § 104.

[d] T. 26. H. 8. 4. pl. 15. Bro. Common 1.

[e] S. P. Dy. 1. b. 2. a, *Oliver v. Empſon.* 2 Leon. 122. Hardr. 352. 2 Hawk. P. C. 454. Crompt J. C. 161. b. 1 Finch 12. 2 Finch 15. Vin. Abr. tit. Forfeiture M. pl. 10. Poſt 382.

[f] H. 5. Ed. 4. 8. b. Bro. Eſtates 44. et 64. Officer 50.

[g] M. 7. Ed. 4. 22. b. Fitz. Annuity 12. Bro. Eſtates 44, in fine. Dy. 259. pl. 18. Ante 161 (a).

And the Court was long in Doubt upon this Matter, for it hung by Continuances eight or nine Years. And *Saunders* Chief Baron conſulted ſeveral Times with the Judges and divers others upon the Point. And a Report was ſhewn to him, which he afterwards ſhewed to me in Writing, and which was reported by *Audley* Lord Chancellor, teſtifying that where the King had granted to

William Brereton and to *John* his Brother for Term of their two Lives, and for the Life of the Survivor of them, the Sheriffwick of *Cheſhire*, and *William* was attainted of High-treaſon, it was the Opinion of all the Juſtices that the whole Office was forfeited, becauſe the Patent and the Office was entire and could not be ſevered: And when *William* was attainted of Treaſon, the King was entitled to the whole preſently, and notwithſtanding he was afterwards executed, yet the Intereſt of the other was not revived, for it was a Forfeiture before; and yet the King cannot be an Officer, but he ſhall have it as he may, *viz.* to extinguiſh the Patent, and to make a new Officer. And all this was written in the Report which he ſhewed to me. And he alſo ſhewed to me in Writing another Caſe reported, *viz.* * that a Fee *pro conſilio impenſo et impoſterum impendendo* was granted to *Empſon*, who was one of the Counſellors of *Henry* 7. and to his Son, both of whom were Counſellors, for their Lives, and afterwards the Father was attainted and put to Death, and the Son brought a Writ of Annuity for the Annuity and the Arrears, and had Judgment to recover, becauſe this Annuity could not be forfeited.

* This ſeems to be the Caſe of *Oliver v. Empſon* Dy. 1. b, 2. a. Vin. Abr. tit. Condition B. b. fo. 186. Ante 381 (c).

Eaſter Term 12 Eliz.

And after theſe Things had been conſidered, and the Opinion of the Juſtices of the Common-Bench had been firſt had, as the Record teſtifies, the Barons in the *Quinzime* of this preſent *Eaſter* Term in the 12th Year of the Reign of Queen *Elizabeth* gave Judgment that the ſaid Deed in Form aforeſaid made, recited, and inrolled, ſhould be allowed, and that the ſaid Arrears ſhould be paid to the ſaid Sir *Henry* at the Receipt of the Exchequer by the Hands of the Treaſurer and Chamberlains, out of the Treaſury of the ſaid Queen being in their Hands. Which Judgment was as follows.

The reſt of the Record, as to the Judgment.

At which Day *Henry Nevil* came here in his own proper Perſon, *&c.* And prays his Judgment as before. And the Premiſſes being ſeen by the Barons, and mature Deliberation being thereupon had amongſt them, and as well the Serjeants of the ſaid Lady the Queen now at Law as the Attorney and Sollicitor General of the ſame Lady the Queen being called hereupon, and the Opinions of the Juſtices of the ſaid Lady the Queen of the Common Bench being had in the Premiſſes,

Judgment.

it is conſidered by the aforeſaid Barons that the aforeſaid Writing in Form aforeſaid made and above recited and inrolled be allowed. And that the aforeſaid 9 *l.* 2 *s.* 6 *d.* of the aforeſaid Arrears of the aforeſaid annual Rent of 3 *l.* 10 *d.* yearly for the aforeſaid three Years ending at the aforeſaid Feaſt of St. *Michael* the Archangel in the aforeſaid 3d Year of the ſaid Lady the Queen now be paid to the aforeſaid *Henry Nevil* Knight at the Receipt of this Exchequer by the Hands of the Treaſurer and Chamberlains of the ſame Receipt, out of the Treaſury of the aforeſaid Lady the Queen in the Hands of the ſame Treaſurer and Chamberlains being. And alſo that the aforeſaid annual Rent of 3 *l.* 10 *d.* yearly from the Feaſt of St. *Michael* the Archangel in the aforeſaid 3d Year of the ſaid Lady the Queen now be annually paid to the aforeſaid *Henry Nevil* Knight during the Life of the ſaid *Henry Nevil* Knight at the aforeſaid Receipt of this Exchequer by the Hands of the Treaſurer and Chamberlains of the ſame Receipt for the Time being, out of the Treaſury of the Queen in the Hands of the ſame Treaſurer and Chamberlains from Time to Time being, at the aforeſaid Feaſts of *Eaſter* and of *St. Michael* the Archangel by equal Portions, during the Life of the ſame *Henry Nevil* Knight. Saving always the Right of the Queen if, *&c.*

And hereupon the ſaid Sir *Henry Nevil* prayed a Writ to the Treaſurer and Chamberlains of the Exchequer to execute the Judgment, which was granted, as appears by the reſt of the Record following containing the Prayer and the awarding of the Writ.

The reſt of the Record, containing the Prayer and awarding of the Writ to the Treaſurer and Chamberlains of the Exchequer to execute the Judgment.

And hereupon the aforeſaid *Henry Nevil* Knight prays a Writ of the ſaid Lady the Queen to the Treaſurer and Chamberlains of the Receipt aforeſaid who now are and for the Time ſhall be in the Premiſſes to be directed: Which is granted to him. And the Tenor of the ſame Writ follows in theſe Words. *Elizabeth* by the Grace of God of *England*, *France*, and *Ireland* Queen, Defender of the Faith; *&c.* To the Treaſurer and Chamberlains of the Receipt of our Exchequer at *Weſtminſter* who now are and for the Time ſhall be, Greeting. Whereas in the Remembrances of our Exchequer aforeſaid of the 3d Year of our Reign, *viz.* amongſt the Records of the Term of *St. Michael* Roll on the Side of the Remembrancer of our Treaſurer there it appears, That one *William* late Archbiſhop of *Canterbury*, by his certain Writing bearing Date the 15th Day of *November* in the 22d Year of the Reign of the late King *Henry* the *Eighth* our late dearly beloved Father, gave and granted to our beloved Servant *Henry Nevil* Knight, and to one *Edward Nevil* Knight afterwards of High-treaſon attainted now deceaſed, by the Names of *Edward Nevil* Knight and *Henry Nevil* Eſquire one of the Sons of the ſaid *Edward Nevil* Knight, and to the longer Liver of them, the Office of Keeper and Guardian of the Park of *Aldington* otherwiſe *Alington* and of the Deer there in our County of *Kent*: To have, hold, and exerciſe the Office aforeſaid by themſelves or by their ſufficient Deputy or Deputies for Term of Life of the ſame *Edward* and *Henry* and of the longer Liver of them. And that the ſaid late Archbiſhop by his Writing aforeſaid further granted to the aforeſaid *Edward* and *Henry* for the Exerciſe of the Office aforeſaid an annual Rent of 3 *l.* 10 *d.* yearly. To have, levy, and perceive the ſame annual Rent of 3 *l.* 10 *d.* every Year during the whole Lives of the ſaid *Edward* and *Henry* and of the longer Liver of them, of the Manor of *Aldington* otherwiſe *Alington* in our County aforeſaid, at the Feaſts of *Eaſter* and *St. Michael* the Archangel by equal Portions to the ſame *Edward* and *Henry* and to the longer Liver of them yearly to be paid, with Clauſe of Diſtreſs for Non-payment of the ſame annual Rent at the Terms

aforeſaid in the aforeſaid Writing contained. And that the aforeſaid Writing in Form aforeſaid made, and every Thing in the ſame Writing contained afterwards, and before the Attainder of the ſaid *Edward Nevil* Knight, *viz.* the 1ſt Day of *December* in the aforeſaid 22d Year of the Reign of our ſaid late Father, the aforeſaid *William* late Archbiſhop then ſurviving and being in full Life and Archbiſhop of *Canterbury*, was ratified, approved, and confirmed by *Thomas* then Prior of *Chriſt's Church* in *Canterbury*, and by the Chapter of the ſame Place, by their Writing ſealed under their common Seal dated at the City of *Canterbury* in their Chapter-houſe there the aforeſaid 1ſt Day of *December* in the ſaid 22d Year of the Reign of our ſaid late Father. And that the aforeſaid *Henry Nevil* Knight in the aforeſaid Term of *St. Michael* in the aforeſaid 3d Year of our Reign exhibited the aforeſaid Writing to our Barons of our Exchequer aforeſaid, and by his Petition then exhibited before our ſame Barons for the Allowance of the ſame Writing, and for the Payment of the annual Rent aforeſaid, amongſt other Things alledged that the Manor aforeſaid is in our Hands and Poſſeſſion, and prayed that 9 *l.* 2 *s.* 6 *d.* of the Arrears of the ſaid annual Rent for three Years ending at the Feaſt of *St. Michael* the Archangel in the aforeſaid 3d Year might be paid to him the ſame *Henry:* And that the ſaid annual Rent of 3 *l.* 10 *d.* yearly from the ſame Feaſt of *St. Michael* the Archangel in the aforeſaid 3d Year might be yearly paid to him the ſame *Henry Nevil* Knight during his Life. And that mature Deliberation being had amongſt our Barons of our Exchequer aforeſaid upon the Petition aforeſaid for the Allowance and Payment aforeſaid to the aforeſaid *Henry Nevil* in Form aforeſaid to be made, it was conſidered by the ſame Barons that the aforeſaid Writing ſhould be allowed, and that the aforeſaid 9 *l.* 2 *s.* 6 *d.* of the aforeſaid Arrears of the ſaid annual Rent due at the ſaid Feaſt of *St. Michael* in the aforeſaid 3d Year of our Reign, ſhould be paid to the aforeſaid *Henry Nevil* at our Receipt of our Exchequer aforeſaid by the Hands of the Treaſurer and Chamberlains of the ſame Receipt, out of our Treaſury in the Hands of the ſame Treaſurer and Chamberlains being: And alſo that the aforeſaid annual Rent of 3 *l.* 10 *d.* yearly from the aforeſaid Feaſt of *St. Michael* the Archangel in the aforeſaid 3d Year of our Reign ſhould be yearly paid to the ſame *Henry Nevil* Knight at the Receipt aforeſaid by the Hands of the Treaſurer and Chamberlains there for the Time being, out of our Treaſury in the Hands of the ſame Treaſurer and Chamberlains from Time to Time being, at the Feaſts aforeſaid by equal Portions, during the Life of the aforeſaid *Henry Nevil* Knight; as in the Remembrances aforeſaid of the Term and Year aforeſaid amongſt other Things more fully is contained. We command you that you pay to the aforeſaid *Henry Nevil* or to his Aſſigns the aforeſaid 9 *l.* 2 *s.* 6 *d.* for the aforeſaid Arrears for the aforeſaid three Years ending at the Feaſt of *St. Michael* the Archangel in the aforeſaid 3d Year of our Reign in Form aforeſaid, and alſo all that which is in Arrear to him of the aforeſaid annual Rent of 3 *l.* 10 *d.* yearly from the aforeſaid Feaſt of *St. Michael* the Archangel in the aforeſaid 3d Year: And that further you yearly pay the aforeſaid annual Rent of 3 *l.* 10 *d.* by the Year to the ſame *Henry Nevil* during his Life at the Feaſts aforeſaid by equal Portions, taking from the ſame *Henry* Letters of Acquittance or other Diſcharge which ſhall be ſufficient for us in this Behalf. Witneſs *Edward Saunders* Knight at *Weſtminſter* the 6th Day of *May* in the 12th Year of our Reign. By the *Memorandum* Roll of the Term and Year aforeſaid, and by the Barons.

From this Record may be ſeen the Order and Form how one who has a Rent out of Land in the King's Hand ſhall make his Petition to the Court of Exchequer to come at it, without making Petition to the King's Perſon; and alſo how he ſhall have the Judgment executed, for it is not the Courſe to command by Parol that Payment be made, but a Writ in the Form aforeſaid ſhall be awarded by the Barons. And it is a Writ judicial ſealed with the Seal of the Exchequer, which is a ſufficient Warrant to the Treaſurer and Chamberlains of the Receipt to pay the Arrears due, and which ſhall be due afterwards. And note (Reader) that in this Caſe no Queſtion was made with Regard to there being no Office or Inquiſition found to intitle the King after the Attainder of the ſaid Sir Edward, *who was attainted and died before the Act of* 33. *H.* 8. *cap.* 20. *which gives the Things of Perſons attainted to the King without Office, for inaſmuch as Sir* Henry *ſhewed the Attainder of his Father in his Petition, the King ſhall take Advantage thereof by Way of Bar, and ſhall rebut him of the Things which ſuch Attainder takes from the Plaintiff* ***without*** *having an Inquiſition.*

Nota bene by the Reporter.

A Re-

A Report of Part of the Arguments made, and of the Judgment given, in the King's-Bench *in* Trinity *Term in the* thirteenth *Year of the Reign of Queen* Elizabeth *upon a Demurrer to a Plea in Bar pleaded to a Bill of* Treſpaſs *there exhibited by* Robert *Earl of* Leiceſter *Plaintiff againſt Sir* Chriſtopher Heydon *Knight Defendant. And the Record was as follows.*

Eaſter Term 13 *Eliz. Rot.* 179.

Declaration.

Same Precedent Raſt. Entr. 643. a.

BE it remembered, that otherwiſe, *viz.* in the Term of *St. Hillary* laſt paſt before the Lady the Queen at *Weſtminſter* came *Robert* Earl of *Leiceſter* by *John Fue* his Attorney, and brought here into the Court of the ſaid Lady the Queen then there his certain Bill againſt *Chriſtopher Heydon* Knight in the Cuſtody of the Marſhal, *&c.* of a Plea of Treſpaſs. And there are Pledges of proſecuting, *viz. John Doe* and *Richard Roe*, which ſaid Bill follows in theſe Words, ſs. *Norf.* ſs. *Robert* Earl of *Leiceſter* complains of *Chriſtopher Heydon* Knight in the Cuſtody of the Marſhal of the Marſhalſea of the Lady the Queen before the Queen herſelf, for this that he the 20th Day of *January* in the 1ſt and 2d Years of the Reign of Lord *Philip* and Lady *Mary* late King and Queen of *England*, with Force and Arms, *&c.* the Cloſe of him the ſaid Earl at *Sidiſterne* in the County aforeſaid broke and entered, and the Graſs of him the ſaid Earl then and there growing to the Value of 40 *l.* with certain cattle, *viz.* Horſes, Oxen, Cows, Hogs, and Sheep eat up, trod down, and conſumed; the Treſpaſs aforeſaid, as to the eating up, treading down, and conſuming the Graſs aforeſaid, from the aforeſaid 20th Day of *January* in the aboveſaid 1ſt and 2d Years of the Reign of the ſaid late King and Queen *Philip* and *Mary*, until the Day of obtaining this Bill, *viz.* the 24th Day of *January* in the 13th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, at divers Days and Times continuing: And other Wrongs to him did, againſt the Peace as well of the ſaid Lord *Philip* and Lady *Mary* late King and Queen of *England* as of the ſaid Lady the Queen now: And to the Damage of him the ſaid Earl 200 *l.* And therefore he produces the Suit, *&c.*

Bar by Feoffment upon Attainder.

And now at this Day, *viz. Wedneſday* next after eighteen Days of *Eaſter* in this ſame Term, until which Day the aforeſaid *Chriſtopher* had Leave to imparl to the Bill aforeſaid, and then to anſwer, before the Lady the Queen at *Weſtminſter* comes as well the aforeſaid *Robert* Earl of *Leiceſter* by his Attorney aforeſaid as the aforeſaid *Chriſtopher* by *Richard Beſt* his Attorney. And the ſame *Chriſtopher* defends the Force and Injury when, *&c.* And as to the coming with Force and Arms, or whatever is againſt the Peace of the ſaid late King and Queen *Philip* and *Mary*, and againſt the Peace of the ſaid Lady the Queen now, he ſays that he is not guilty thereof. And of this he puts himſelf upon the Country, and the aforeſaid *Robert* Earl of *Leiceſter* likewiſe, *&c.* And as to the Reſidue of the Treſpaſs aforeſaid above ſuppoſed to be done, the ſame *Chriſtopher* ſays that the aforeſaid Earl his Action aforeſaid thereof againſt him ought not to have or maintain, becauſe he ſays that the Cloſe aforeſaid, and alſo the Place in which the Treſpaſs aforeſaid is above ſuppoſed to be done, contains, and at the aforeſaid Time when, *&c.* contained in itſelf 40 Acres of Land, 30 Acres of Meadow, and 60 Acres of Paſture with the Appurtenances in *Sidiſterne* aforeſaid, of which ſaid 40 Acres of Land, 30 Acres of Meadow, and 60 Acres of Paſture with the Appurtenances the aforeſaid Earl, before the aforeſaid Time of the Treſpaſs aforeſaid above ſuppoſed to be done, was ſeized in his Demeſn as of Fee. And the ſaid Earl being ſo thereof ſeized, long before the aforeſaid Time when, *&c. viz.* the 19th Day of *January* in the 1ſt Year of the Reign of Lady *Mary* late Queen of England, at *Norwich* in the Shire-houſe there in the County of *Norfolk*, by a certain Inquiſition taken the ſame Day and Year before *Richard Southwel* Knight, the aforeſaid *Chriſtopher Heydon* Knight, *Edmund Wyndham* Knight, *Thomas Gawdy* Serjeant at Law, *Robert Holdich*, *Henry Hobart*, *Oſbert Moundford*, and *Nicholas Rokewood* Eſquires then Juſtices of the ſaid late Queen *Mary* to enquire * by the Oath of good and lawful Men of the aforeſaid County of *Norfolk*, and by other Ways, Methods, and Means by which it might be better known, of whatſoever Treaſons, Miſpriſions of Treaſons, Inſurrections, Rebellions, unlawful Aſſemblies, and unlawful Conventicles, ſpeaking of Words, Confederacies, falſe Allegiances, Contempts, Falſities, Negligences, Concealments, Oppreſſions, Riots, Routs, Murders, Felonies, and other Treſpaſſes and Offences whatſoever, and alſo the Acceſſaries of the ſame, within the aforeſaid County of *Norfolk*, by whomſoever and howſoever had, done, perpetrated or committed, and by whom, or to whom, when, how, and in what Manner, and of other Articles and Circumſtances the Premiſſes and every of them, or any of them in any wiſe concerning, more fully the Truth, and the ſame Treaſons and other the Premiſſes to hear and determine according to the Law and Cuſtom of the Realm of the ſaid late Queen *Mary*, by Virtue of a Commiſſion of the ſame late Queen *Mary* to the ſame *Richard Southwel*, *Chriſtopher Heydon*, *Edmund Wyndham*, *Thomas Gawdy*, *Robert Holdich*, *Henry Hobart*, *Oſbert Moundford*, *and Nicholas Rokewood*, and to *Thomas* Duke of *Norfolk*, *Henry* Earl of *Suſſex*, *Henry Bedingfield* Knight, *John Shelton* Knight, *William Paſton* Knight, *William Woodhouſe* Knight, and *John Corbet*, fourteen, thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, and four of them, (of whom the ſame late Queen then willed that there ſhould be ſome two of them the aforeſaid *Richard Southwel*, *Henry Bedingfield*, *Thomas Gawdy*, *Robert Holdich*, *John Corbet* and *Oſbert Moundford*,) to them thereof directed, the Preſences of the aforeſaid Duke, Earl, *Henry Bedingfield*, *John Shelton*, *William Paſton*, *William Woodhouſe*, and *John Corbet* being then not expected, the aforeſaid *Robert* Earl of *Leiceſter*, by the Name of *Robert Dudley* late of *London* Knight, Son of *John* late Duke of *Northum-*

If not guilty Plea of deft. Sir Christ. Heydon as to the force.

Special plea as to residue.

The plt's Lord of Leicester seized in fee of the Lands in which no trespass is supposed by the declarat. to have been committed.

So seized the 19. Jan. 1. that was indicted at

* See 2 Hawk. P. C. 20. § 22.

Norwich before for treason before 8 persons justices of the Queen to inquire by oath of lawful men of Norfolk of the treasons &c. under a commission of the Queen to them 4 7. viz. 14, 13, 12, 11, 10, 9, 7, 6, 5, & 4 of them.

Quorum.

Northumberland late of *London*, by the Verdict of 12 free and lawful Men of the ſaid County of *Norfolk* was indicted, for this, that whereas the aforeſaid *John* Duke of *Northumberland* late of *London*, together with *William* Marquis of *Northampton*, *John* Earl of *Warwick*, *John Gate* Knight, and *Thomas Palmer* Knight, and other falſe Traitors and Rebels againſt the moſt illuſtrious Princeſs the ſaid *Mary* Queen of *England*, not having God before their Eyes, but ſeduced by the Inſtigation of the Devil, and not regarding their due Allegiances, contriving the ſaid Lady Queen *Mary* of her regal State, Title, Government, and Power of this her Realm of *England* to depoſe and deprive, and alſo the ſaid Queen *Mary* to kill and wholly to deſtroy, with Force and Arms, viz. with Swords, Spears, Lances, Bows and Arrows, Coats of Mail, Shields, Iron-Helmets, and Fire-Arms, commonly called Canons, Demy-Canons, Culverines and Demy-Culverines, and alſo with armed Horſes, and other Arms offenſive and defenſive, the 16th and 17th Days of *July* in the 1ſt Year of the Reign of the ſaid Lady *Mary* by the Grace of God of *England*, *France*, and *Ireland* Queen, Defender of the Faith, and in Earth Supreme Head of the Church of *England* and *Ireland*, at the Town of *Cambridge* in the County of *Cambridge* unlawfully, falſly, and traiterouſly, with a great Number of Rebels and Enemies of the ſaid Lady the Queen, to the Number of 3000 Perſons, aſſembled and gathered themſelves together, and then and there in plain and open Field, with Force and Arms aforeſaid, falſly and traiterouſly in a warlike Manner put themſelves in Battle-Array, and a cruel War againſt the ſaid Lady Queen *Mary* then and there, with Standards erect and diſplayed, falſly and traiterouſly prepared and ordained, and ſo a moſt fierce War againſt the ſame Lady Queen *Mary* in her Realm of *England* then and there falſly and traiterouſly made, publiſhed, and levied, againſt their due Allegiances; the aforeſaid *Robert Dudley* late of *London* Knight, Son of the aforeſaid Duke of *Northumberland*, as a falſe Traitor and Rebel againſt the ſaid Lady Queen *Mary* his Sovereign, his due Allegiance not regarding, but contriving the Deprivation and Deſtruction of the ſaid Lady Queen *Mary*, the 18th Day of *July* in the 1ſt Year aboveſaid, with Force and Arms with a great Multitude of People, the Town of the ſaid Lady the Queen of *King's-Lynn* in the County of *Norfolk* entered, and the Poſſeſſion thereof againſt the ſaid Lady the Queen, and contrary to her Will, took, poſſeſſed, and in a warlike Manner kept, and one *Jane Dudley* Wife of *Guilford Dudley* Eſquire Brother of the aforeſaid *Robert Dudley*, the aforeſaid 18th Day of *July* in the 1ſt Year aboveſaid, falſly and traiterouſly Queen of this Realm of *England*, at *King's-Lynn* aforeſaid within written, to be publiſhed and proclaimed made, and *George Rively* then being Mayor of the ſame Town of *Lynn*, and other Subjects of the ſaid Lady the Queen, to the Number of 300 Perſons at leaſt then inhabiting and dwelling within the ſame Town of *Lynn*, their cordial Love and due Allegiance from the ſaid Queen to withdraw and quit, and with the aforeſaid Duke of *Northumberland* and the other Traitors aforeſaid a moſt cruel War againſt the ſaid Lady their Sovereign to continue, levy, and prepare, the ſame *Robert Dudley* the ſaid 18th Day of *July* in the 1ſt Year aboveſaid at *King's-Lynn* aforeſaid falſly and traiterouſly laboured, went about, abetted, and compaſſed, to the final Deſtruction of the ſaid Queen, againſt their due * Allegiances, and and alſo againſt her Crown and Dignity, and againſt the Form of the Statute in ſuch Caſe made and provided. † And afterwards, viz. the 19th Day of *January* in the 1ſt Year of the Reign of the ſaid Lady *Mary* late Queen of *England*, the ſame Lady *Mary* by her Letters-patent bearing Date at *Weſtminſter* the ſame Day and Year, commanded her beloved and faithful *Thomas White* Knight then Mayor of her City of *London*, and her moſt dear Couſin and Counſellor *Edward* then Earl of *Derby*, and her moſt dear Couſin and Counſellor *Edward* then Earl of *Devon*, and her moſt dear Couſin and Counſellor *Henry* then Earl of *Suſſex*, and alſo her beloved and faithful Counſellors *Robert Rocheſter* Knight, Comptroller of her Houſhold, *Edward Haſtings* Knight, *Richard Morgan* Knight her Chief Juſtice of the Bench, *Edward Walgrave* Knight, and her beloved and faithful *David Brook* Knight Chief Baron of her Exchequer, *Humphry Brown* Knight, *Roger Cholmley* Knight, *Edward North* Knight, *Thomas Pope* Knight, and *Robert Brook* Eſquire Recorder of the ſaid City of *London*, reciting by the ſame, that whereas the aforeſaid *Robert Dudley* late of *London* Knight, before *Thomas* Duke of *Norfolk* Earl Marſhal of *England*, *Henry* Earl of *Suſſex*, *Richard Southwel* Knight, *Henry Bedingfield* Knight, *John Shelton* Knight, *William Paſton* Knight, *Chriſtopher Heydon* Knight, *Edmund Wyndham* Knight, *William Woodhouſe* Knight, *Thomas Gawdy* Serjeant at Law, *Robert Holdich*, *Henry Hobart*, *Oſbert Moundford*, *John Corbet*, and *Nicholas Rokewood* Eſquires, her Juſtices lately aſſigned in the County of *Norfolk* amongſt other Things of all Treaſons whatſoever, Miſpriſions of Treaſons, Inſurrections, Rebellions, unlawful Aſſemblies, and unlawful Conventicles, ſpeaking of Words, Confederacies, falſe Allegiances, Contempts, Falſities, Negligences, Concealments, Oppreſſions, Riots, Routs, Murders, Felonies, and other Treſpaſſes and Offences whatſoever, and alſo the Acceſſaries of the ſame, within the aforeſaid County of *Norfolk*, by whomſoever and howſoever had, done, perpetrated, or committed, and by whom, or to whom, how and in what Manner, and of other Articles and Circumſtances the Premiſſes and every of them, or any of them, in any wiſe concerning, more fully the Truth, of divers High Treaſons by him committed and perpetrated then ſtood indicted, the ſame Lady the Queen, conſidering that Juſtice is an excellent Virtue and moſt pleaſing, was deſirous to exerciſe it before all Things, and therefore being very confident of their Fidelity, Induſtry and Circumſpection, ſhe appointed them, thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, and

See 7 Co. 10. b. *Calvin's* Caſe Salk. 631.

† Note here a ſpecial Commiſſion iſſued to determine in foreign County an Indictment taken before Juſtices of *Oyer* and *Terminer* for an Offence committed in proper County. See 2 H. H. P. C. 21, 22, 27. 2 Hawk. P. C. 19 21. 3 Inſt. 27. 4 Inſt. 73.

Note that in this recital of this 2. commiſſion the Name of Duke & Earle of Leiceſter is ſtated to have ſtood indicted ſeverally before all of the 15 Commiſſioners in the firſt commiſſion; & that the authority in this 2. commiſſion is to try the ſaid indictment that is, the recital in the indictment whereas the indictment ſtated in the firſt pleaded commiſſion is one taken only before 10 of the 15 commiſſioners.

Quorum.

and four of them, (of whom ſhe willed that there ſhould be ſome two of them the aforeſaid Mayor, *Richard Morgan*, *David Brook*, *Humphry Brown*, *Roger Cholmley*, and *Robert Brook*,) for that Cauſe and Cauſes her Juſtices, giving and granting to them thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, or four of them (of whom ſhe willed that there ſhould be ſome two of them the aforeſaid Mayor, *Richard Morgan*, *David Brook*, *Humphry Brown*, *Roger Cholmley*, and *Robert Brook*) by the Tenor of the Premiſſes, full and ſufficient Authority and ſpecial Command the Indictment aforeſaid concerning the ſame *Robert Dudley*, with all Things touching it, from the aforeſaid Juſtices of the ſaid Lady Queen *Mary* before whom it was taken, and in whoſe Cuſtody it then remained, to receive, and the ſame to inſpect, and at certain Days which they ſhould appoint for that Purpoſe to meet at the *Guildhall* of the City of *London* aforeſaid, and the ſaid *Robert Dudley* before them to call, and him thereupon to hear and examine, and to compel him to anſwer, and at a due End to try, determine, and adjudge: And alſo ſo many and ſuch good and lawful Men of the County of *Norfolk*, by whom the Truth of the Matter in that Behalf might be the better known, at the Days and Place aforeſaid for the Cauſe and Cauſes aforeſaid before them to compel to appear, and the Truth thereof being found, to give Judgment thereon by them in that Behalf according to the Laws, Statutes, Cuſtoms, and Ordinances of her Realm of *England*, and againſt the aforeſaid *Robert Dudley* to proceed, give Sentence, and adjudge, and Execution thereof to command to be done, and all and ſingular other Things which in that Behalf ſhould appertain and be requiſite to do, exerciſe, and execute. And therefore the ſame Lady Queen *Mary* commanded them that they ſhould diligently attend about the Premiſſes, and them ſhould do and execute in Form aforeſaid. Alſo ſhe gave to all and ſingular her Officers, Miniſters, and Lieges, by the Tenor of the Premiſſes, firmly in Command that they ſhould be attendant, adviſing, aſſiſting, obedient, and aiding to them in the Execution of the Premiſſes in all Things as became them. Alſo ſhe commanded her ſame Juſtices, that the Indictment aforeſaid with all Things touching it for the Cauſe or Cauſes aforeſaid to them or ſome of them they ſhould deliver. Alſo the ſame Queen commanded the Conſtable of the Tower of *London* and his Lieutenant or Deputy there, that at certain Days and Places which they, thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, or four of them (of whom ſhe willed that there ſhould be ſome two of them the aforeſaid Mayor, *Richard Morgan*, *David Brook*, *Humphry Brown*, *Roger Cholmley*, and *Robert Brook*) ſhould make known to them, they ſhould cauſe the aforeſaid *Robert Dudley* to come before them, thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, or four of them, (of whom ſhe willed that there ſhould be ſome two of them the aforeſaid Mayor, *Richard Morgan*, *David Brook*, *Humphry Brown*, *Roger Cholmley*, and *Robert Brook*). Alſo the ſame Queen *Mary* commanded her Sheriff of the County of *Norfolk* aforeſaid, that at certain Days and Places which they, thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, or four of them (of whom ſhe willed that there ſhould be ſome two of them the aforeſaid Mayor, *Richard Morgan*, *David Brook*, *Humphry Brown*, *Roger Cholmley*, and *Robert Brook*) ſhould make known to him, he ſhould cauſe to come before them, thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, or four of them (of whom ſhe willed that there ſhould be ſome two of them the aforeſaid Mayor, *Richard Morgan*, *David Brook*, *Humphry Brown*, *Roger Cholmley*, and *Robert Brook*) ſo many and ſuch good and lawful Men of his Bailiwick, as well within Liberties as without, by whom the Truth of the Matter in the Premiſſes might be better known and enquired. And moreover the ſame Lady *Mary* late Queen of *England*, the ſaid 19th Day of *January* in the aboveſaid 1ſt Year of her Reign, by her certain Writ cloſe, the *Teſte* whereof was at *Weſtminſter* the ſame Day and Year, commanded her moſt dear Couſin and Counſellor *Thomas* then Duke of *Norfolk* Earl Marſhal of *England*, and her moſt dear Couſin and Counſellor *Henry* then Earl of *Suſſex*, and her beloved and faithful Counſellors *Richard Southwel* Knight, *Henry Bedingfield* Knight, *John Shelton* Knight, and alſo her beloved and faithful *Chriſtopher Heydon* Knight now Defendant, *Edmund Wyndham* Knight, *William Paſton* Knight, *William Woodhouſe* Knight, and her beloved *Thomas Gawdy* Serjeant at Law, *Robert Holdich*, *Henry Hobart*, *Oſbert Moundford*, *John Corbet*, and *Nicholas Rokewood* Eſquires, and every of them, then her Juſtices lately aſſigned of all Treaſons whatſoever, Miſpriſions of Treaſons, Inſurrections, Rebellions, unlawful Aſſemblies, and unlawful Conventicles, ſpeaking of Words, Confederacies, falſe Allegiances, Contempts, Falſities, Negligences, Concealments, Oppreſſions, Riots, Routs, Murders, Felonies, and other Treſpaſſes and Offences whatſoever, and the Acceſſaries of the ſame, in the County of *Norfolk*, by whomſoever and howſoever had, done, committed, and perpetrated, that all and every Indictments, Records, and Proceſſes of whatſoever Treaſons, Miſpriſions of Treaſons, or other the Premiſſes aforeſaid, whereof the aforeſaid *Robert Dudley* late of *London* Knight (by whatſoever Name he ſhould be reputed) was indicted before them in the ſaid County of *Norfolk*, as it is ſaid, to her beloved and faithful *Thomas White* Knight Mayor of her City of *London*, and to her moſt dear Couſin and Counſellor *Edward* Earl of *Derby*, and to her moſt dear Couſin *Edward* Earl of *Devon*, and to others her Juſtices aſſigned to hear and determine at the *Guildhall* of her City of *London* aforeſaid divers Treaſons and other the Premiſſes aforeſaid touching or concerning the aforeſaid *Robert Dudley*, they ſhould deliver without Delay, together with the Writ aforeſaid, that they and their Companions aforeſaid having inſpected the Indictment, Records, and Proceſſes aforeſaid might further cauſe to be done therein as of Right, and according to the Law and Cuſtom of her

Realm of *England* ſhould be done. And moreover the ſame Lady Queen *Mary* afterwards, viz. the ſame Day and Year, commanded her very beloved and faithful Counſellor *John Gage* Knight of the moſt noble Order of the Garter, her Lord Chamberlain, and her Conſtable of her Tower of *London*, or his Lieutenant or Deputy there, that he ſhould cauſe to come ſafely and ſecurely *Robert Dudley* late of *London* Knight indicted of High Treaſon by him done and perpetrated, and being in his Cuſtody, before her beloved and faithful *Thomas White* Knight Mayor of her City of *London* aforeſaid, and her moſt dear Couſin and Counſellor *Edward* Earl of *Derby*, and her moſt dear Couſin *Edward* Earl of *Devon*, and others her Juſtices aſſigned to hear and determine, at certain Days and Places which her ſame Juſtices ſhould make known to him, to anſwer upon the Premiſſes. By Virtue of which ſaid Letters-patent of Lady *Mary* aforeſaid to the aforeſaid *Thomas White* Mayor of the City of *London* and his Companions the Juſtices aforeſaid directed, the ſame Juſtices, viz. the 20th Day of *January* in the 1ſt Year aboveſaid, commanded the aforeſaid *Richard Southwel* Knight and his Companions the Juſtices aforeſaid in the ſaid County of *Norfolk*, that they or one of them ſhould ſend before the aforeſaid *Thomas White* Mayor of the City of *London* and his Companions the Juſtices aforeſaid, under the Seals of them the ſaid *Richard Southwel* Knight and his Companions, or of one of them, at the *Guildhall* of the City of *London*, viz. the 22d Day of *January* then next following, all and ſingular Indictments, Records, and Proceſſes of High Treaſons before them lately taken, whereof the aforeſaid *Robert Dudley* then ſtood indicted, with all Things touching them, as fully and entirely as they were taken before them and then remained in their Hands, by whatſoever Name the aforeſaid *Robert* was called in the ſame, that they might cauſe further to be done therein what of Right and according to the Law and Cuſtom of her Realm of *England* they ſhould ſee meet to be done. And alſo the aforeſaid *Thomas White* Mayor of the City of *London* and his Companions the Juſtices aforeſaid, the Day and Year aboveſaid, commanded the Conſtable of the Tower of *London*, or his Lieutenant or Deputy there, that he ſhould have the Body of the aforeſaid *Robert Dudley*, being detained in the Priſon of the Lady the Queen under his Cuſtody, together with the Cauſe of his Detainment, by whatſoever Name the aforeſaid *Robert* ſhould be called in the ſame, before the aforeſaid Juſtices at the *Guildhall* of the City of *London*, viz. the 22d Day of *January* at eight of the Clock in the Forenoon of the ſame Day, to ſubmit and receive ſuch Things as the Court of the Lady the Queen then and there ſhould happen to ordain. At which Day and Place before the aforeſaid *Thomas White* Mayor of the City of *London*, and his Companions the Juſtices aforeſaid, at their Seſſions held at the *Guildhall* of the City of *London* aforeſaid, the aforeſaid 22d Day of *January* in the 1ſt Year of the Reign of the ſaid Lady Queen *Mary*, *Richard Southwel* Knight and *Chriſtopher Heydon* Knight, two of the Juſtices aforeſaid in the ſaid County of *Norfolk*, by virtue of the Writ of the ſaid Lady the Queen, and of the Precept aforeſaid, to them and others directed, the Inquiſition above ſpecified touching the aforeſaid *Robert Dudley* Knight, as fully and entirely as it was taken before them and their Companions the Juſtices aforeſaid, before the aforeſaid *Thomas White* Mayor of the City of *London* and others his Companions the Juſtices aforeſaid, with their own proper Hands delivered, to be determined as the Writ and Precept aforeſaid therein demanded and required. And afterwards, viz. the ſaid 22d Day of *January* in the 1ſt Year aboveſaid, before the aforeſaid Juſtices at the *Guildhall* of the City of *London* aforeſaid came the aforeſaid *Robert Dudley* under the Cuſtody of the aforeſaid *John Gage* Knight then Conſtable of the Tower of *London*, into whoſe Cuſtody for the Cauſes aforeſaid and for other certain Cauſes by the Command of the ſaid Lady the Queen he was committed, and by the aforeſaid Conſtable by virtue of the Writ of the ſaid late Queen to him thereupon directed, and of the Precept aforeſaid, to the Bar there brought in his proper Perſon, * and immediately of the Treaſons aforeſaid in the Inquiſition aforeſaid ſpecified on him above charged being aſked how he would thereof acquit himſelf, he ſaid that he could not deny but that he of the Treaſons aforeſaid was guilty, and the ſaid Treaſons expreſly confeſſed, and put himſelf upon the Mercy of the ſaid late Queen. Whereupon inſtantly the Serjeants of the ſame late Queen at Law, and the Attorney of the ſame Queen, for that the aforeſaid *Robert Dudley* expreſly confeſſed the Treaſons aforeſaid on him above charged, according to the due Form of Law prayed againſt the ſame *Robert Dudley* Judgment and Execution thereupon for the ſame late Queen to be had. And thereupon all and ſingular the Premiſſes being ſeen, and by the Court then there underſtood, † it was conſidered that the aforeſaid *Robert Dudley* ſhould be carried by the aforeſaid Conſtable unto the ſaid Tower of *London*, and from thence thro' the Middle of the City of *London* to the Gallows of *Tyburn* be drawn, and there be hanged up, and cut down alive to the Ground, and that his Entrails ſhould be taken out of his Belly, and be burnt, ‡ he living, and that his Head ſhould be cut off, and his Body be divided into four Parts, and that his Head and thoſe Quarters ſhould be put where the ſaid late Queen would appoint them. § And afterwards, viz. by a certain Act of Parliament at *Weſtminſter* in the County of *Middleſex* the 12th Day of *November* in the 1ſt and 2d Years of the Reign of Lord *Philip* and Lady *Mary* late King and Queen of *England* held, it was enacted, amongſt other Things, by the ſame late King and Queen, with the Aſſent and Conſent of the Lords Spiritual and Temporal, and of the Commons in the ſame Parliament aſſembled, and by the Authority of the ſame, that whereas *Henry* Duke of *Suffolk* late of *Brodegate* in the County

* See *Geary's* Caſe Salk. 630. 1 Show. 131, 132. *Batſomb's* Caſe 3 Mod. 265. Attainder of Treaſon reverſed for Want of this Arraignment before Judgment. See 2 H. H. P. C. 217, 218. 2 Hawk. P. C. 398, 303.

† See the ſame Form of Judgment *verbatim* 1 Judgments 292. Poſt 551. For the ſeveral Parts of this Judgment in High Treaſon, See 3 Inſt. 210. 2 Hawk. P. C. 443, § 3. and the Books there cited.

‡ See *Walcot's* Caſe Salk. 632, Judgment in Treaſon reverſed for Want of theſe Words as to burning the Bowels. Lilly's Entr. 241.

Of

§ See Poſt 551.

of *Leiceſter*, *John Grey* late of *Brodegate* aforeſaid Knight, *Thomas Grey* late of *Brodegate* in the ſaid County of *Leiceſter* Knight, *Thomas Wyat* late of *Allington* in the County of *Kent* Knight, otherwiſe called *Thomas Wyat* late of *London* Knight, *Robert Dudley* late of *London* Knight, *James* a *Croftes* late of *London* aforeſaid Knight, *Peter Carew* late of *London* Knight, *Henry Iſley* late of *Sundrich* in the County of *Kent* Knight, *Robert Rudſton* late of *Boughton Monchefey* in the County of *Kent* Eſquire, *William Thomas* late of *London* Eſquire, *William Cromer* late of *Tuſtal* in the County of *Kent* Eſquire, *Cuthbert Vaughan* late of *Charte Magna* in the County of *Kent* Eſquire, *Anthony Knivet* late of *Chedingſton* in the County of *Kent* Eſquire, *William Knivet* late of *London* Gentleman, *Walter Mantel* the elder late of *Monks-Horton* in the County of *Kent* Eſquire, *Walter Mantel* the younger late of *Canterbury* in the County of *Kent* Gentleman, *Alexander Brett* late of *London* Gentleman, *William Pelham* late of *London* Gentleman, *Henry Fane* late of *Tunbridge* in the ſaid County of *Kent* Gentleman, *Thomas Culpeper* late of *Ailsforth* in the ſaid County of *Kent* Eſquire, *George Moor* late of *Pluckley* in the ſaid County of *Kent* Gentleman, *Thomas Brook* late of *Cobham* in the ſaid County of *Kent* Gentleman, *Leonard Diggs* late of *Barham* in the ſaid County of *Kent* Eſquire, *Thomas Fane* late of *Tunbridge* in the ſaid County of *Kent* Gentleman, *John Naylor* late of *Maidſtone* in the ſaid County of *Kent* Yeoman, *John Goldwel* late of *Charte Magna* in the ſaid County of *Kent* Gentleman, *Hugh Booth* late of *London* Yeoman, *John Wollock* late of *Loughborough* in the ſaid County of *Kent* Clerk, *John Bryſon* late of *Stawfield* in the ſaid County of *Kent* Huſbandman, *Richard Mund* late of *Smarden* in the ſaid County of *Kent* Glover, *Thomas Corte* late of the Iſle of *Grain* in the ſaid County of *Kent* Labourer, *John Vapells* late of *Selling* in the ſaid County of *Kent* Labourer, *John Read* late of *Cartham* in the ſaid County of *Kent* Tanner, *Thomas Gawdy* late of *Wichling* in the ſaid County of *Kent* Clerk, *Simon Fiddy* late of *Boxley* in the ſaid County of *Kent* Tanner, *John Fray* late of *Tunbridge* in the ſaid County of *Kent* Yeoman, *Richard Lewkner* late of *Ligh* in the ſaid County of *Kent* Gentleman, *Peter Mapleſden* late of *Maidſtone* in the ſaid County of *Kent* Yeoman, *William Tilden* late of *Maidſtone* in the ſaid County of *Kent* Taylor, *Jervaſe Mapleſden* late of *Maidſtone* in the ſaid County of *Kent* Butcher, *William Smith* late of *Maidſtone* in the ſaid County of *Kent* Yeoman, *John Warrop* late of *Ailsforth* in the ſaid County of *Kent* Gentleman, *Henry Springfield* late of *Boxley* in the ſaid County of *Kent* Fuller, *William Smothing* late of *Ailsforth* in the ſaid County of *Kent* Yeoman, *Alexander Fiſher* late of *Maidſtone* in the ſaid County of *Kent* Gentleman, *Robert Merchant* late of *Maidſtone* in the ſaid County of *Kent* Smith, otherwiſe called *Robert Marſhal* late of *Maidſtone* in the ſaid County of *Kent* Smith, *John Stanley* late of *Maidſtone* in the ſaid County of *Kent* Taylor, *William Packnam* late of *Leveham* in the ſaid County of *Kent* Huſbandman, *John Allen* late of *Leveham* in the ſaid County of *Kent* Huſbandman, *Roger Collier* late of *Leveham* aforeſaid Shereman, *Thomas Rayner* late of *Leveham* aforeſaid Huſbandman, *Walter Buckhurſt* late of *Leveham* aforeſaid Shereman, *Robert Skudder* late of the ſame Town Huſbandman, *John Hart* of the ſame Town Huſbandman, *Ralf Hurlock* of *Wichling* in the ſaid County of *Kent* Labourer, and *Robert Hilles* of *Leveham* aforeſaid in the ſaid County of *Kent* Clerk,, had committed, perpetrated, and done many deteſtable and abominable Treaſons, to the great Danger of the Deſtruction of the royal Perſon of the ſame late Queen, and to the extreme Loſs, Diſheriſon, and Deſolation of her Realm of *England*, if God of his infinite Goodneſs had not in ſeaſonable Time laid open and made known to the ſame Lady the Queen their treaſonable Intentions, of and for which Treaſons, being manifeſtly and openly proved, the ſaid *Henry* Duke of *Suffolk* and the other Perſons aforeſaid lawfully and juſtly, according to the Laws of her Realm of *England*, were convicted and attainted, as by the Records of their ſeveral Attainders more fully appeared: And the ſaid Duke of *Suffolk*, *Thomas Grey* Knight, *Thomas Wyat* Knight, *Henry Iſley* Knight, *Anthony Knivet*, *Walter Mantel* the elder, *William Knivet*, *Walter Mantel* the younger, *Alexander Brett*, *Thomas Iſley*, and *Henry Springfield*, for their abominable and deteſtable Offences juſtly and according to their Deſerts ſuffered Puniſhment of Death. Nevertheleſs the ſaid late King and Queen, out of the excellent and accuſtomed Goodneſs of the ſaid late Queen, and for the internal Love and cordial Affection which her Majeſty always bore towards the Public-wealth of her ſaid Realm of *England*, and for the Preſervation of her moſt excellent Highneſs and of that of her Poſterity, and alſo of the Peace, Unity, and Quiet of all her Subjects, at the moſt humble Requeſt and Petition of her ſaid Subjects, and of the Lords Spiritual and Temporal, and of the Commons in the ſame Parliament aſſembled, granted and aſſented that the ſaid Convictions and Attainders of all and ſingular the ſaid Offenders ſhould be approved and confirmed by the Authority of the ſame Parliament. And further by the ſame Act it was enacted that the ſaid Duke of *Suffolk*, and the other attainted Perſons above named, for their ſaid abominable and deteſtable Treaſons by them and every of them traiterouſly committed and perpetrated againſt their ſaid Sovereign, her Crown and Dignity, by the Authority of the ſame Parliament ſhould be convicted and attainted of High Treaſon. And that ſo many of the ſaid attainted Perſons aforeſaid above expreſſed as at the Time of making and publiſhing the Act or Statute ſhould be alive and not pardoned at the Will and Pleaſure of the ſaid Lady the Queen ſhould ſuffer Puniſhment of Death as in Caſes of High Treaſon. And that the ſaid *Henry* Duke of *Suffolk*, and all and ſingular the other attainted Perſons before named, as well thoſe who were alive at the Time of making the Act of Parliament aforeſaid, as thoſe of whom Execution had been before

before done for their ſaid Treaſons, ſhould loſe and forfeit to the ſame Lady the Queen, her Heirs and Succeſſors, all their Honours, Manors, Meſſuages, Lands, Tenements, Rents, Reverſions, Remainders, Poſſeſſions, Offices, Rights, Conditions, and all other their Hereditaments with their Appurtenances whatſoever, being of any Eſtate of Inheritance or Freehold in their Right, and alſo all their Goods and Chattles, of whatſoever Names, Natures, and Qualities they were, which they or any of them had the Day of their ſeveral Treaſons and Offences by them committed, perpetrated, and done, or at any Time afterwards. And that the ſaid Honours, Manors, Meſſuages, Lands, Tenements, Rents, Reverſions, Remainders, Poſſeſſions, Offices, Rights, Conditions, Hereditaments, Goods and Chattles by the Authority aforeſaid ſhould be reputed, veſt, and be adjudged to be in the actual and real Poſſeſſion of the ſame late Lady the Queen, without any Office or Inquiſition thereof afterwards to be taken and found; ſaving to all and all Manner of Perſon and Perſons, Bodies politic and corporate, and their Heirs, Aſſigns, and Succeſſors, and to every one of them, other than the ſaid Duke of *Suffolk*, and the other attainted Perſons aforeſaid, and their Heirs, and the Heirs of every one of them, and all and every other Perſon and Perſons claiming to their Uſes, or to the Uſe of any one of them, or to the Uſe of any of their ſaid Heirs, all ſuch Right, Title, Uſe, Poſſeſſion, Intereſt, Reverſion, Remainder, Entry, Conditions, Fees, Offices, Rents, Commodities, Commons, Titles of Entry for Conditions broken or to be broken given or accrued, or to be given or to accrue by Reaſon of any Condition broken before the ſaid Treaſons committed, and all other Commodities and Hereditaments whatſoever which they or any of them could, might, or ought to have if ſuch Act was not had or made. Provided always, and it is enacted by the Authority aforeſaid, that the aforeſaid Act or any Thing in the ſame contained by any Reaſon ſhould not extend to take away the Benefit or Advantage of any Pardon granted under the Great Seal of *England* to any of the Perſons before mentioned in the Act aforeſaid by the ſaid King and Queen, or by the Queen alone, but that they and every of them may have, enjoy, and receive Benefit and Advantage of all and every ſuch Pardon to any of them granted, as is aforeſaid, in as ample Manner as they or any of them might have done if the Act aforeſaid had never been made, any Thing in the ſame contained to the contrary in any wiſe notwithſtanding, as by the ſame Act of Parliament amongſt other Things more fully appears. And further the ſame *Chriſtopher* will aver that the aforeſaid *Robert Dudley* Knight in the aforeſaid Indictment, and in the aforeſaid Commiſſion made to the aforeſaid *Thomas White* Mayor of the City aforeſaid and to the other Commiſſioners at the Guildhall of the City of *London*, and in the Record aforeſaid, named, and the aforeſaid *Robert Dudley* in the Act of Parliament aforeſaid named, and the aforeſaid *Robert* Earl of *Leiceſter* in the Declaration aforeſaid named, are one and the ſame Perſon, and not others nor divers. By Force of which ſaid Conviction and Attainder, and of the Act of Parliament aforeſaid, the aforeſaid *Philip* and *Mary* late King and Queen of *England* were ſeized of the Tenements aforeſaid in which, *&c.* in their Demeſn as of Fee, in Right of their Crown of *England*. And being ſo ſeized thereof, by their Letters-Patent ſealed with their great Seal of *England*, bearing Date at *Weſtminſter* the 17th Day of *January* in the ſaid 1ſt and 2d Years of the Reign of the ſaid late King *Philip* and Queen *Mary*, (which the ſame *Chriſtopher Heydon* here produces in Court) gave and granted to the aforeſaid *Chriſtopher Heydon*, by the Name of *Chriſtopher Heydon* Knight, the Tenements aforeſaid in which, *&c.* amongſt other Things, to have to the ſame *Chriſtopher Heydon*, the Heirs and Aſſigns of the ſaid *Chriſtopher*, for ever. By virtue of which ſaid Letters-patent aforeſaid the aforeſaid *Chriſtopher* into the Tenements aforeſaid with the Appurtenances in which, *&c.* the aforeſaid Time when, *&c.* entered, and the Graſs aforeſaid as the proper Graſs of him the ſaid *Chriſtopher* with his Cattle aforeſaid trod down and conſumed, and the ſame treading down and Conſumption of the Graſs aforeſaid during all the Time aboveſaid in the Declaration aforeſaid above ſpecified continued, as it was lawful for him to do. And this he is ready to verify, wherefore he prays Judgment if the aforeſaid Earl of *Leiceſter* his Action aforeſaid thereof againſt him ought to have or maintain, *&c.*

Replication. And the aforeſaid *Robert* Earl of *Leiceſter* ſays that he by any Thing by the aforeſaid *Chriſtopher Heydon* above by Pleading alledged from having his Action aforeſaid againſt the ſaid *Chriſtopher* ought not to be precluded, becauſe he ſays that the Plea aforeſaid by the ſaid *Chriſtopher* in Manner and Form aforeſaid above pleaded, and the Matter in the ſame contained, are inſufficient in Law to preclude him the ſaid Earl from having his Action aforeſaid againſt the aforeſaid *Chriſtopher*, to which he the ſame Earl of *Leiceſter* has no Neceſſity, nor is by the Law of the Land in any wiſe bound to anſwer; wherefore for Want of a ſufficient Anſwer in this Behalf he the ſame Earl of *Leiceſter* prays Judgment and his Damages aforeſaid by the Occaſion aforeſaid to be adjudged to him, *&c.*

Demurrer.

Joinder in Demurrer. And the aforeſaid *Chriſtopher* ſays that the Plea aforeſaid by him the ſaid *Chriſtopher* in Manner and Form aforeſaid above pleaded, and the Matter in the ſame contained, are good and ſufficient in Law to preclude the aforeſaid Earl of *Leiceſter* from having his Action aforeſaid againſt him the ſaid *Chriſtopher*, which ſaid Plea and the Matter in the ſame contained he the ſame *Chriſtopher* is ready to verify and prove as, *&c.* And becauſe the aforeſaid Earl of *Leiceſter* to that Plea does not anſwer, nor the ſame hitherto in any wiſe deny, he the ſame *Chriſtopher* as at firſt prays Judgment, and that the aforeſaid Earl of *Leiceſter* may be precluded from having his Action aforeſaid

Continuance.

againſt him the ſaid *Chriſtopher*, &c. And becauſe the Court of the Lady the Queen here is not yet adviſed of giving their Judgment of and upon the Premiſſes, Day therefore is given to the Parties aforeſaid before the Lady the Queen at *Weſtminſter* until, &c. next after, &c. to hear their Judgment of and upon the Premiſſes, &c. becauſe the Court of the Lady the Queen here not yet, &c.

The CASE.

A Commiſſion of *Oyer* and *Terminer* is directed to divers Perſons, reciting that ſuch a Day Sir R. D. was indicted of High-treaſon before 15 Commiſſioners of *Oyer* & *Terminer* in ſuch a County, (whereas in Truth that Commiſſion was directed to ſo many, but the Indictment was taken before 8 of them only) and granting to them or any 4 of them Authority to receive the Indictment taken before 15 Commiſſioners, and to proceed thereupon as ſpecial Juſtices of *Oyer* and *Terminer*, &c. by force whereof they proceeded and gave Judgment of High-treaſon againſt Sir R. D. upon his own Confeſſion. In this Caſe the Attainder is void and *coram non judice*, for the latter Commiſſioners had no Power to proceed upon any Indictment but that only taken before 15. whereas there was none taken before 15 and therefore their Proceedings upon another Indictment, viz. upon that taken before 8 are void. And Sir R. D. may falſify this Attainder by Plea without being driven to his Writ of Error. S. C. cited 3 Inſt. 231. Crompt. J. C. 132. b. 2 Bulſt. 105.

The Caſe was recited in this Manner. *Robert* Earl of *Leiceſter* has here exhibited a Bill of Treſpaſs againſt Sir *Chriſtopher Heydon* Knight for breaking his Cloſe at *Sidiſterne* in the County of *Norfolk* the 20th Day of *January* in the 1ſt and 2d Years of the Reign of King *Philip* and Queen *Mary*, and deſtroying his Graſs, &c. and has alledged Continuance as to the treading down and deſtroying the Graſs until the Time of exhibiting the Bill, *viz.* the 24th Day of *January* in the 13th Year of the Reign of the preſent Queen. And the Defendant ſays that the Place in which the Treſpaſs is ſuppoſed contains 40 Acres of Land, 30 Acres of Meadow, and 60 Acres of Paſture in *Sidiſterne* aforeſaid, of which the ſaid Earl before the Treſpaſs ſuppoſed was ſeized in his Demeſn as of Fee. And he being ſo ſeized, long before the Time of the Treſpaſs, *viz.* the 9th Day of *January* in the 1ſt Year of the Reign of Queen *Mary*, at *Norwich* in the Shirehouſe there in the County of *Norfolk*, by an Inquiſition then taken before Sir *Richard Southwel*, the ſaid Sir *Criſtopher Heydon*, *Edmund Wyndham*, Knights, *Thomas Gawdy* Serjeant at Law, *Robert Holdich*, *Henry Hobart*, *Oſbert Moundford*, and *Nicholas Rokewood*, Eſquires, then Juſtices of the ſaid late Queen *Mary* to enquire by the Oath of good and lawful Men of the ſaid County of *Norfolk* and otherwiſe of all Treaſons, Miſpriſions of Treaſons, Inſurrections, Rebellions, &c. within the County of *Norfolk* by whomſoever done, and the ſame Treaſons and other the Premiſſes to hear and determine according to the Law and Cuſtom of the Realm, by virtue of the Commiſſion of the ſame Queen to the ſame Sir *Richard Southwel*, *Chriſtopher Heydon*, and the other Perſons above named, and alſo to *Thomas* Duke of *Norfolk*, *Henry* Earl of *Suſſex*, *Henry Bedingfield*, *John Shelton*, *William Paſton*, *William Woodhouſe* Knights, and *John Corbet*, fourteen, thirteen, twelve, eleven, ten, nine, eight, ſeven, ſix, five, and four of them (of whom the ſame Queen willed that there ſhould be ſome two of them the aforeſaid *Richard Southwel*, *Henry Bedingfield*, *Thomas Gawdy*, *Robert Holdich*, *John Corbet*, and *Oſbert Moundford*) to them thereupon directed, the Preſences of the ſaid Duke, Earl of *Suſſex*, *Henry Bedingfield*, *John Shelton*, *William Paſton*, *William Woodhouſe*, and *John Corbet* being not then expected, the ſaid *Robert* Earl of *Leiceſter*, by the Name of *Rober Dudley* late of *London* Knight, Son of *John* late Duke of *Northumberland*, by the Verdict of 12 free and lawful Men of the ſaid County of *Norfolk* was indicted, for this that whereas the aforeſaid *John* Duke of *Northumberland* late of *London*, together with *William* Marquis of *Northampton*, *John* Earl of *Warwick*, *John Gate* Knight, and *Thomas Palmer* Knight, and many other falſe Traitors and Rebels againſt the ſaid late Queen, imagining to depoſe the ſame late Queen, and to kill her, with Force and Arms, *viz.* Swords, &c. the 16th and 17th Days of *July* in the ſaid 1ſt Year of the Reign of the ſaid Queen *Mary*, at the Town of *Cambridge* in the County of *Cambridge*, unlawfully, falſly, and traiterouſly with a great Multitude of Rebels and Enemies of the ſaid Queen to the Number of 3000 Perſons aſſembled together, and there in open Field traiterouſly put themſelves in Battle Array, and a cruel War falſly and traiterouſly with Banners diſplayed prepared and ordained: The ſaid *Robert Dudley* late of *London* Knight, Son of the ſaid Duke, as a falſe Traitor and Rebel againſt the ſaid Queen *Mary* his Sovereign, not regarding his Allegiance, but imagining the Deprivation and Deſtruction of the ſaid Queen *Mary*, the 18th Day of *July* in the ſaid 1ſt Year, with Force and Arms, and with a Multitude of People, the Town of the ſaid Queen of *King's-Lynn* in the County of *Norfolk* entered, and the Poſſeſſion thereof againſt the ſame Queen and her Will took, poſſeſſed, and in an hoſtile Manner kept, and one *Jane Dudley* Wife of *Guilford Dudley* Eſquire, Brother of the aforeſaid *Robert Dudley*, the ſaid 18th Day of *July* in the ſaid 1ſt Year, falſly and traiterouſly cauſed to be publiſhed and proclaimed Queen of this Realm of *England*, at *King's-Lynn* aforeſaid, and *George Riveley* then being Mayor of the ſame Town, and other Subjects of the ſaid Queen, to the Number of 300 Perſons at leaſt, then inhabiting and dwelling within the ſame Town of *Lynn*, their cordial Love and due Allegiance from the ſame Queen to withdraw and quit, and with the aforeſaid Duke and the ſaid other Traitors a moſt cruel War againſt the ſaid Queen their ſovereign Lady to continue, levy, and prepare, the ſame *Robert Dudley* the ſaid 18th Day of *July* in the ſaid 1ſt Year, at *King's Lynn* aforeſaid falſly and traiterouſly laboured, abetted, and compaſſed, to the utter Deſtruction of the ſaid Queen, againſt his Allegiance, and alſo againſt the Crown and Dignity of the ſaid Queen, and againſt the Form of the Statute in ſuch Caſe provided. And that afterwards, *viz.* the 19th Day of *January* in the ſaid 1ſt Year, Queen *Mary* ſent her Commiſſion to Sir *Thomas White* Mayor of *London* and to 13 others, reciting that whereas the ſaid *Robert Dudley* before *Thomas* Duke of *Norfolk* and the 14 others above named in the firſt Commiſſion was indicted of divers High-treaſons by him committed, ſhe aſſigned the ſame Sir *Thomas White* and the 13 others named in the ſaid Commiſſion, and every four of them (whereof ſhe named ſome to be of the *Quorum*) for this Cauſe and Cauſes her Juſtices, giving and grant-

granting to the ſame 14 and to every four or more of them, (whereof ſome were of the *Quorum*) by the Tenor of the ſaid Commiſſion full and ſufficient Authority and ſpecial Command to receive the Indictment aforeſaid concerning the ſame *Robert Dudley*, with all Things touching it, from the ſaid Juſtices of the ſaid Queen *Mary* before whom it was taken, and in whoſe Cuſtody it then remained, and the ſame to peruſe, and at certain Days which they ſhould appoint for that Purpoſe to aſſemble together at the Guildhall of the City of *London*, and to call before them the ſaid *Robert Dudley*, and to hear and examine him thereupon, and to compel him to anſwer, and at a due End to try, determine, and adjudge; and alſo to diſtrain ſuch and ſo many good and lawful Men of the County of *Norfolk*, by whom the Truth in that Behalf might be the better known, to appear before them for the Cauſe and Cauſes aforeſaid at the Days and Place aforeſaid; and the Truth therein being found, to give Judgment thereupon in this Behalf according to the Laws, Statutes, and Ordinances of the Realm of *England*, and againſt the ſaid *Robert Dudley* to proceed to give Sentence, and to adjudge, and to command Execution thereof to be done. In which Commiſſion there are divers Clauſes of *Mandavit*, *viz.* one to the ſaid Juſtices that they ſhould deliver the ſaid Indictment with all Things touching it for the Cauſe and Cauſes aforeſaid to the ſaid Sir *Thomas White* and to his Companions, or to ſome of them; and another to the Conſtable of the Tower, to bring the Body of the ſaid Sir *Robert Dudley* at a Day and Place to be appointed by the Commiſſioners; and another to the Sheriff of the County of *Norfolk*, to return a Jury at a Day and Place, *&c.* And further the ſaid Queen *Mary* the ſaid 19th Day of *January* by her Writ cloſe commanded the ſaid *Thomas* Duke of *Norfolk* and the ſaid 14 others his Companions and every of them, that they ſhould deliver to the ſaid Sir *Thomas White* and his ſaid other Companions all and ſingular Indictments, Records, and Proceſſes of whatſoever Treaſons, Miſpriſions of Treaſons, and other the Premiſſes, whereof the ſaid *Robert Dudley* was indicted before them in the County of *Norfolk*. And further the ſame Queen *Mary* the ſaid Day commanded Sir *John Gage* Conſtable of the Tower to bring the ſaid Sir *Robert Dudley*, being in his Cuſtody, before the ſaid Sir *Thomas White* and his other ſaid Companions at a Day and Place which they ſhould appoint him. By virtue of which Letters-patent the ſaid Sir *Thomas White* and his Companions ſent their Precept the 20th Day of *January* in the ſaid 1ſt Year to the aforeſaid Sir *Richard Southwel* and his Companions, that they or one of them ſhould ſend to the ſaid Sir *Thomas White* and his Companions at the Guildhall aforeſaid the 22d Day of the ſaid *January* all and ſingular Indictments, Records, and Proceſſes of High-treaſons before them lately taken, of which the ſaid *Robert Dudley* then was indicted, with all Things touching them. And they ſent another Precept the ſame Day to the Conſtable of the Tower of *London* to bring the Body of the ſaid *Robert Dudley* before them the ſame 22d Day of *January*. At which 22d Day of *January* at the Place aforeſaid before the ſaid Sir *Thomas White* and his Companions at their Seſſions then held at the Guildhall aforeſaid, the ſaid Sir *Richard Southwel* and Sir *Chriſtopher Heydon* Knights with their own Hands delivered the Inquiſition before ſpecified touching the ſaid Sir *Robert Dudley*, to be determined as the Letter and the Precept required. At which Day and Place came the ſaid *Robert Dudley* under the Cuſtody of the Conſtable of the Tower, and he being arraigned upon the Indictment aforeſaid confeſſed the Treaſons aforeſaid. Whereupon Judgment was accordingly given againſt him, *viz.* that he ſhould be brought back by the ſaid Conſtable to the ſaid Tower, and afterwards ſhould be drawn thro' the Middle of the City of *London* unto the Gallows of *Tyburn*, and there ſhould be hung up, and be cut down alive, and his Entrails be taken out of his Belly, and be burnt, he living, and that his Head ſhould be cut off, and his Body be divided into four Parts, and that his Head and thoſe Quarters ſhould be placed where the Queen pleaſed to appoint. And afterwards by an Act of Parliament held at *Weſtminſter* the 12th Day of *November* in the 1ſt and 2d Years of the Reign of *Philip* and *Mary*, it was enacted, that whereas *Henry* Duke of *Suffolk*, *John Grey* late of *Brodegate* in the County of *Leiceſter* Knight, *Robert Dudley* late of *London* Knight, and divers others recited in the Act, had committed many deteſtable and abominable Treaſons to the great Danger of the Deſtruction of the royal Perſon of the Queen, and the extreme Deſolation of the Realm of *England*, if God of his Goodneſs had not diſcovered to the Queen their traiterous intentions, of and for which Treaſons, being openly proved, the ſaid Duke of *Suffolk* and the other ſaid Perſons lawfully and rightfully according to the Laws of her Realm of *England* were convicted and attainted, as by the Records of their ſeveral Attainders more fully appears, and the Duke and ſome others particularly named in the Act were put to Death: The King and the Lords Spiritual and Temporal and the Commons granted and aſſented that the ſaid Convictions and Attainders of all and ſingular the ſaid Offenders ſhould be approved and confirmed by the Authority of the ſaid Parliament. And further it was enacted, that the ſaid Duke of *Suffolk* and the other attainted Perſons above-named for their abominable and deteſtable Treaſons ſhould be convicted and attainted of High-treaſon by the Authority of the ſaid Parliament. And that as many of the ſaid attainted Perſons as at the Time of the making the ſaid Act ſhould be alive and not pardoned at the Will of the ſaid Queen ſhould ſuffer Puniſhment of Death: And that the ſaid Duke of *Suffolk* and all and ſingular the other attainted Perſons above named ſhould forfeit to the Queen all their Honours, Manors, Meſſuages, Lands, *&c.* and that their Offices, *&c.* ſhould be actually in the Queen: Saving to all Perſons other than the ſaid Duke and the other attainted Perſons aforeſaid, *&c.* their Rights, Title, *&c.* as by the ſaid Act amongſt other Things more fully appears.

And

And further the Defendant avers that the ſaid *Robert Dudley* Knight in the Indictment, and in the Commiſſion made to the Mayor of *London* and others his Companions, and in the Record aforeſaid, named, and the ſaid *Robert Dudley* in the Act of Parliament aforeſaid named, and the ſaid *Robert* Earl of *Leiceſter* in the Declaration named, are one and the ſame Perſon, and not divers. By Force of which Conviction, Attainder, and Act of Parliament the ſaid King *Philip* and Queen *Mary* were ſeized of the Tenements aforeſaid in which, *&c.* in their Demeſn as of Fee, in Right of the Crown of *England*, and being ſo ſeized, they by their Letters-patent under the Great Seal, bearing Date at *Weſtminſter* the 17th Day of *January* in the ſaid 1ſt and 2d Years of the Reign of the ſaid late King and Queen, here ſhewn forth, gave and granted to the ſaid Sir *Chriſtopher Heydon* the Tenements aforeſaid in which, *&c.* amongſt other Things, to have to the ſame *Chriſtopher* his Heirs and Aſſigns for ever. By Force of which Letters-patent the ſaid Sir *Chriſtopher* into the ſaid Tenements in which, *&c.* the ſaid Time when, *&c.* entered, and did the Treſpaſs, as it was lawful for him to do, and this he is ready to verify, *&c.* And he demands Judgment if the Earl ought to maintain his Action againſt him. And upon this the Earl of *Leiceſter* has demurred in Law, and the Defendant alſo.

Eaſter Term 13 Eliz. *Trin. Term, 13 Eliz.* And the Matter was argued the laſt Term, *viz.* in *Eaſter* Term 13 *Elizabeth*, by *Fleetwood* Recorder of *London* on the Part of the Plaintiff, (the latter End of whoſe Argument I only heard) and by *Anderſon* on the Part of the Defendant. And now this Term, *viz. Trinity* 13 *Elizabeth*, the Matter was argued again by an Apprentice of the Middle-Temple and by Serjeant *Manwood* on the Part of the Plaintiff, and by Serjeant *Loveleſs* on the Part of the Defendant. And the Counſel for the Plaintiff who demurred took upon themſelves and endeavoured to prove that the Matter alledged was not an effectual Proof that the Earl was attainted, but that the Judgment given upon the Arraignment, and the Act of Parliament, and the Patent of the Land made to Sir *Chriſtopher Heydon*, were all void as to the Plaintiff, and that the Bar had not Matter of Subſtance. And the Caſe was digeſted by them into divers Points.

1 Point. For the Plaintiff. The firſt was, whether or no Sir *Thomas White* and the others his joint Commiſſioners could lawfully arraign the Plaintiff upon the ſaid Indictment. [a] And as to this, the Counſel for the Plaintiff argued that they could not, for the Commiſſion was made to the Duke of *Norfolk* and 14 others, being 15 in all, to take the Indictment, and it gave Authority to them 15 and to every four of them or more (whereof two at leaſt appointed ſhould be of the *Quorum*) to take the Indictment, and it appears by the Record that the Indictment was taken before 8 only, whereof there was a ſufficient Mumber of the *Quorum*, and ſo thoſe 8 who took the Indictment had ſufficient Power to take it, for which Reaſon the Indictment is good. But the Commiſſion made to the Mayor of *London* and others recites that he was indicted before the Duke of *Norfolk* and 14 others, and makes them Juſtices of this Cauſe and Cauſes, and gives them Authority to receive of the Juſtices before whom it was taken *the Indictment aforeſaid, and to hear, examine, and compel the aforeſaid* Robert Dudley *to anſwer thereupon*, which is, upon the Indictment taken before 15, *and at a due End to try, determine, and adjudge* upon ſuch Indictment, *and to give Sentence and Judgment, and to command Execution to be done* upon ſuch Indictment, and the *Mandavit* to the Duke of *Norfolk* and his Companions is to deliver to Sir *Thomas White* and his Companions the *Indictment aforeſaid*, which is, the Indictment taken before 15, and no other, for no other is mentioned in the Commiſſion made to Sir *Thomas White* and others, and the Writ cloſe directed to the Duke of *Norfolk* and others, for them to deliver the Indictment to the Mayor of *London* and others, is directed to all the 15, and commands them to deliver the Indictment by which the ſaid *Robert Dudley* is indicted before them, that is, before them all, *viz.* the 15, and no other; and it might be that there were two Indictments, *viz.* one taken before the 15, and another before the 8, and therefore the Power given to them upon the Indictment taken before the 15 could not extend to that taken before the 8 only. For which Reaſon they had no Authority to receive of Sir *Richard Southwel* and Sir *Chriſtopher Heydon* the ſaid Indictment taken before the 8, nor had they any Warrant to deliver it to the Mayor of *London* and the others, for the Precept made by the Mayor and others to Sir *Richard Southwel* and his Companions was void (as *Manwood* ſaid) for all other Indictments but for that taken before the 15. For they who made the Precept had no Power to do it for any other Indictment, and the expreſſing of the Number here, before whom the Indictment is taken, is a very material Thing, and of great Weight, for it might be that there were two Indictments, as it has been ſaid, *viz.* the one taken before 8, and the other before 15, and it might be that the Queen's Intent was that the Mayor and the others ſhould arraign him upon that Indictment only which was taken before the 15, and therefore the Number is material, and expreſſes Certainty, and takes away Incertainty. And to this Purpoſe Time, Place, and Number are often limited and expreſſed, as the Apprentice ſaid, [b] and if a Thing is referred to them, and miſtakes them, all ſhall be void. [c] As is the Caſe in 7 *Ed.* 3. concerning Time, where (as the Apprentice cited it) one brought a Writ and recited that it is contained in the Articles made in the Time of King *Edward* the Father of King *Edward* 3. *that no Sheriff ſhall put in Inqueſts, &c.* and he declared further according to the Statute, and the Writ was abated by Award, becauſe the Articles, *viz. Articuli ſuper chartas cap.* 9. were made in the Time of King *Edward* 1. and not in the Time of King *Edward* 2. who was Father of King *Edward* 3. So that the Reference to Time which was limited for Certainty was material, and being miſtaken abated the Suit.

[a] 1 Bulſt. 105. Inſt. 231.

[b] Vin. Abr. tit. Miſrecital A. pl. 1.

[c] T. 7. Ed. 3. 26. pl. 11. Cart. 150.

And

[a] And he cited the Caſe in 18 *Ed.* 3. where a Statute Merchant was made to pay *Anno* 16. *Ed.* 3. and the Party ſued Execution, and the Writ ſuppoſed the Sum to be paid *anno* 14. *Ed.* 3. and by the Suit the Feoffee was ouſted, and he ſued a Writ of Error in the King's Bench, and it was awarded that he ſhould be [b] received to the Suit; [c] for, he ſaid, if upon Suits in the Chancery according to the Order of the Common Law there is Error, this ſhall be reformed by Error in the King's Bench, becauſe it is the higher Court. And therefore, he ſaid, Time declares Certainty, for it might be that there were two Statutes payable at ſeveral Days, for which Reaſon the Time of Payment is material, and the Suit referring to Time and miſtaking it ſhall abate. [d] So, he ſaid, if a Defeaſance is made of a Statute which is recited to be made the 10th Day of *May*, where in Fact it bore Date the 1ſt Day of *May*, the Defeaſance is void for the Miſtake of the Time, for the Law ſays that inaſmuch as it might be that there were two Statutes, the one bearing Date the 1ſt Day, and the other the 10th Day, the Time of the Date is material. So that a Time certain to which Acts are referred is material. And ſo is it with Regard to Place. [e] As if a Man will plead the King's Letters-patent bearing Date at *Weſtminſter*, and in Fact they bear Date at another Place, it ſeems by 38. *H.* 6. that for the Variance of the Place he has failed, and the Plea ſhall be adjudged againſt him, for the Place is material, and it is a Circumſtance and Teſtimony of Truth and Certainty. So if the King gives Authority to a Man to arraign one upon an Indictment taken againſt him at *Dale* in ſuch a County, where in Truth the Indictment was taken at another Place in the ſame County, he cannot arraign him, for the Place ſhews the certain Indictment which the King meant, for it may poſſibly happen that there are two Indictments of one ſame Matter and Thing, viz. the one taken at one Town, and the other at another Town, and therefore the expreſſing of the Town ſhews certainly which Indictment was intended. So ſhall it be alſo with Reſpect to Number, for where a Thing is referred to Number, the Number is material. As in Rediſſeizin the Statute of *Merton cap.* 3. is, *that the Sheriff, taking with him the Keepers of the Pleas of the King's Crown, and other lawful Knights, in his own proper Perſon ſhall go to the Land whereof the Plaint hath been made*; [f] and in 23 *Aſs.* it was adjudged that the Writ ſhould abate where the Sheriff only took one Coroner with him, there being more in the County, for the Act appoints a particular Number, viz. two at leaſt, which Number ought to be complied with. [g] And ſo in a *Præcipe quod reddat* there ought to be two Summoners, and if there is but one, and the Tenant makes Default and loſes by Default, he ſhall have a Writ of Diſceit. [h] And he alſo cited the laſt Caſe in 8. *H.* 7. concerning the Court of Star-Chamber, in which the Act of 3. *H.* 7. *cap.* 1. is recited, whereby it is enacted *that the Chancellor, Treaſurer, and Keeper of the Privy-Seal, or two of them, calling to them a Biſhop, and a Temporal Lord of the Council, and the two Chief Juſtices, &c. ſhall have Authority to examine Riots, &c.* and there it is held that [i] none is a Judge but the Chancellor, Treaſurer, and Keeper of the Privy-Seal, or two of them, and the others are but Aſſiſtants and Aidants, and not Judges, but the Juſtices there held that it was Error if the Chancellor, Treaſurer, and Keeper of the Privy-Seal, or two of them did not call the others, for the Number limited by the Act ought to be obſerved. So the Statute of *Weſtminſter* 2. *cap.* 11. ſays, that when a Man has aſſigned Auditors to Accountants, and they are found in Arrears, *their Bodies ſhall be arreſted, and by the Teſtimony of the Auditors ſhall be ſent and delivered to the next Goal of the King's in thoſe Parts, and ſhall be received by the Sheriff or Goaler, and be impriſoned in Iron under ſafe Cuſtody, and ſhall remain in the ſame Priſon at their own Coſt, until they have ſatisfied their Maſter fully of the Arrearages, &c.* [k] but there if one Auditor is aſſigned, he cannot commit the Accountant to Goal, for the Statute limits ſuch Power to two at leaſt: Wherefore the Number to which the Statute has referred the Thing to be done ought to be obſerved. And as Acts referred to a greater Number cannot be executed by a leſſer Number, ſo one who has Authority given him to proceed upon Acts done before a greater Number cannot proceed upon them if they are done before a leſſer Number only, as here. For they ſhall not be intended one ſame Act, and that which is done before 15 cannot be intended the ſame that is done before 8 only, becauſe there may poſſibly be two ſeveral Things of the ſame Kind. And as a great Proof that Sir *Thomas White* and his Companions had no Power to proceed to the Arraignment of the Plaintiff upon the Indictment taken before the 8 only, where their Commiſſion gave them Power to proceed upon the Indictment taken before 15, the Apprentice cited the Caſe in 2 *Aſs. pl.* 5. [l] where in Attaint there brought the Writ ſuppoſed that the Verdict paſſed before 4 Juſtices, whereas by the Record it paſſed before 2 only, and there *Herle* ſaid that he had no Warrant to take the Attaint. [m] But, the Apprentice ſaid, in 31 *Aſs. pl.* 1. in Aſſize of Rent, the Tenant heretofore prayed in Aid of the King, and afterwards the Plaintiff put forth a Writ of *Procedendo*, by which Writ he ſuppoſed that the Aſſize was arraigned before *Stouff* and *Byrton*, whereas it was arraigned before them and *Shard* alſo, and there Judgment was demanded if upon ſuch Writ they would take the Aſſize, where *Stoner* ſaid, " the Writ ſuppoſes no Deceit, for if it was arraigned before " them three, *ergo* before two, wherefore anſwer", and he ſaid that there was a Writ of *Simon omnes*. From which two Caſes there appears a plain Diverſity, and that the one Part thereof is in Effect our Caſe. For as the Writ, which ſuppoſed the Verdict to paſs before four, where in Fact it paſſed but before two of them, was not a ſufficient Warrant to *Herle* Chief Juſtice of the Common Bench, and to his Companions, to take the Attaint, but that there they ſhould ceaſe to take it, ſo the Commiſſion here to Sir *Thomas White* and his Companions, which recited that the Indictment was taken before 15, was not a ſufficient Warrant to arraign him upon the Indictment taken before 8 of the 15. But in the other Caſe of 31 *Aſs.* the *Procedendo* which ſaid that it was

[a] T. 18. Ed. 3. 25. b. Fitz. Error 71. 17 Aſs. pl. 24. Bro. Error 114. Statute Merch. 21.

[b] *Note* the Feoffee was not Party, nor Privy to the Execution ſued, and yet the Writ of Error maintainable. Dy. 1. b. pl. 5.

[c] 29 Aſs. pl. 47. Dy. 315. pl. 100. 1 Rol. Abr. 744. H. pl. 1. 1 Rol. R. 287. pl. 5. *per Coke* C. J. 4 Inſt. 80. Crompt. J. C. 11. b. 78. a. 2 Finch 480. *Quære* if Error lies in Parliament upon a Judgment in Chancery? Vide H. 37. H. 6. 13, 14. T. 11. Ed. 4. 9. a.

[d] P. 17 Ed. 3. 24. pl. 10. Cart. 150.

[e] T. 38. H. 6. 34. b. *per Choke.* 36. b. *per Litt.* 37. *per Nedham, Moile, et Priſot.* 1 Bulſt. 106.

[f] 23 Aſs. pl. 7. Fitz. Rediſſeizin 2. Bro. 3. 10 Co. 103. a. 1 Bulſt. 106. Bridgm. 119.

[g] T. 50. Ed. 3. 17. a. *per Fulth.*

[h] P. 8. H. 7. 13. pla. ult. Fitz. Bar 282. Bro. Judgment 125. Parlement 45. Bridgm. 119. Crompt. J. C. 29. a. b. 98. a.

[i] Contra 4 Inſt. 62. and there ſaid that the Book of 8 *H.* 7. here cited is a ſudden Opinion, and contrary to Law and continual Experience.

[k] 2 Inſt. 380.

[l] 2 Aſs. pl. 5. P. 2. Ed. 3 8. pl. 2. Bro. Attaint 47. 1 Bulſt 105. And ſee the like Point 2 Ed. 3. 4. pl. 13. 3 Aſs. pl. 3. 2 H. H. P. C. 215. But if it had ſuppoſed the Verdict to paſs before 2, where in Fact it paſſed before 4 Juſtices, it had been good enough, for *omne majus continet minus*, 2 Finch 31.

[m] 31 Aſs. pl. 1. Fitz. Aſſize 373 Bro. Variance 73. 1 Bulſt. 105. Lit. R. 25.

taken before two, whereas it was taken before them two and another, was true. [a] For, as *Manwood* ſaid, the greater Number contains the leſſer, and if he was arraigned before three, *ergo* he was arraigned before two. And ſo in our Caſe if the Indictment had been taken before all the 15, and the Commiſſion to Sir *Thomas White* and the others had recited that the Indictment was taken before Sir *Richard Southwel* and the ſeven others, and had given them Authority to arraign the Plaintiff upon the ſame Indictment, they might perhaps have proceeded, for there would have been no Falſity in the Recital, becauſe the leſs is comprehended in the greater, but not *e contra*, for the leſs does not comprehend the greater, and that is our Caſe here. And ſo is the Diverſity, for which Reaſon the Arraignment was not duly done. And the Counſel for the Defendant did not inſiſt ſo much upon this as they did upon the other Points.

[a] See 2 Finch 21, many good Caſes to this Purpoſe.

2 Point. For the Defendant.

The ſecond Point was, admitting that the Arraignment was not duly done, whether it is abſolutely void, or only voidable by Error or otherwiſe. For *Anderſon* ſaid, if it ſhould be granted clearly on their Part that the Arraignment for the Cauſe ſhewn was not well and duly done, (which he would not fully confeſs) yet, he ſaid, it is not void but voidable, becauſe Sir *Thomas White* and his Companions had Power by their Commiſſion over the Treaſon mentioned in the Indictment, for the Queen in the Commiſſion recites that *Robert Dudley* was indicted of divers High Treaſons, and aſſigns the ſaid Sir *Thomas White* and others *for that Cauſe and cauſes her Juſtices*, and gives them Authority *to call before them the ſaid* Robert Dudley, *and to hear and examine him thereupon, and to compel him to anſwer, and at a due End to try, determine, and adjudge*, and to make a Jury appear before them *for the Cauſe and Cauſes aforeſaid*. And, he ſaid, the Cauſe is the Matter, and the Matter is the Cauſe, and the Cauſe and the Matter is nothing elſe than High Treaſon, and of this the Queen has made them Juſtices, giving them Authority to call the ſaid *Robert* before them, and to hear and examine him *thereupon*, that is, upon the Treaſon, and to make a Jury appear for that Cauſe, which Words alone, if all the reſt of them had been omitted, are ſufficient for the Commiſſioners to meddle with the Matter. For he who is made a Juſtice of Treaſon has thereby Power to proceed upon the Treaſon, and to give Judgment that the Perſon ſhall be executed or acquitted, for this is the Office of a Juſtice of Treaſon. And if they who have ſuch Authority proceed upon the Treaſon unduly, and do not make the Party to be newly indicted before them, but arraign him upon an Indictment for the ſame Matter taken before others, which is not duly brought to them, this cannot be void, but voidable by Error. For when any Court has Power over a Thing, and proceeds to give Judgment upon it, and the due Circumſtances of Law are not obſerved in all Points, the Judgment given ſhall not be void, but voidable by Error. [b] As if Judgment is given upon a Plea of Land in the Common Bench upon Plea of the Parties, where there is no Original, this is not void, but voidable by Error. [c] And a Fine levied in the Common Bench without an Original is not void, but voidable by Error. [d] And hereupon he cited the Caſe in 22 *Aſs. pl.* 64. where one *R.* entered in Court-Baron a Plaint of Treſpaſs againſt *J.* and counted againſt him in a Plea of Land to Damages, &c. The Defendant pleaded that no Man ought to anſwer touching his Freehold without the King's Writ, and demanded Judgment if the Court would take Conuſance of ſuch Plaint; and becauſe he would not ſay any other Thing, the Court awarded him Non-defendant, and that the Party ſhould recover againſt him Damages of eight Marks, and by the Command of the Steward the Officer took four Horſes of *J.* in Name of Execution, and *J.* brought a Bill of Treſpaſs, and there it was touched whether the Judgment given in the Court-Baron was void or voidable, and at the End it was awarded that the Plaintiff ſhould take nothing by his Writ, becauſe the Court had Juriſdiction of the Land, for it was held of the Manor, and therefore it was ſaid to the Plaintiff that his Recovery was by Writ of falſe Judgment: But there it is admitted that if the Judgment had been given upon a Covenant or Contract made out of the Juriſdiction of the Court, it had been void, but not in the other Caſe, becauſe the Court had Juriſdiction. And ſo in our Caſe Sir *Thomas White* and his Companions had Juriſdiction over the Treaſon by the ſaid Words of their Commiſſion, and then the Judgment is not void but voidable, and the Party is driven to a Writ of Error by the Courſe of the Common Law. But ſuch Writ is taken away by the ſaid Act of Parliament, for the Words of the Act are, *that the Queen and the Lords and Commons have granted and aſſented that the ſaid Convictions and Attainders of the ſaid Offenders ſhall be approved and confirmed by the Authority of the Parliament*, and that which is confirmed by Parliament is made indefeaſible, altho' it were defeaſible before. Alſo the Statute of 33. *H.* 8. *cap.* 20. enacts, *that if any Perſon ſhall be attainted of High Treaſon by the Courſe of the Common Law, every ſuch Attainder by the Common Law ſhall be of as good Force, Value, and Effect, as if it had been made by the common Authority of Parliament*, which Act alſo takes away all Error that was in the Attainder, if there was an Attainder. And each of the Acts veſts the Land of the Perſons attainted in the Queen actually without Office. Wherefore it ſeemed to *Loveleſs* and *Anderſon* that the Attainder of the Plaintiff is made indefeaſible, and that his Land was in the Queen without Office, and that the Patent made thereof to Sir *Chriſtopher Heydon* was good, and that therefore he ſhould be diſcharged of the Treſpaſs.

[b] P. 7. Ed. 4. 3. pl. 6. Bro. Error 164. M. 11. H. 7. 4. pl. 13. Bro. Utlagary 78. H. 2. M. 1. Bro. Judgment 114. in fine. 10 Co. 77. a. Sed Contra B. N. C. § 461.

[c] T. 26 H. 6. Fitz. Aſſize 13. Bro. 396. Fitz. Error 28. Bro. Judgment 130. P. 21. Ed. 4. 4. b. *per Tremail.* M. 21 Ed. 4. 62. a. *per Brian.* Bro. Fines 97. Co. Litt. 352. b. 2 Inſt. 513. 5 Co. 38. b. 2 Rol. Abr. 14. pl. 4. Kelw. 19. b. *per Vaviſor*, contra *per Keble.*

[d] 22 Aſs. pl. 64. Bro. Error 120. Faux Judgment 11. Judgment 64. Treſpaſs 238. Kitch. 284. 1 Finch 24. 2 Finch 36. Crompt. J. C. 38. a.

E contra for the Plaintiff.

But this Argument was on the other Hand impugned by the Counſel for the Plaintiff for two Cauſes, and by them it was inſiſted that the Letter and Senſe of the Commiſſion would not ſuffer ſuch Expoſition as hath been made, but that it gave Authority to the Commiſſioners to proceed only upon the Indictment ſpecified, and not upon the Treaſon generally. One Cauſe was, for that no Treaſon is particularly ſpecified in the Commiſſion made to Sir *Thomas White* and others, for the Commiſſion recites that whereas *Robert Dudley* was indicted before the Duke of *Norfolk*

and others *for divers High Treaſons by him committed*, the Queen aſſigned them her Juſtices *for that Cauſe and Cauſes*. And if we ſhould aſk what Cauſe and Cauſes are theſe? it will be anſwered, High Treaſons? but what High Treaſons? for there are many High Treaſons, and of divers Natures; it will be anſwered, the Treaſons ſpecified in the Indictment; but in what Indictment? the Anſwer is, in the Indictment ſpecified in the Commiſſion; and what Indictment is that? it will be anſwered, the Indictment taken before the Duke of *Norfolk* and 14 others, to which it may be ſaid that there is none ſuch, *ex quo ſequitur* that they ſhall not arraign him upon any Treaſon, for if they muſt arraign him upon ſuch Treaſon as is ſpecified in ſuch Indictment, and upon no other Treaſon, and there is no ſuch Indictment, from thence it follows that there is no Treaſon ſpecified by the Relation, and ſo the Relation to that which is not makes the Thing referred void. As if one has Lands in *Dale* of his own Purchaſe, and he makes a Leaſe for 20 Years to another of all his Lands in *Dale*, if he ſtops there, the Leſſee ſhall have all his Lands in *Dale*,; [a] but if he carries on the Sentence further, and ſays, "which he has by Deſcent from his Mother," and he has no Lands by Deſcent from his Mother, there the Leaſe is utterly void, becauſe he has referred the Certainty to a Thing which is not, which Relation deſtroys the Thing referred, and makes it to be nothing. [b] But if the Leaſe had been of the Manor of *Sale* in *Dale* which he had by Deſcent from his Mother, whereas he had the Manor of *Sale* by Purchaſe, and not by Deſcent from his Mother, in ſuch Caſe the Leſſee ſhall have it, becauſe the Manor of *Sale* in *Dale* was certain enough without any further Certainty expreſſed, and the Saying, "which he had by Deſcent," was not requiſite, inaſmuch as there was ſufficient Certainty before, but it is rather Surpluſage or Superabundance of Certainty. [c] And ſo it is taken in 2 *Ed.* 4. for there it is held that if one releaſes all his Right in all the Lands in *Dale* which he has by Deſcent, he ſhall ſay that he has no Lands by Deſcent, and ſo ſhall avoid the Releaſe, altho' he has other Lands there; but if he releaſes all his Right in *White-Acre* in *Dale* which he has by Deſcent, there he ſhall not avoid the Releaſe by ſaying that he has not *White-Acre* by Deſcent, but by Purchaſe, for the Relation to the Deſcent was in vain, inaſmuch as Certainty appeared before. So that there is a Diverſity where a Thing incertain is referred to another Thing, and where a Thing certain is ſo referred. And in our Caſe if the Treaſon whereof the Plaintiff was indicted had been certainly expreſſed in the Commiſſion made to Sir *Thomas White* and others, there would have been more Colour to ſupport the Objection, but inaſmuch as no Treaſon is particularly expreſſed, but it is ſaid, *of divers High Treaſons*, and the Certainty of them is referred to an Indictment taken before 15, where there is no ſuch Indictment, the Thing referred and the whole Clauſe is void, and no Authority is given thereby to Sir *Thomas White* and the others his joint Commiſſioners.

[a] Godb. 237 *per Curiam.* Ante 170 (a)

[b] Litt. R. 25. Cart. 150. Kelw. 7. b.

[c] M. 2 Ed. 4. 29. b. Fitz. Releaſe 11. Bro. 49. Grants 92. Pleadings 92. Dy. 5c. pl. 7, 8. 2 Co. 33. b. 34. a. Cro. C. 548. Heath's Max. 161. Vin. Abr. tit. Releaſe Z. 3. pl. 2. X. a. pl. 6. Ante 191 (o) and (q).

The other Cauſe was, for that the Clauſe which conſtitutes them Juſtices does not ſtop there, nor is it an abſolute Sentence of itſelf, but that and the *(thereupon)* and all the other Clauſes are referred to the Indictment only; for immediately after the Clauſe of aſſigning them Juſtices *for that Cauſe and Cauſes*, it follows, *giving and granting to them, thirteen, twelve, &c. and every four of them, whereof ſome to be of the Quorum, full and ſufficient Authority and ſpecial Command to receive the Indictment aforeſaid concerning the ſame* Robert Dudley, *with all Things touching it, from the aforeſaid Juſtices of the ſaid Lady the Queen before whom it was taken, and in whoſe Cuſtody it then remained, and the ſame to inſpect.* So that the *(giving and granting)* being Part of the Sentence refers to the Subſtantive (Queen), which before declared how they ſhould be Juſtices, and what they ſhould do. And ſo does the reſt of the Sentence afterwards, viz. *and at certain Days which they ſhall appoint for that Purpoſe to meet together at the* Guildhall *of the City of* London *aforeſaid, and to call the ſaid* Robert Dudley *before them, and to hear and examine him thereupon, and to compel him to anſwer, and at a due End to try, determine, and adjudge.* In which Caſe the *(thereupon)* and all the reſt is referred to the Indictment, for the ſeveral Parts of the Sentence proceed regularly in Order, for firſt the Queen gives them Authority to ſend for the Indictment, and to receive and peruſe it, and to aſſemble themſelves together at *Guildhall*, and to call the ſaid *Robert Dudley* before them, and to hear and examine him *thereupon*, and to compel him to anſwer: In which Caſe the *(thereupon)* muſt of Neceſſity be referred to the Indictment, for they cannot compel him to anſwer, nor adjudge him before he is indicted, for the Indictment is the Thing to which he ſhall anſwer, and it is the Foundation of their Judgment, for which Cauſe the *(thereupon)* is referred to the Indictment. And in the Clauſe next after, viz. *and alſo to diſtrain ſo many and ſuch good and lawful Men, &c. for the Cauſe and Cauſes aforeſaid to appear before them*, the Words *(for the Cauſe and Cauſes aforeſaid)* ſhall be referred to the Indictment, and to the Matter thereof, and not to the Matter of it only without the Indictment. And to this Senſe alſo plainly tends the *Mandavit* afterwards to the firſt Juſtices, viz. *that they ſhould deliver to them or ſome of them the Indictment aforeſaid with all Things touching it for the Cauſe and Cauſes aforeſaid*, for it ſhall be delivered to them to the Intent to proceed upon it, and it would be in vain ſo to do, if Sir *Thomas White* and his Companions were abſolute Judges of the Treaſon, and might indict him *de novo*. And in the King's Commiſſions and Charters, as well as in all Deeds of Writing, all the Parts of them ought to be conſidered together, and one Part ſo conſidered will give Light to another, and it is not the Office of an Expoſitor to reſt upon one Sentence only, and to make Senſe of that at the ſame Time that he makes all the reſt to be of no Force. For if a Man makes a Deed of Feoffment, with a Letter of Attorney to enter into the Land, and thereof to take Seizin and Poſſeſſion, and afterwards to deliver Seizin to the Feoffee, there if the Attorney will enter and keep Poſſeſſion for three or four Months, and take the Profits, he does not do well, and yet the Words in the

firſt

firſt Part of the Letter of Attorney are, that he ſhall enter and take Seizin and Poſſeſſion, but he ought to execute the latter Part alſo, which is, to deliver Seizin over, and that ſhall be done preſently by the Senſe of the latter Part. So that all the Parts of every Deed ought to he fulfilled. And ſo in our Caſe all the Parts being conſidered, Sir *Thomas White* and his Companions are Juſtices only of the Indictment ſpecified, and have Power to arraign him upon that only, and they are not abſolute Judges of the Treaſon, and therefore if they being ſpecial Juſtices of this Indictment only, which was taken before 15, exceed their Authority by arraigning the Plaintiff upon another Indictment, viz. upon one taken before 8 of the 15, the whole is void and *coram non judice*. And it is not like to the Caſes put, viz. [a] of a Fine levied without an Original, or to the ſaid Caſe in [b] 22 *Aſs.* for in thoſe Caſes they had Authority over the Thing, and the Thing was within the Juriſdiction of the Courts, but the Order was miſuſed, in which Caſe the Acts ſhall not be void but voidable. But here Sir *Thomas White* and his Companions were not Juſtices otherwiſe, nor for other Cauſes than thoſe aſſigned by the Queen's Commiſſion, and if they are aſſigned to do one Thing, and they do another, that other is without Authority. [c] As if one is choſen Arbitrator to make an Arbitrement upon one particular Thing, and he makes an Arbitrement upon another Thing, ſuch Arbitrement is utterly void. So here that which Sir *Thomas White* and his Companions did was *coram non judice*, and meerly void. And therefore each of the Reaſons here given anſwers and avoids the Objection which has been made on the other Side, and proves that the Plaintiff was never attainted.

[a] Ante 394 (c).
[b] Ante 394 (d).
[c] M. 9. Ed. 4. 4. a. *per Choke*. Weſt's Symb. pt. 2. fo. 167. b.

3 Point. For the Defendant.

The third Point which was argued was upon the Act of Parliament. For *Anderſon* and *Loveleſs* ſaid that altho' the Judgment of Sir *Thomas White* and others was void, and the Plaintiff not attainted thereby, yet the Act and the Eſtoppel in it ſhall attaint him in Fact or by Concluſion. For the Act recites *that he*, amongſt others, *had done abominable Treaſons, for which he*, amongſt others, *was attainted*, and the Parliament approved and confirmed the Attainders, and further it was enacted *that the ſaid Duke of* Suffolk, *and the attainted Perſons above named, for their abominable Treaſons ſhould be attainted of High Treaſon by the Authority of the Parliament*; in which Caſe if he, viz. the Plaintiff, was not attainted before, then the Confirmation is void. But then by the ſecond Part of the Sentence he is attainted, for the Statute ſhall not be void to all Intents, but ſhall ſome where or other be of Force againſt him, and if the firſt Clauſe is without Effect, the ſecond ſhall take Effect. For the Makers of the Act had a full Intent to ordain ſomething touching the Plaintiff and his Treaſon, and to make ſuch an Expoſition of the Act as would * confound the Text is not the Office of an Expoſitor. And altho' the Act ſays, *the Duke of* Suffolk, *and the attainted Perſons above named*, and the Plaintiff was not attainted, yet he is comprehended in the Intent of the Makers of the Act, and ſhall be taken to be one of *the Perſons above named* who are recited to be attainted; ſo that the Word *(attainted)* ſhall not deſtroy the whole Matter, ſeeing his Name and Surname are well recited, for it appears preciſely to be the Intent of the Makers of the Act to attaint him, which Intent is the principal Thing that Expoſitors of Statutes ought to regard. And *Anderſon* ſaid, the Act of 27. *H.* 8. *cap.* 10. which enacts *that Women ſhall not have Dower, where Lands were aſſured to them and their Huſbands for Jointure, has a* Proviſo *that if any Woman has Lands aſſured after Marriage to her for her Life, that then ſuch Woman may at her Liberty after the Death of her Huſband refuſe to have and take the Lands ſo aſſured to her for her Jointure, and demand her Dower*; and foraſmuch as the Statute ſpeaks of an Aſſurance after Marriage, [d] it has been held that if the Aſſurance be made before Marriage ſhe ſhall not refuſe it, for the Judges took the Intent of the Makers of the Act to be ſo by the Implication of the Words; *a multo fortiore* in our Caſe by the preciſe Words of Rehearſal of his Name and Surname, and his Treaſon, and his Attainder, and by the Words further *that the attainted Perſons before named ſhall be attainted by the Authority of Parliament*, it ſhall be taken that they intended to attaint him, for the preciſe Words exceed all Implication.

* *Mala eſt expoſitio quæ corrumpit viſcera textus.* Ante 196 (*) 288 (†).

[d] Co. Litt. 36. b. 4 Co. 3. a. reſolved.

And if the latter Words of the Clauſe are not ſufficient to attaint him, if he was not attainted before, yet by the firſt Recital of the Attainder, and by the Confirmation of it, he is eſtopped to deny the Attainder, becauſe he is Party and Privy to the Act, for every Subject is Party and Privy to an Act of Parliament, and therefore this his Recital by Matter of Record of his own Attainder ſhall conclude him to deny it. [e] And hereupon *Loveleſs* ſaid, in 9 *H.* 6. a Man who had made a Defeaſance by Indenture of a Deed was thereby eſtopped to deny the Deed, and if by ſuch Recital by Indenture, which is but a Matter in Deed, he ſhall be eſtopped to deny the Thing to which the Indenture has Relation, *a fortiore* in our Caſe he ſhall be eſtopped to deny the Attainder to which the Act of Parliament, which is a Matter of the higheſt Record, has Relation. And he put many other Caſes of Eſtoppels by Matters in Deed, and Matters of Record, to enforce the Eſtoppel here. And therefore upon this and many other Caſes cited and Things ſaid they concluded that the Plaintiff was attainted, or at leaſt that he was eſtopped to ſay otherwiſe, and that his Land in which the Treſpaſs is aſſigned was by this Act and the ſaid Act of 33 *H.* 8. veſted in Queen *Mary*, and that her Patent to Sir *Chriſtopher Heydon* was good.

[e] P. 9. H. 6. 9. pl. 22. Fitz. Eſtoppel 26. Bro. 5. Et H. 9 H. 6. 60. a. *per Paſton.* Fitz. Eſtoppel 24. but contrary to the Opinion of *Loveleſs* here.

E Contra for the Plaintiff.

On the other Hand it was argued by the Counſel for the Plaintiff. And the Apprentice and *Manwood* ſaid that the Intent of the Makers of the Act was only to confirm the Attainder before had, if there was any ſuch, and not to attaint the Plaintiff *de novo*, if he was not attainted before. For the firſt Clauſe recites *that he and the others were attainted before*,

Where an Act of Parliament recites that A is attainted of High Treaſon, and approves and confirms the ſaid Attainder, and further enacts that he ſhall be attainted by the Authority of Parliament, both theſe Clauſes are but Clauſes of Confirmation, and not of a new Attainder, for none can be attainted twice for the ſame Offence, and therefore if in Fact A. was never attainted, this Act cannot be made Uſe of as an Attainder of him *de novo*.

as by the Records of their ſeveral Attainders appears, and that they of the Parliament *granted and aſſented that the ſaid Attainders be approved and confirmed by the Authority of the Parliament.* In which Caſe there are three Things to be obſerved, firſt, the Allegation, that they were attainted, ſecondly, the Reference to the Records of their Attainders, thirdly, the Confirmation, which Confirmation cannot be but upon Matter precedent. For a Confirmation does not create a new Thing, but gives Strength to a Thing which was before. And from theſe three Things it is manifeſt to every one that the Makers of the Act took it that they were attainted before, and that they intended to fortify that Attainder. And when they went further and ordained *that the ſaid Duke of* Suffolk *and the attainted Perſons above named ſhould be attainted of High-treaſon by the Authority of Parliament*, theſe are but Words of Confirmation alſo, and not of a new Attainder. For a Perſon attainted for an Act cannot be again attainted for the ſame Act, for an Attainder is a Conviction of any Perſon of a Crime whereof he was not convicted before, for he cannot be twice attainted, becauſe as much is done by the firſt Act as by the ſecond, for by the firſt Attainder he ſhall have Execution of Death, and ſhall be out of the Law, and ſhall forfeit as much as he ſhould do if he was attainted again, and therefore one Attainder is ſufficient, and by the Law he cannot be attainted afterwards, for it is a good Plea for one arraigned to ſay that he ſtands attainted of the ſame Offence, for the Law ſays that it ſhall be in vain to do Acts which are ineffectual. [a] But the Apprentice ſaid that a Man attainted of Felony may be arraigned for Treaſon, becauſe it is a higher Offence, and the Eſcheat for Treaſon ſhall be to the King of whomſoever the Land is holden, if the Treaſon is committed before the Felony: But where the Offences are equal, a Perſon attainted ſhall not be arraigned again. And for this Cauſe he cannot be here attainted by the Parliament, but the latter Words of Attainder in the Act ought to be taken as a Confirmation, and to be of the ſame Effect as the firſt Confirmation is, becauſe the Words cannot be a Confirmation and an Attainder alſo, and ſo there is a double Confirmation. As if the King by his Letters-patent recites that whereas he by his Letters-patent before had made *J. S.* who was born beyond Sea, a Denizen, he confirms the ſaid Letters-patent, and further grants to him that he ſhall be from thenceforth a Denizen, in ſuch Caſe *J. S.* cannot plead for his Legitimation the ſecond Letters-patent, becauſe they recite that he was a Denizen before by the firſt Letters-patent, and ſo he is not made a Denizen by the ſecond Letters-patent, but both the Clauſes ſhall be taken as a Confirmation, becauſe they cannot have two Effects, the one contrary to the other. And ſo, he ſaid, if the King by his Letters-patent reciting that whereas he by his Letters-patent bearing Date before had manumiſed *A. B.* his Villain, he now ratifies and confirms his ſaid Manumiſſion, and further manumiſes him, now if the King impeaches him as his Villain, he cannot plead that the King manumiſed him by the ſecond Letters-patent, becauſe they recite that he was manumiſed before; and therefore both the Clauſes in the ſecond Letters-patent ſhall enure as a Confirmation, inaſmuch as they cannot be a Confirmation and a new Manumiſſion alſo. [b] And he cited the Opinion of *Huſſey* in 9. *H.* 7. where it appears that the King had granted certain Lands to a Man by his Letters-patent, and afterwards the ſame King by his ſecond Letters-patent made by Authority of Parliament reciting his former Grant ratified and confirmed the Eſtate of the Patentee, and further ſaid, *damus et concedimus* the ſame Land to the ſaid Patentee, and the Patentee pleaded the ſecond Letters-patent made by Authority of Parliament by Way of Grant, and not by Way of Confirmation, and there *Huſſey* Chief Juſtice held clearly that he could not plead them by Way of Grant, but by Way of Confirmation, for inaſmuch as the Land paſſed by the firſt Letters-patent, it could not paſs by the ſecond Letters-patent. [c] The like Caſe, he ſaid, is in 7. *H.* 7. in an Action of Treſpaſs brought by the Provoſt and Scholars of *Cambridge*, where by Replication they pleaded that King *Henry* 6. at his Parliament held ſuch a Day with the Aſſent of the Lords and Commons, reciting that whereas two Years paſt he had granted the Land to the ſaid Provoſt and Scholars for ever, the King by his ſaid ſecond Letters-patent ratified and confirmed the ſaid Land to the ſaid Provoſt and Scholars for ever, and alſo by the Authority of the Parliament aforeſaid *gave and granted* the ſaid Land to them, by Force of which ſecond Letters-patent they entered and were ſeized, ſo that theſe ſecond Letters-patent were uſed by Way of Grant, and not of Confirmation, and by the better Opinion (as he took it) the Plea was not good, becauſe the Land could not paſs by the ſecond Letters-patent except it was ſhewn that after the firſt Letters-patent the Land came again to the King's Hands, but the ſecond Letters-patent ought to have been pleaded as a Confirmation. But, he ſaid, if the King grants to a Man Paſture for two Oxen in his Land, and afterwards the King by his ſecond Letters-patent reciting his firſt Grant confirms it, and further *gives and grants* to the firſt Grantee Paſture for two Oxen in the ſame Land, there theſe ſecond Letters-patent ſhall enure as a Confirmation of the firſt Grant, and alſo as a new Grant of Paſture for two other Oxen, ſo that the Grantee ſhall have Paſture for four Oxen in the whole; for in this Caſe the Thing mentioned in the Confirmation is one, and the Thing in the Grant is another, and ſo every Part has Relation to a ſeveral Thing. [d] But where the Thing mentioned in the Confirmation and in the Grant is the ſame, and is not nor can be ſeveral, as in the Caſes of Land, and of Infranchiſement of a Villain, or Naturalization of an Alien, it is otherwiſe. And ſo is it in the Caſe of an Attainder, which can but be once, for the Plaintiff could not be firſt convicted by Parliament, becauſe he was convicted before, and therefore it is impoſſible that the Makers of the Act could intend to attaint thoſe by Parliament who they ſaid were attainted before, nor will the Words ſuffer ſuch Thing.

[a] M. 1. H. 6. 5. pl. 22. Fitz. Corone 2. Bro. Treaſon 11.

[b] T. 9. H. 7. 2. Fitz. Eſtoppel 84. 8 Co. 167. a. Contra Ante 156 (l).

[c] T. 7. H. 7. 4.

[d] Vin. Abr. tit. Grants H. 13. pl. 66.

Another Cauſe to prove that it was not their Intention to attaint him by the Act, and that the Words themſelves do not import ſuch Intention, is the Word *(attainted)*, which is placed in the Clauſe of the Attainder, and in all the Clauſes afterwards, and has Relation to the Perſons named in the Act. For the Words are *that the ſaid Duke of* Suffolk *and the other attainted Perſons above-named be convicted and attainted of High-treaſon by the Authority of the ſame Parliament.* And afterwards

wards in another Clauſe it is, *that the ſaid* Henry *Duke of* Suffolk *and the other attainted Perſons before-named forfeit to the Queen all their Lands, &c.* which Word *(attainted)* ſhews (as *Fleetwood* ſaid) the Degree of the Perſons to whom the Clauſe is referred, *viz.* that they ſhall be ſuch Perſons as were before convicted of Treaſon, and put out of the Law, and no others, and their proper Names or Surnames are not expreſſed in the Clauſes, and therefore none ſhall be comprehended in the Words *(attainted Perſons)* but thoſe who were before attainted in Fact, ſo that if *Robert Dudley* (the Plaintiff) was not before attainted, he is not comprehended in the Words *(attainted Perſons.)* And if the King recites that *A. B. C.* and *D.* were Burgeſſes of ſuch a Town, and grants to the Burgeſſes before-named that they ſhall be diſcharged of Toll in other Places, or that they ſhall not be ſworn on Juries out of the Town, if they will plead their Exemption elſewhere it was ſaid that they ought to aver that they were Burgeſſes of the ſaid Town, for the Grant is to the Burgeſſes, and none ſhall take Benefit of it if he is not ſhewn to be a Burgeſs, for no other was comprehended in the Grant. So here none is compriſed in the Words *(attainted Perſons)* but he who was before attainted in Fact, for no others were comprehended in the Words of the Act, nor in the Intent of the Makers of it, for if they had intended to have attainted any others, they would have ſent for them, and have heard their Anſwer, and have examined the Matter, which they did not do, as it is well known, the Affair happening but of late Time; and this may be ſufficient to diſcover to us the Intent of the Makers of the Act. Wherefore inaſmuch as the Plaintiff was not before attainted, he is out of the Words and Intent of the ſaid Clauſe of Attainder. And if the Defendant has made Uſe of this Act to attaint him, his Plea ſhall be double, for then he has pleaded an Attainder at common Law, and alſo an Attainder by Statute, which requires two Anſwers, and therefore it is double. But in Fact it is not double, becauſe it is not any new Matter of Attainder, but a Confirmation of the firſt ſuppoſed Attainder, and the Defendant could not plead the Act without mentioning the ſaid ſuppoſed Attainder at common Law to which the Act is referred, for a Confirmation cannot be pleaded but where the Thing which is confirmed is firſt ſhewn, for which Cauſe the Plea is not double.

Where an Act of Parliament recites that A. is attainted of Treaſon, and confirms the Attainder, and in Fact A. is not attainted, this Act is no Eſtoppel to him, but he may deny the Attainder. S. C. Co. Litt. 352. b.

Further as to the Eſtoppel, the Counſel for the Plaintiff ſaid that the Recital of the Attainder by the Parliament, which is a Court, ſhall not prejudice the Party for divers Cauſes. One is (as *Manwood* ſaid) becauſe it is not * preciſely recited that the Plaintiff was attainted, but only by Reference to the Record of the Attainder. For the Words are that they were convicted and attainted, *as by the Records of their ſeveral Attainders more fully appears*, ſo that the Act refers the Attainder to the Record, which is not ſuch an abſolute Affirmation as it would be if the *prout (as by &c.)* had been omitted. For Recitals in Patents *prout informamur* is no full Affirmation that the Matter recited is true. [a] And ſo, he ſaid, the King's Licence to alien to another the Manor of *Dale*, which is held of the King, *ut dicitur*, is no Eſtoppel to him, to whom the Licence is made, to ſay that it is not held of the King, but of another, for the Tenure in *capite* is not preciſely affirmed, but *ut dicitur*, which deſtroys every abſolute Affirmation. So here when the Attainder is recited to be had, *as by the Record of it appears*, the Attainder is not affirmed to be otherwiſe than as it appears by the Record. And if there is no Record by which the Attainder appears, then there is no abſolute Affirmation, by the Intent of the Makers of the Act, for they thought that there was Matter of Record to warrant their Aſſertion of the Attainder, and they did not mean that their Aſſertion ſhould warrant any more than could be ſupported by the Record. So that the Reference to the Record has taken away much of the Preciſeneſs of Truth from the Thing recited.

[a] Vide 29 Aſſ. pl. 38. Bro. Eſtoppel 134. Vide 3 Inſt. 238.

And further they ſaid that if the Reference to the Record had been left out, and the Act had abſolutely recited that the Plaintiff was attainted of Treaſon, and had confirmed it, yet the Plaintiff might ſay that he never was attainted of Treaſon, and ſo avoid the Act entirely; for this Recital cannot be taken to proceed but upon Information, and the court of Parliament may be miſinformed as well as other Courts, and when they have recited a Thing which is not true, it cannot be otherwiſe taken but that they were miſ-informed, for none can imagine that they would purpoſely recite a falſe Thing to be true, [b] for it is a Court of the greateſt Honour and Juſtice, of which none can imagine a diſhonourable Thing. And foraſmuch as the Legiſlature always have Juſtice and Truth before their Eyes, and their falſe Recitals (if there are any) are made upon falſe Information, from thence it follows that they do not intend any one to be concluded by ſuch Recital grounded upon Falſhood, for he that ſays to the contrary affirms that their Intent is to oppreſs Men wrongfully, which is indecent to be ſaid of them, and he who inſiſts that ſome ſhall be concluded by ſuch Falſhood, impugns the Intent of the Makers of the Act, and in that the Act itſelf, for the Act is nothing elſe but the Intention of the Makers of it. And ſo the Recital in our Caſe, which is falſe, and founded upon a falſe Information, ſhall not conclude the Plaintiff to ſay the Truth, but he may ſay that he was not attainted, and ſo avoid the Statute of Confirmation, which has Relation to a Thing that never was. And hereupon the Apprentice put a Diverſity where Acts of Parliament are referred to a Thing which is, and has no Force, and where they are referred to a Thing which is not. For in the one Caſe where they are referred to a Thing which is, and has no Force, the Act is good and adds Force to the Thing; [c] but in the other Caſe it is meerly void. [d] And upon this he cited the Caſe in 29. *Ed.* 3. in a *Quid juris clamat* brought by the Earl of *Hertford* and *Eſſex*, which he recited in this Manner: A Man endowed his Wife of a Manor *ad oſtium eccleſiæ*, and died, and the Wife entered, and the Heir of the Huſband granted the Reverſion to one *John Matravers* in Fee, and afterwards he being beyond Sea was attainted by Parliament, and all his Lands and Reverſions were forfeited, and ſeized into the King's Hands, and afterwards the King granted the Reverſion of the ſaid Manor to one in Fee, who died, and the Reverſion deſcended to his Son and Heir being Earl of *Saliſbury*, and afterwards the King by his Charter reciting the ſaid Attainder of the ſaid *John Matravers*, and the Services which he had done when he

[b] Co. Litt. 110. a. 4 Inſt. 343. 11 Co. 14. a. Pref. to 9. Co. fo. 8. a.

[c] 1 Rol. R. 152.

[d] P. 29. Ed. 3. 24. b. Fitz. Grant 100. Bro. Parlement 82.

he was out of the Realm, and that he was out of the Realm at the Time of the Judgment given, reverſed the ſame Judgment, and awarded that the ſaid *John Matravers* ſhould be reſtored to all his Lands and Tenements, Manors, Reverſions, *&c.* and that all Gifts, Alienations, and Warranties of the ſame ſhould be null, and afterwards the ſame Thing was recited in full Parliament, and there by the Aſſent of the whole Parliament the ſame Thing was ratified and confirmed, and afterwards *John Matravers* granted the ſaid Reverſion by Fine to the ſaid Earl of *Hertford* and *Eſſex* in Fee, and he brought a *Quid juris clamat* againſt the ſaid Wife and her ſecond Huſband, and there all this Matter was diſcloſed, and it was there ſaid that the Words in the Patent are only the Words of the King, who could not of his own Head reverſe an Award made in Parliament, ſo that it is but a Charter of Pardon, and although the Thing was afterwards confirmed by Parliament, this could not be of any other Effect than the Grant precedent was, by which the Judgment could not be reverſed, and therefore no more could it by the Act of Confirmation: Againſt which it was there ſaid, that if the Words of the King compriſed in the Patent had firſt been recited in Parliament in ſuch Manner as they were by the King, then it muſt be granted that the Judgment had been clearly reverſed, and now it ſeems to be of the ſame Effect, ſince the Grant before made by the King was recited in Parliament, and there approved and ratified; and for this Reaſon the Court there awarded that they ſhould attorn. From which Caſe, he ſaid, one may ſee that where an Act of Parliament confirms a Thing which is before, as the King's Charter there was, and is void of Effect, as it there was, thereby Effect ſhall be given to the Thing, for he ſaid that nothing was done by the Parliament but an Act of Confirmation, as he took it by the Argument of the Caſe in the Book, notwithſtanding that by the Recital of the Caſe by the Serjeant before Argument it ſeems as if the Parliament had added other Words of Reſtitution above the Charter; but thoſe, he ſaid, are the Words of the Serjeant there collecting the Effect of the Matter (as he took it) rather than the true Fact of the Caſe. [a] And to the like Purpoſe he and Serjeant *Manwood* cited the Caſe in 38. *H.* 6. in a *Quare impedit* brought by the King againſt the Abbeſs of *Sion*, where it appears that King *Henry* 5. was ſeized of a Manor to which an Advowſon was appendant, and leaſed the ſaid Manor by his Letters-patent to Huſband and Wife for their Lives, and afterwards the ſame King by his other Letters-patent reciting that the ſaid Huſband and Wife had the Manor of him, amongſt other Things, for their Lives, granted to the Biſhop of *D.* and others that the ſaid Manor, amongſt other Manors, Tenements, and Poſſeſſions of the Abbey of ſuch a Place in *France*, which the ſaid Huſband and Wife held for their Lives, ſhould remain to the ſaid Biſhop and others after the Term of Life of the ſaid Huſband and Wife, *habendum et tenendum omnia prædicta maneria, terras, et tenementa, una cum advocatione* to them and their Heirs, *ad effectum* that they ſhould grant them to the Nuns of *Sion* when they were founded by the King: [b] And there it was agreed by the Court that the Advowſon did not paſs to the Tenants for Life, becauſe it was not granted by ſpecial Words; and it was alſo agreed that the Advowſon did not paſs to the Biſhop and others by the ſecond Letters patent, becauſe by the Leaſe for Life it was for the Time ſevered from the Manor, and then it could not paſs by the ſecond Letters-patent becauſe it was not ſpecified in the Premiſſes of the Deed before the *habendum*, for it being ſevered and diſmembered from the Manor, there ought to have been Words of Grant before the *habendum* to make it paſs: And the Caſe ſtanding thus, King *Henry* 6. reciting the firſt Grant for Life, and alſo the Grant to the Biſhop and others, by Authority of Parliament ratified the ſaid Letters-patent and Grants, and there it is touched whether this Confirmation by Parliament ſhall make the Advowſon to paſs by the firſt Letters-patent or the ſecond, and alſo it is touched whether, if the ſaid Words *(ad effectum)* make a Condition, this Condition is taken away by the Confirmation by Parliament, or not, and there it is agreed that the Condition is not taken away by the Confirmation, and that the Advowſon was not made to paſs by the Letters-patent, for the Letters-patent are confirmed according to their Effect and Purport, and not otherwiſe. Another Point is alſo there moved, *viz.* that if ſo be the Grant of King *Henry* 5. was void, becauſe the Grant to the Biſhop and others was that the ſaid Manor, amongſt other Manors, Tenements, and Poſſeſſions of the Abbey of ſuch a Place in *France*, ſhould remain, *&c.* and the King could not grant the Lands of others, that is to ſay, the Lands of the Abbot and Convent, in ſuch Caſe it ſeemed to them that the Act of Parliament ſhall make thoſe Lands to paſs, for it is there ſaid, if the King grants the Land of another, and it is confirmed by Parliament, the Grant is made good. And ſo from theſe Caſes it appears that where an Act of Parliament confirms a Thing which is, and wants Force, the Act ſhall give Force to it, and ſhall make it to be of Effect where it was not before: [c] But if an Act of Parliament is referred to that which is not, and confirms it, as in our Caſe, there the Act ſhall be void to all Intents. [d] And hereupon the Apprentice ſaid that if a Town has Cuſtoms which are againſt Law or Reaſon, and no other Cuſtoms, and their Cuſtoms are confirmed by Parliament, in ſuch Caſe *Danby* Chief Juſtice in *Long* 4 *Ed.* 4. ſays that ſuch Confirmation ſhall not extend to thoſe Cuſtoms, [e] for a Thing uſed meerly contrary to Law and Reaſon is no Cuſtom notwithſtanding the Uſage, as the Law ſays; and therefore the Act of Parliament which confirms their Cuſtoms is referred to that which is not, for they have no Cuſtoms, for which Reaſon it ſhall be void. So, he ſaid, in 27 *H.* 8. there was an Act of Parliament made that embezzilling or Robbery of Maſters by their Servants of Things in their Cuſtody ſhould be Felony; and afterwards in the Act of 1 *Edw.* 6. *cap.* 12. all Offences made Felony by any Act after the Commencement of the Reign of King *Henry* 8. and all Branches in the ſame concerning the making of any Offence Felony, ſhall be void and repealed, in which Act there is a Branch by which it is provided and ordained, *that an Act made in a Parliament held at* Weſtminſter *upon divers Prorogations the 4th Day of* February *in the 27th Year of the Reign of King* Henry 8. *and there continued and kept until the 24th Day of* April *then next following, concerning the felonious taking by any Servant of the Goods and Chattles of the Maſter or Miſtreſs, and all Articles and Sentences contained in the ſame Act ſhall be in Force and*

Eff *ect,*

[a] T. 38. H. 6. 33. Bro. Confirmation 13.

[b] Watſ. Compl. Incumb. 82. Ante 152 (e).

[c] 1 Rol. R. 152.

[d] P. Long 5 Ed. 4. 32. b. Kelw. 142. a. *Per Scrope.* Litt. R. 233. Hardr. 41. 2 Sid. 120. Co. Litt. 295. b. Dy. 263. pl. 37.

[e] Cowel's Inſt. 6.

Effect, this Repeal notwithſtanding. [a] And he ſaid that it was taken in the Time of King *Edw.* 6. ſince this Act, that the ſaid Act was repealed notwithſtanding the ſaid Branch, and therefore ſome ſaid to him that they would forbear to arraign any that were indicted upon it, becauſe the Branch miſrecites the Act of 27. *H.* 8. for that Seſſion commenced the 4th Day of *February* in the ſaid 27th Year, and continued until the 14th Day of *April* then next following, and then ended, and it did not continue until the 24th Day of *April*, as the Branch makes Mention. And ſo the Branch of the Act, which has Reference to a Statute made in a Parliament commencing ſuch a Day, and continuing until ſuch a Day, where in Truth the Parliament did not continue ſo long, is void. [b] So that the Parliament may miſtake a Thing, [c] and Statutes which miſrecite Things and are referred to them ſhall be void, and none ſhall be concluded by them. [d] So in our principal Caſe, the Statute which recites that the Plaintiff was attainted, and confirms it, where in Fact he was not attainted, ſhall be void. And by the Intent of the Makers of the Act, who would not that any Man ſhould be concluded by a Thing that is falſly recited, the Plaintiff ſhall not be eſtopped, nor ſuffer any Damage thereby, but ſhall avoid the Act by Averment that he was not attainted, or by the Record pleaded, which amounts to as much. Wherefore the Counſel for the Plaintiff prayed Judgment, and a Writ to the Sheriff to enquire of Damages. And many other Things were ſaid by the Counſel on both Sides. And afterwards the Judges having conferred amongſt themſelves, Judgment was given as here follows.

[a] Crompt J. C. 14. b. Vide Dy. 203. pl. 73.

[b] Bro. Parliament 16. Crompt J. C. 12. a. 14. b.

[c] Vin. Abr. tit. Statutes A. 2. pl. 1.

[d] Crompt J. C. 14. b.

The reſt of the Record. At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid. Whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the ſaid Lady the Queen now here more fully underſtood, and mature Deliberation being thereupon had, for that it ſeems to the Court of the ſaid Lady the Queen now here that the Plea aforeſaid by the aforeſaid *Chriſtopher* in Manner and Form aforeſaid above pleaded, and the Matter in the ſame contained, are inſufficient in Law to preclude the ſaid *Robert* Earl of *Leiceſter* from having his Action aforeſaid againſt the aforeſaid *Chriſtopher*, it is conſidered that the aforeſaid *Robert* Earl of *Leiceſter* his Damages againſt the aforeſaid *Chriſtopher* by Occaſion of the Treſpaſs aforeſaid ought to recover, *&c.* But becauſe it is unknown to the Court of the ſaid Lady the Queen now here what Damages the aforeſaid *Robert* Earl of *Leiceſter* has ſuſtained as well by Occaſion of the Treſpaſs aforeſaid, as for his Coſts and Charges by him about his Suit in this Behalf expended, therefore the Sheriff is commanded that by the Oath of good and lawful Men of his Bailiwick he diligently enquire what Damages the aforeſaid *Robert* Earl of *Leiceſter* has ſuſtained as well by Occaſion of the ſaid Treſpaſs, as for his Coſts and Charges about his Suit in this Behalf expended: And that the Inquiſition which, *&c.* to the ſaid Lady the Queen at *Weſtminſter* on *Tueſday* next after the Octave of *St. Michael*, under the Seal, *&c.* and the Seals, *&c.* he ſend, together with the royal Writ to him thereof directed. The ſame Day is given to the ſame *Robert* Earl of *Leiceſter* there, *&c.* At which Day before the Lady the Queen at *Weſtminſter* came the aforeſaid *Robert* Earl of *Leiceſter* by his Attorney aforeſaid. And the Sheriff returned a certain Inquiſition before him taken at *Norwich* in the Shirehouſe in the County aforeſaid the 3d Day of *October* in the 13th Year of the Reign of the ſaid Lady the Queen now, by which it is found that the aforeſaid *Robert* Earl of *Leiceſter* has ſuſtained Damages by Occaſion of the Treſpaſs aforeſaid, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to 100 Marks, and for thoſe Coſts and Charges to 40 *s.* Therefore it is conſidered that the aforeſaid *Robert* Earl of *Leiceſter* recover againſt the aforeſaid *Chriſtopher Heydon* his Damages aforeſaid by the Inquiſition aforeſaid above found, and alſo 40 *s.* for his Coſts and Charges by him about his Suit in this Behalf expended by the Court of the Lady the Queen here with his Aſſent of Increaſe adjudged. Which ſaid Damages in the whole amount to 70 *l.* 13 *s.* 4 *d.* And that the aforeſaid *Chriſtopher Heydon* be taken, *&c.*

Judgment.

Nota bene. *Note*, the Plaintiff's Counſel prayed that they might ſee the Judgment when it was drawn before it was entered, and the Prothonotary ſhewed it to them, and he had drawn it, *that the Plea aforeſaid by the aforeſaid* Chriſtopher *in Manner and Form aforeſaid pleaded is inſufficient in Law, &c.* And the ſaid Counſel added to it *(and the Matter in the ſame contained is inſufficient, &c.)* and they prayed that this might be entered, for they ſaid that they demurred upon the Matter of the Plea, and not upon the Form only, and therefore they prayed that the ſaid Words might be put in, to ſhew that the Matter and the Subſtance of it was not ſufficient to prove the Plaintiff attainted. And ſome ſaid that it was not the Form of Entries in the King's-Bench to put in the Words *(and the Matter in the ſame contained)* as it is in the Common-Bench, and ſome Queſtion was made hereupon amongſt the Judges, and afterwards Precedents were ſearched, and at the End the Judgment was entered as before appears with the Words *(and the Matter in the ſame contained.)*

* See Hob. 164.

A Re-

A Report of a Judgment given in the King's Bench *in* Michaelmas *Term, in which the* thirteenth *Year of the Reign of Queen* Elizabeth *ended, upon the general Pardon by Parliament of the ſaid Queen in the ſaid* thirteenth *Year pleaded by* Richard Cole *of the City of* Canterbury, *upon his Arraignment of Felony for killing* Elizabeth Pembroke *Wife of one* Richard Pembroke, *whereof he was indicted in the ſaid City before* Henry Prowde *the Queen's Coroner in the County of the ſaid City, upon the View of the Body lying dead. And the Record appears among the Records of the ſaid Term in the Crown-Office,* Rot. 12. inter Placita Reginæ.

IT was found by the ſaid Indictment that the Wound whereof the Woman died was given the 12th Day of *February* in the ſaid 13th Year, and that ſhe died of it the 18th Day of *June* in the ſame Year. And the ſaid *Richard Cole* upon his Arraignment pleaded in his Diſcharge the ſaid Pardon, by which all Felonies, Offences, Injuries, Miſdemeanors, and other Things, Cauſes, and Quarrels in the Act not excepted, which might be pardoned by the Queen, before and until the 14th Day of the ſaid Month of *February* were pardoned, releaſed, and diſcharged againſt the Queen, and he averred that neither he nor the ſaid Offence were excepted in the ſaid Pardon. And he prayed to be diſcharged.

Mich. Term 13 *Eliz.* A. gives B. a mortal Wound, and between the Stroke and the Death a Pardon comes of all Felonies and Miſdemeanors, afterwards the Party wounded dies, altho' this is no Felony till the Death, which is after the Pardon, yet the Felony is pardoned, becauſe the Miſdemeanor, which is the Cauſe thereof, is pardoned, and conſequently every Thing that followed from it is thereby pardoned. Vide S. P. 1 Rol. R. 139. 3 Mod. 52. 7 Mod. 158. 11 Mod. 11. 1 H. H. P. C. 426. 1 Finch 8. 2 Finch 9. Wing. Max. reg. 19. pl. 61.

And (as I was credibly informed, for I was not always preſent when the Matter was touched) it was debated whether or no the Pardon ſhould diſcharge him, inaſmuch as the Offence of the Priſoner was not [a] Felony until the Death, which happened after the Pardon, and therefore the Act could not pardon the Felony which was not then committed. [b] And hereupon the Caſe in 11. *H.* 4. was cited, where one who had mortally wounded another was arreſted by two Conſtables, and afterwards they ſuffered him voluntarily to eſcape, and after that the Perſon wounded died, and it was there held that this was not Felony in the Conſtables, becauſe at the Time of the Eſcape the Perſon wounded was alive, and until his Death it was not Felony in him that wounded him, and then the Eſcape which was in his Life time could not be Felony. So here this is a Felony which commenced after the Pardon, for which Cauſe it cannot be pardoned by the Act.

And the Court took Adviſe hereupon, and afterwards the Juſtices agreed that the Pardon diſcharged him, becauſe the Wound given by the Priſoner was the Cauſe of the Felony, the giving of which Wound was an Offence and Miſdemeanor againſt the Queen, and that being pardoned by the Act, all the Conſequences that followed from the ſaid Offence are alſo pardoned thereby. Wherefore the Priſoner was diſcharged by Award of the Court. And the Judgment was entered as follows.

3 Bac. Abr. 807. Vide Dy. 99. pl. 65. 263 (g) and the other Books there cited.

[a] 4 Co. 42. b.

[b] M. 11 H. 4. 12. pl. 26. Fitz. Corone 84. Bro. 28. Eſcape 8. Relation 7.

Ante 258 (a)

The Judgment. 1 Judgments 240. Free Pardon allowed.

Whereupon all and ſingular the Premiſſes being ſeen, and by the Court here more fully underſtood, the Serjeants of the ſaid Lady the Queen at Law, and the Attorney of the ſaid Queen being hereunto called and preſent, it is conſidered that the aforeſaid *Richard Cole* go thereof without Day.

The END of the FIRST PART.

THE

SECOND PART

OF THE

COMMENTARIES,

OR

REPORTS

OF

EDMUND PLOWDEN,

Of the MIDDLE-TEMPLE, Esq;

An APPRENTICE of the COMMON LAW.

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Veritas sæpe agitata magis splendescit in lucem.

Ἐν τοις νόμοις ἐσὶν ἡ σωτηρία τῆς πόλεως. ARIST. Rhet.

Major hæreditas venit unicuique nostrum a jure et legibus quam a parentibus. CICERO.

LONDON:

Printed for the TRANSLATOR, and to be sold by the Booksellers in *London* and *Westminster*. MDCCLXI.

THE

SECOND PART

OF THE

COMMENTARIES,

OR

REPORTS.

A brief Report of the Opinions of the Juſtices of the Common Bench *in a Caſe upon a Deviſe argued by them in the* Common Bench *in* Michaelmas *Term in the* 13*th and* 14*th Years of the Reign of Queen* Elizabeth, *upon an* Aſſize *pending in the* Common Bench *before them, and brought by* Robert Newis *and* Scolaſtica *his Wife Plaintiffs againſt* William Lark *and* John Hunt, *for Tenements in* South-Mimmes *in the County of* Middleſex. *And the Record was entered in* Eaſter *Term* 12 Elizabeth, Rot. * 1773. *And was as follows.*

* See N. Bendl. 196. S. C. ſaid to be *Roll.* 758.

WHITELEY.

THE Aſſize comes to recognize if *William Lark* Gentleman and *John Hunt* unjuſtly and without Judgment have diſſeized *Robert Newis* and *Scolaſtica* his Wife of their Freehold in *SouthMimmes*, within 30 Years, &c. And whereupon the ſame *Robert* and *Scolaſtica* by *John Kemp* their Attorney complain, that the aforeſaid *William* and *John* have diſſeized them of one Meſſuage, 2 Acres of Meadow, 2 Acres of Paſture, and 2 Acres of Wood, with the Appurtenances in *South-Mimmes*, &c. And the aforeſaid *William Lark* and *John Hunt* being ſolemnly called have not come. And the Sheriff has now returned that they have nothing, nor either of them has any Thing in his Bailiwick, by which they or either of them may be attached, nor that they or either of them have any Bailiff or Bailiffs, nor are they or either of them found in his Bailiwick. Therefore it is conſidered that the Aſſize aforeſaid be taken againſt them by Default, &c. † The Recognitors of the Aſſize aforeſaid being called came, who to ſay the Truth in the Premiſſes were elected, tried, and ſworn, whereupon *William Bendloe* Serjeant at Law of Counſel with the aforeſaid *Robert* and *Scolaſtica*, in Maintenance of the Aſſize aforeſaid, before the Juſtices of the Lady the Queen of the Bench here, in Evidence to the Recognitors of the Aſſize aforeſaid ſaid, that long before the Day of obtaining the Aſſize aforeſaid one *Henry Clerk* was ſeized of one Meſſuage, one Garden, 40 Acres of Land, 60 Acres of Meadow, 60 Acres of Paſture, and 30 Acres of Wood, with the Appurtenances in *South-Mimmes* aforeſaid, whereof the aforeſaid Tenements with the Appurtenances put in View of the Recognitors aforeſaid, and in the Plaint ſpecified, then and from Time whereof the Memory of Man is not to the contrary, were parcel, in his Demeſn as of Fee. And that the ſame *Henry* was likewiſe ſeized of 3 other Meſſuages, 20 Acres of Land, 10 Acres of Meadow, and 20 Acres of Paſture with the Appurtenances in *Uttexeter* in the County of *Stafford*, and of one Meſſuage in the Town of *Stanmer* in the County of *Hertford*, in his Demeſn as of Fee, and held the Tenements aforeſaid with the Appurtenances of the Biſhop of *London* in Socage, viz. by Fealty only for all Services. And the ſaid *Henry* being ſo ſeized thereof, he the ſame *Henry*, before the Day of obtaining the Writ of Aſſize of the aforeſaid *Robert* and *Scolaſtica*, viz. the 14th Day of *Auguſt* in the 4th and 5th Years of the Reign of the Lord *Philip* and Lady *Mary* late Queen of *England*, at *South-Mimmes* aforeſaid, made his laſt Will and Teſtament in Writing amongſt other Things, Part whereof follows in theſe Words, viz. "Alſo this is the laſt Will and Teſtament of "me the ſaid *Henry Clerk* for and concerning the good Diſpoſition of all and ſingular my Meaſes, "Lands, Tenements, and Hereditaments, Rents, Reverſions and Services, with all their Ap"purtenances whatſoever, lying and being in the Counties of *Stafford* and *Middleſex*, or elſewhere "within the Realm of *England*, wherein or whereof I am ſeized or ought to be ſeized, with all "my Right and Title of and in the ſame: And alſo all ſuch Evidences and Muniments as I "have or ought to have concerning the ſame, I deviſe, will, and bequeath in Manner and Form "following, that is to ſay, firſt, I will that *Elizabeth* my Wife ſhall have and enjoy all my "Lands, Tenements, and Meadows with their Appurtenances ſet, lying, and being in the Pa"riſhes of *Oldnam-Buſh* and *Stanmer* in the Counties of *Middleſex* and *Hertford*, to her during her "natural Life, in full Contentation of her Dowry out of my whole Lands, or elſe if ſhe be not ſo "contented, then ſhe to have the third of all my Lands whereſoever they lie during her natural "Life, according to the Cuſtom of *England*. *Item*, I will and my Mind is, that my Wife afore"ſaid ſhall have and receive the Profits and Rents of all the reſt of all my Lands for the Space "of two Years next enſuing after my Deceaſe, and that ſhe ſhall of the Profits and Rents of the "ſaid two Years give and pay to *Scolace* and *Anne* my Daughters 20 *l.* a-Piece towards their Mar"riages, over and beſides their Portions after the Rate and Cuſtom of the City of *London* to them "to be contingent. *Item*, I give and bequeath unto my ſaid Son *Francis Clerk* my Houſe cal"led the *Crown*, with all my Houſes and Lands in the Pariſh of *Uttexeter* in the County of *Staf"ford* in the holding and Tenure of *John Taylor* and others: To have and to hold the ſame un"to the ſaid *Francis* and the Heirs of his Body lawfully begotten for ever, and for Default of "ſuch Iſſue, the Remainder to the ſaid *John* my Son, and to the Heirs of his Body lawfully be"gotten, and ſo from Heirs to Heirs in the Form as hereafter followeth. *Item*, I will and be"queath to my ſaid Son *John Clerk* as well all the aforeſaid Lands bequeathed to my aforeſaid "Wife after her Deceaſe, as all other my Lands, Tenements, Meaſes, and Hereditaments be-

† Tri. per Pais 461.

" queathed, ſituate, lying, and being whereſoever within the Realm of *England*, with all my " Right, Title, and Intereſt of and in the ſame, and all ſuch Deeds, Evidences, and Muniments " as I have or ought to have concerning the ſame. To have and to hold the ſame my Lands, " Tenements, and Hereditaments, and other the Premiſſes with their Appurtenances unto the " ſaid *John Clerk* my eldeſt Son, and to the Heirs Males of the Body of the ſame my Son in " true Wedlock lawfully begotten, ſo that he the ſaid *John Clerk* my Son, or ſuch his Heirs, " whenſoever he or they ſhall or may inherit, poſſeſs, or take any Profit of the ſame my Meſ- " ſuages, Lands, Tenements, and other the Premiſſes with their Appurtenances, or any Part " thereof, do well and truly content and pay unto my Son *Francis Clerk* his Brother 30 *l.* of " lawful Money of *England*, within three Years next after ſuch Time of Inheritance or Entry into " the ſame Lands and Tenements, if the ſame my Son *Francis* be then living, in Manner and " Form following, that is to ſay, by the equal Portions of 10 *l.* yearly during his Life of the " ſame three Years, and accordingly make or cauſe to be made unto the ſame *Francis* his Bro- " ther ſuch Aſſurance for the due Payment of the ſame yearly Portion or Annuity during the ſaid " three Years out of the ſame my Lands, Tenements, and other their Appurtenances, as the " ſaid *Francis* or his learned Counſel ſhall deviſe or require of the ſaid *John Clerk* my Son, or his " ſaid Heirs, without Grudge or Denial in any wiſe. And for Default of my ſaid Son *John*, " and ſuch his Heirs Males of his Body lawfully begotten, or when ſuch Heirs are deceaſed or " be ſpent, then all and ſingular the ſame my Lands, Tenements, and Hereditaments, and o- " ther the Premiſſes with their Appurtenances, ſhall remain and be to my ſaid Son *Francis Clerk*; " To have and to hold the ſame unto the ſaid *Francis Clerk* my Son, and to the Heirs Males of " his Body lawfully begotten, and for Default of ſuch Iſſue, then the ſame my Lands, Tene- " ments, and Hereditaments, with all their Appurtenances, ſhall remain and be to any other Heir " of Heirs Males of my Body lawfully begotten, from one to another ſucceſſively, and to the " Heirs Males of the Body of ſuch mine Heirs lawfully begotten; and for Default of ſuch Iſſue, " and when all ſuch Heirs ſhall be all deceaſed and ſpent, then unto my Daughter *Scolace*, and to " the Heirs Males of her Body lawfully in true Wedlock begotten, and for Default of ſuch Iſſue, " unto her other Siſter or Siſters if any ſhe ſhall then have of my Body lawfully begotten, orderly " from one to another, and to the Heirs Males of the Body of her Siſter and Siſters lawfully be- " gotten: And for Default of ſuch Iſſue, then I will that the ſame my Lands, Tenements, and " their Appurtenances deſcend and come unto my Godſon *Henry Clerk* the Son of *John Clerk* my " Brother of *Eton*: To have and to hold the ſame unto the ſaid *Henry Clerk* my Godſon, and " to the Heirs Males of his Body lawfully begotten; and for Default of ſuch Iſſue, unto his Bro- " ther *Francis Clerk*, and to the Heirs Males of his Body lawfully begotten; and for Default of ſuch " Iſſue, unto the next lawful Heir and Heirs Males orderly from Heir to Heir of the Body of the " ſame my Brother *John Clerk* lawfully begotten; and for Default of ſuch Iſſue, unto *Robert Clerk*, " Son of *William Clerk* of *London* Ironmonger my Brother, and to the Heirs Males of his Body " lawfully begotten, and for Default of ſuch Iſſue, unto *Auguſtine Clerk* Brother of the ſame *Ro-* " *bert*, and to the Heirs Males of his Body lawfully begotten. And for Default of ſuch Iſſue of " my Brethren and their Children, the Remainder of all and ſingular the ſame my Lands, and " Tenements, Rents, Reverſions, and Services with their Appurtenances wholly and entirely to " be and remain to the Maſter and Wardens of my Company or Occupation of Pewterers of " the City of *London*, (whereof I am free) and to the Succeſſors from Maſter and Wardens to " Maſter and Wardens for the Time being, to have and to hold unto the ſame Maſter and War- " dens for the Time being, to the only Uſe and Behoof of the ſaid whole Company or Occupa- " tion, and to the Benefit, and Public-weal, and Commodity of the ſame Company only and " their Heirs, Succeſſors and Aſſigns for ever, in Token of a perpetual Remembrance of me a- " mongſt them to be had. And leſt it might appear to ſome not well digeſting the whole Mean- " ing of this preſent Teſtament and laſt Will, that I have ſomewhat inconſiderately or not upon " good Reſpects entailed theſe my ſaid Lands and Tenements with their Appurtenances, I have " thought good here alſo to declare the Conſiderations me thereunto moving, of which the one " is, for that I would the ſame my Lands and Tenements ſhould as long as might be continue " and be amongſt the Name of the *Clerks* to the further Memorial of mine own Name. The ſe- " cond is, that I would none of the Entailees aforeſaid touching the ſame to alien, bargain, ſell, " waſt, ſeparate, or conſume the ſame or any Part of the ſame, but every one ſucceſſively, as the " Thing ſhall deſcend and happen unto him, her, or them of the ſame mine Entailees, honeſtly, " quietly, huſbandly, and in reaſonable, frugal, and profitable wiſe during his, her, or their Time, " with Thanks towards me for ſuch my gentle Remembrance of them, ſhould uſe and take the " Commodity and Profit of the ſame towards his own ſo much Advancement, and yet " alter not nor hinder my ſemblable good Meaning towards him, her, or them that ſhall ſuc- " ceed him, her, or them therein, ſince equally, freely, and at mine own Election I may mean " and procure ſeverally the Benefit and Commodity of every of them, as beſt ſeemeth me. Accor-

" ding

" ding to which my Deviſe and diſpoſing of ſuch my Lands and Tenements, I will and my " whole Mind is, notwithſtanding whatſoever is aforeſaid, that if any of the ſaid Perſons afore " entailed to my ſaid Lands or Tenements, or their Heirs, do unlawfully vex, diſquiet, or trouble " any other of them for the ſame my Lands or Tenements, or any Part of them, or mortgage, " bargain, ſell, or pledge the ſame my Lands or Tenements, or any Part thereof, or his Intereſt, " Poſſibility, or Title of or in the ſame, in Part or in all, or in any undue wiſe entangle or in- " cumber and hurtfully diſmember, diſſipate, or waſt the ſame or any Part thereof, otherwiſe " than I ſhall leave it unto them to be uſed and enjoyed, that then and from thenceforth all and " every ſuch Perſon and Perſons, and his or their Heirs, ſo vexing, troubling, or diſquieting the " other Perſon or Perſons ſo entailed with him touching the ſame my Lands and Tenements, in " Part or in the whole, or mortgaging, bargaining, ſelling, pledging, entailing, incumbering, hurt- " fully diſmembering, diſſipating, or waſting the ſame my Lands and Tenements, or any Part " of them, ſhall forthwith be clearly diſcharged, excluded, and diſmiſſed, as touching the ſaid " Entail of mine, and the Conveyance by Words aforegoing of the entailing of my ſaid Lands and " Tenements towards him or them to be of no Force, Benefit, or Advantage towards him or them, " but the ſame my Lands or Tenements immediately to deſcend and come unto the Party next in Tail " unto him or them, as effectually as if ſuch diſorderous Perſon or Perſons had never been minded of " in this my preſent Teſtament and laſt Will." And the ſame Serjeant at Law of Counſel with the aforeſaid *Robert* and *Scolaſtica* ſaid further to the Recognitors of the Aſſize aforeſaid on Behalf of the aforeſaid *Robert* and *Scolaſtica*, that the aforeſaid *Henry Clerk* afterwards at *South-Mimmes* aforeſaid died of ſuch his Eſtate thereof ſeized, and that the aforeſaid *John Clerk* was Son and Heir of the ſame *Henry*. And that after the Death of the ſame *Henry* the aforeſaid *John Clerk* into the Tenements aforeſaid with the Appurtenances put in View, &c. amongſt other Things, entered, and was thereof ſeized in his Demeſn as of Fee tail, viz. to him and to the Heirs Males of his Body iſſuing, by virtue of the laſt Will and Teſtament aforeſaid. And that the aforeſaid *John Clerk* paid to the aforeſaid *Francis Clerk* the aforeſaid 30 *l.* in the ſaid laſt Will and Teſtament ſpecified, according to the Form of the ſaid Teſtament. And the ſaid *John* being ſo ſeized thereof by the Form, &c. the aforeſaid *Francis Clerk* into the Tenements aforeſaid with the Appurtenances in *Uttexeter* aforeſaid entered, and was thereof likewiſe ſeized in his Demeſn as of Fee tail, viz. to him and to the Heirs of his Body iſſuing, by virtue of the laſt Will and Teſtament aforeſaid. And that the aforeſaid *John* and *Francis Clerk* by a certain Indenture made between them the ſaid *John* and *Francis*, by the Names of *John Clerk* of *London* Goldſmith, Son and Heir of *Henry Clerk* of *London* Pewterer, and *Francis Clerk* Brother of the ſame *John*, of the one Part, and the aforeſaid *William Lark*, by the Name of *William Lark* of *London* Eſquire, of the other Part, (which other Part, ſealed with the Seal of the ſame *William Lark*, the ſame *Robert* and *Scolaſtica* bring here into Court) the Date whereof is the 22d Day of *July* in the 8th Year of the Reign of the ſaid Lady the Queen now, for 300 *l.* to the ſame *John Clerk* paid by the ſaid *William Lark* had covenanted, bargained, and granted with the aforeſaid *William Lark*, that he the ſame *John Clerk* and one *Joan* his Wife, before the Feaſt of *St. Luke* the Evangeliſt next following the Date of the ſame Indenture, ſhould levy a Fine in the Court of the ſaid Lady the Queen before the Juſtices of the ſaid Lady the Queen of the Bench here, viz. at *Weſtminſter*, of and in all their Lands, Tenements, and Hereditaments in *South-Mimmes* in the County of *Middleſex*, whereof, &c. by the Names of one Meſſuage, one Garden, 40 Acres of Land, 60 Acres of Meadow, 60 Acres of Paſture, 30 Acres of Wood with the Appurtenances in *South-Mimmes* in the ſaid County of *Middleſex*, and Common of Paſture for Cattle without Number in *Enfield* Chace at all Times of the Year within the ſaid County of *Middleſex*, to the ſame *William Lark* his Heirs and Aſſigns, with Proclamations therein to be made according to the Form of the Statute; by which ſaid Fine the aforeſaid *John Clerk* and *Joan* his Wife ſhould acknowledge the Tenements aforeſaid with the Appurtenances to be the Right of the ſaid *William Lark*, as them which the ſaid *William Lark* had of the Gift of the aforeſaid *John Clerk*, and them the aforeſaid *John Clerk* and his Wife ſhould remit and quit-claim from themſelves and their Heirs to the aforeſaid *William Lark* and his Heirs for ever, with Warranty againſt the ſaid *John Clerk* and his Heirs for ever. Which ſaid Fine ſo levied and had ſhould be to the Uſe of the ſaid *William Lark* his Heirs and Aſſigns for ever. And that after the aforeſaid Fine of the ſame Tenements with the Appurtenances in Form aforeſaid levied, the aforeſaid *William Lark* being ſeized of the Premiſſes by the Fine aboveſaid, upon a Writ of Entry upon a Diſſeizin in the *Poſt* to be ſued forth by ſome Perſon or Perſons againſt the ſaid *William Lark* touching the Tenements aforeſaid with the Appurtenances, upon ſome Voucher called a Voucher to Warranty to be made by the ſame *William Lark* his Heirs and Aſſigns upon the aforeſaid *John Clerk*, that the ſame *John Clerk* ſhould immediately appear and enter into the Warranty, and ſhould vouch over the aforeſaid *Francis Clerk* Brother of the ſame *John* to warrantize, and that the ſame *Francis* ſhould vouch over the Common Vouchee in the aforeſaid Court of the Bench to warrantize in Form aforeſaid;

and thereupon amongſt them to ſuffer the ſaid Perſon or Perſons proſecuting the ſaid Writ of Entry againſt the ſaid *William Lark* to recover the ſame Tenements againſt the ſame *William Lark* according to the Form, Effect, and Courſe of common Recoveries had, uſed, and ſuffered in the aforeſaid Court of the ſaid Lady the Queen of the Bench, as in the ſame Indenture more fully appears. And further the aforeſaid Serjeant at Law on Behalf of the aforeſaid *Robert* and *Scolaſtica* then ſhewed here in Court to the Recognitors of the Aſſize aforeſaid a certain Bill bearing Date the 28th Day of *October* in the Year of our Lord 1566, by which it appears that the aforeſaid *Francis Clerk* of *Uttexeter* in the aforeſaid County of *Stafford* Yeoman received of *John Clerk* of *London* Goldſmith Brother of the ſaid *Francis*, for his good Will given and granted to the aforeſaid *William Lark* of *London* Gentleman for a certain Farm called *Gowningſtile* in the aforeſaid Pariſh of *South-Mimmes*, which the ſaid *John Clerk* aliened to the aforeſaid *William*, the Sum of 40 *l.* of which ſaid Sum of 40 *l.* the ſaid *Francis Clerk* acquitted the ſaid *John Clerk* by the ſame Bill, as by the ſame Bill more fully appears, of which ſaid Farm the Tenements aforeſaid with the Appurtenances put in View, &c. are parcel. And further the ſame Serjeant at Law on Behalf of the aforeſaid *Robert* and *Scolaſtica* ſhewed here in Court to the Recognitors of the Aſſize aforeſaid one Part of the Chirograph of a Fine of the ſame Tenements with the Appurtenances in *South-Mimmes* aforeſaid. Which ſaid Fine was levied in the Court of the ſaid Lady the Queen now in the 8th Year of her Reign before *James Dyer*, *Anthony Brown*, *Richard Weſton*, and *John Walſh* Juſtices of the ſaid Lady the Queen of the Bench, between the aforeſaid *William Lark* Eſquire Complainant, and the aforeſaid *John Clerk* and *Joan* his Wife Deforceants, of the Tenements aforeſaid with the Appurtenances put in View, &c. amongſt other Things, by the Names of one Meſſuage, one Garden, 40 Acres of Land, 60 Acres of Meadow, 60 Acres of Paſture, and 30 Acres of Wood with the Appurtenances in *South-Mimmes*, and Common of Paſture for all Cattle in *Enfield*; by which ſaid Fine the aforeſaid *John Clerk* and *Joan* acknowledged the Tenements aforeſaid with the Appurtenances put in View, &c. amongſt other Things, to be the Right of the ſaid *William Lark*, as them which the ſame *William* had of the Gift of the aforeſaid *John* and *Joan*; and them remitted and quit-claimed from the ſaid *John* and *Joan* and their Heirs to the aforeſaid *William* and his Heirs for ever. And further the aforeſaid *John* granted for himſelf and his Heirs, that they would warrant to the aforeſaid *William* and his Heirs the aforeſaid Tenements and Common of Paſture with the Appurtenances, againſt the ſaid *John* and his Heirs for ever. Which ſaid Fine in Form aforeſaid by the aforeſaid *John* and *Joan* to the aforeſaid *William Lark* touching the Tenements aforeſaid with the Appurtenances in *South-Mimmes* aforeſaid, whereof, &c. then was levied to the Uſe of the aforeſaid *William Lark* and his Heirs for ever. By Reaſon of which ſaid Fine the ſame *William Lark* was of the ſame Tenements with the Appurtenances whereof, &c. ſeized in his Demeſn as of Fee. And the ſaid *William* being ſo ſeized thereof, one *William Gray* Gentleman and *Robert Hart* Gentleman out of the Court of Chancery of the ſaid Lady the Queen ſued forth againſt the ſaid *William Lark* a certain Writ of the Lady the Queen of Entry upon a Diſſeizin in the *Poſt*, returnable before the aforeſaid Juſtices of the ſaid Lady the Queen of the Bench at *Weſtminſter* in the County of *Middleſex* on the Morrow of *All-Souls* then next following, &c. by which ſaid Writ the aforeſaid *William Gray* and *Robert Hart* demanded againſt the aforeſaid *William Lark* the Tenements aforeſaid with the Appurtenances whereof, &c. amongſt other Things, &c. by the Names of one Meſſuage, one Garden, 40 Acres of Land, 60 Acres of Meadow, 60 Acres of Paſture, and 30 Acres of Wood with the Appurtenances in *South-Mimmes*, and Common of Paſture for all Cattle in *Enfield*, as their Right and Inheritance, and into which the ſame *William Lark* had not Entry but after a Diſſeizin which *Hugh Hunt* thereof unjuſtly and without Judgment made to the aforeſaid *William Gray* and *Robert* within 30 Years then laſt paſt, &c. And whereupon they ſaid that they themſelves were ſeized of the Tenements and Common of Paſture aforeſaid with the Appurtenances in their Demeſn as of Fee and Right, in Time of Peace, in the Time of the Lady the Queen now, taking thereof Eſplees to the Value, &. and into which, &c. And therefore they produced the Suit, &c. And the aforeſaid *William* then in proper Perſon came and defended his Right when, &c. and vouched therein to Warranty *John Clerk*, who was then preſent in Court in his proper Perſon, and freely warranted to him the Tenements and Common of Paſture aforeſaid with the Appurtenances, &c. And thereupon the aforeſaid *William Gray* and *Robert Hart* then demanded againſt the ſaid *John*, Tenant by his Warranty, the Tenements and Common of Paſture aforeſaid with the Appurtenances in Form aforeſaid, &c. And whereupon they ſaid that they themſelves were ſeized of the Tenements and Common of Paſture aforeſaid with the Appurtenances in their Demeſn as of Fee and Right, in Time of Peace, in the Time of the Lady the Queen now, taking thereof Eſplees to the Value, &c. and into which, &c. And therefore they produced the Suit, &c. And the aforeſaid *John*, Tenant by his Warranty, defended his Right when, &c. and then vouched over therein to Warranty the aforeſaid *Francis Clerk*, who likewiſe was then preſent in Court in his proper Perſon, and freely warranted to him the Tenements

and Common of Paſture aforeſaid with the Appurtenances, *&c.* And thereupon the aforeſaid *William Gray* and *Robert Hart* then demanded againſt the ſaid *Francis*, Tenant by his Warranty, the Tenements and Common of Paſture aforeſaid with the Appurtenances in Form aforeſaid, *&c.* And whereupon they ſaid that they themſelves were ſeized of the Tenements and Common of Paſture aforeſaid with the Appurtenances in their Demeſn as of Fee and Right, in Time of Peace, in the Time of the ſaid Lady the Queen now, taking thereof Eſplees to the Value, *&c.* and into which, *&c.* And therefore they produced the Suit, *&c.* And the aforeſaid *Francis*, Tenant by his Warranty, defended his Right when, *&c.* and vouched over therein to Warranty *John Howel*, who likewiſe was then preſent in his own proper Perſon, and freely warranted to him the Tenements and Common of Paſture aforeſaid with the Appurtenances, *&c.* And thereupon the aforeſaid *William Gray* and *Robert Hart* then demanded againſt the ſaid *John*, Tenant by his Warranty, the Tenements and Common of Paſture aforeſaid with the Appurtenances in Form aforeſaid, *&c.* And whereupon they ſaid that they themſelves were ſeized of the Tenements and Common of Paſture aforeſaid with the Appurtenances in their Demeſn as of Fee and Right, in Time of Peace, in the Time of the ſaid Lady the Queen, taking thereof Eſplees to the Value, *&c.* and into which, *&c.* And therefore they produced the Suit, *&c.* And the aforeſaid *John Howel* Tenant then by his Warranty defended his Right when, *&c.* and ſaid that the aforeſaid *Hugh* did not diſſeize the aforeſaid *William Gray* and *Robert* of the Tenements and Common of Paſture aforeſaid with the Appurtenances, as the ſame *William* and *Robert* then by their Writ and Declaration aforeſaid above ſuppoſed: And of this he put himſelf upon the Country, *&c.* And the aforeſaid *William Gray* and *Robert* prayed Leave to imparl thereon, and had it, *&c.* And afterwards the ſame *William* and *Robert* came again into the ſame Court by their Attorney aforeſaid. And the aforeſaid *John Howel* being then ſolemnly called did not come again, but departed in Contempt of the Court, and made Default; wherefore it was then conſidered that the aforeſaid *William* and *Robert* ſhould recover their Seizin againſt the aforeſaid *William Lark* of the Tenements and Common of Paſture aforeſaid with the Appurtenances, and that the ſame *William* ſhould have of the Lands of the aforeſaid *John Clerk* to the Value, *&c.* and that the ſame *John* ſhould have over of the Lands of the aforeſaid *Francis* to the Value, *&c.* and that the ſame *Francis* ſhould have over of the Lands of the aforeſaid *John Howel* to the Value, *&c.* and that the ſame *John* ſhould then be in Mercy, *&c.* And thereupon the aforeſaid *William Gray* and *Robert* prayed a Writ of the ſaid Lady the Queen now to have full Seizin to be made to them of the Tenements and Common of Paſture aforeſaid with the Appurtenances. And it was granted to them returnable here from the Day of *St. Martin* in 15 Days, *&c.* At which Day here came the aforeſaid *William Gray* and *Robert* by their Attorney. And the Sheriffs, *viz. Richard Lambert* and *Ambroſe Nicholas* then returned that they, by virtue of the Writ aforeſaid to them directed, the 12th Day of *November* then laſt paſt cauſed full Seizin to be given to the aforeſaid *William Gray* and *Robert* of the Tenements and Common of Paſture aforeſaid with the Appurtenances, as by that Writ they were commanded. And further the ſame Serjeant at Law gave in Evidence to the Recognitors of the Aſſize aforeſaid, that afterwards, *viz.* the laſt Day of *September* in the 11th Year of the Reign of the ſaid Lady the Queen now, the aforeſaid *John Clerk* at *London* died without Iſſue of his Body lawfully begotten, after whoſe Death, and before the Day of obtaining the Aſſize of the aforeſaid *Robert Newis* and *Scolaſtica*, the ſame *Robert and Scolaſtica* the 30th Day of *December* in the 12th Year of the Reign of the ſaid Lady the Queen now, into the Tenements aforeſaid with the Appurtenances put in View, *&c.* entered, claiming the ſame Tenements with the Appurtenances amongſt other Things, *&c.* by virtue of the Teſtament and laſt Will of the aforeſaid *Henry Clerk*, and by Force of the Forfeitures of the aforeſaid *John Clerk* and *Francis Clerk*, and by Reaſon of the Condition and Limitation in the ſaid Teſtament and laſt Will ſpecified, by them ſeverally broken and not obſerved: Upon the Poſſeſſion thereof of which ſaid *Robert Newis* and *Scholaſtica* the aforeſaid *William Lark* and *John Hunt* into the ſame Tenements with the Appurtenances put in View, *&c.* re-entered, and the ſame *Robert Newis* and *Scolaſtica* thereof diſſeized and expelled, as the ſame *Robert* and *Scolaſtica* by their Aſſize aforeſaid above ſuppoſe. And further the ſame Serjeant at Law on Behalf of the aforeſaid *Robert* and *Scolaſtica* gave in Evidence to the ſame Recognitors, that the aforeſaid *Scolaſtica* now one of the Plaintiffs, and the aforeſaid *Scolaſtica* in the aforeſaid Teſtament and laſt Will named, is the ſame and one Perſon, and not others nor divers. By Reaſon whereof the ſame now Serjeant at Law demands that the ſame Recognitors of the Aſſize aforeſaid ought to try and find the Aſſize aforeſaid of the Tenements aforeſaid with the Appurtenances put in View, *&c.* in Behalf of the ſaid *Robert* and *Scolaſtica*, *&c.* and ought to give their Verdict that the aforeſaid *William Lark* and *John Hunt* the ſaid *Robert Newis* and *Scolaſtica* of the Tenements aforeſaid with the Appurtenances put in View, *&c.* diſſeized, *&c.*

And the aforeſaid *William Lark* and *John Hunt* in their own proper Perſons ſay, that the Evidences and Allegations aforeſaid on Behalf of the aforeſaid *Robert Newis* and *Scolaſtica* above alledged are inſufficient in Law to maintain the Aſſize aforeſaid, to which they have no Neceſſity, nor are by the Law of the Land bound to anſwer; Wherefore for Want of ſufficient Evidence in this Behalf, they pray Judgment that the Jurors aforeſaid from giving their Verdict in the Premiſſes may be diſcharged, *&c.* and that the aforeſaid *Robert Newis* and *Scolaſtica* from having their Aſſize aforeſaid may be precluded. Defendants demur upon the Evidence.

Joinder.

And the aforeſaid *Robert* and *Scolaſtica* ſay that for that they have ſhewn in Evidence to the Recognitors aforeſaid ſufficient Matter in Maintenance of the Aſſize aforeſaid, which ſaid Matter the aforeſaid *William Lark* and *John Hunt* do not deny, nor thereunto in any wiſe anſwer, pray Judgment, and that the ſame Jurors thereof may be diſcharged, and that the aforeſaid *William Lark* and *John Hunt* of that Aſſize may be convicted, *&c.* * Whereupon it is ſaid to the Recognitors aforeſaid that they ſhould enquire what Damages the aforeſaid *Robert* and *Scolaſtica* have ſuſtained as well by Occaſion of the Diſſeizin aforeſaid, as for their Coſts and Charges by them about their Suit in that Behalf expended, if Judgment ſhould happen to be given for the ſame *Robert* and *Scolaſtica* in the Plea aforeſaid upon the Evidence aforeſaid. Which ſaid Recognitors ſay upon their Oath that if Judgment ſhould happen to be given for the aforeſaid *Robert* and *Scolaſtica* in the Plea aforeſaid upon the Evidence aforeſaid, the ſame *Robert* and *Scolaſtica* have ſuſtained Damages by Occaſion of the Diſſeizin aforeſaid to 13 *s.* 4 *d.* and for their Coſts and Charges to 20 *d.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the Morrow of the *Holy Trinity*, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.* The ſame Day is given to the Parties aforeſaid here, *&c.* At which Day here came as well the aforeſaid *Robert* and *Scolaſtica*, as the aforeſaid *William* and *John*, by their Attornies aforeſaid. And becauſe the Juſtices here will further adviſe of and upon the Premiſſes before they give Judgment thereon, Day is further given to the Parties aforeſaid here until the Octave of *St. Michael*, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.* At which Day the Plaint aforeſaid was adjourned by the Writ of the Lady the Queen of common Adjournment here to this Day, *viz.* from the Day of *St. Michael* in one Month then next following. At which Day here came as well the aforeſaid *Robert* and *Scolaſtica*, as the aforeſaid *William* and *John*, by their Attornies aforeſaid. And becauſe the Juſtices here will further adviſe of and upon the Premiſſes before they give Judgment thereon, Day is further given to the Parties aforeſaid here until on the Octave of *St. Hillary*, to hear their Judgment thereon, becauſe the Juſtices thereof not yet, *&c.* At which Day here came as well the aforeſaid *Robert* and *Scolaſtica*, as the aforeſaid *William* and *John*, by their Attornies aforeſaid. And becauſe the Juſtices here will further adviſe of and upon the Premiſſes before they give judgment thereon, Day is further given to the Parties aforeſaid here until from the Day of *Eaſter* in 15 Days, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.* At which Day here came as well the aforeſaid *Robert* and *Scolaſtica*, as the aforeſaid *William* and *John*, by their Attornies aforeſaid. And becauſe the Juſtices here will further adviſe of and upon the Premiſſes before they give Judgment thereon, Day is further given to the Parties aforeſaid here until the Octave of the *Holy Trinity*, to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.*

* *Note*, though the Jurors who came to find the Iſſue were by the Demurrer diſcharged therefrom, yet the Court here put them to aſſeſs Damages conditionally, and ſee the like Sty. 22. Raſt. Entr. 148. a. pl 13. 358. b. pl. 11. But it ſeems by the Caſe of *Darroſe v. Newbott* Cro. C. 143. that the moſt uſual Courſe is, in a Demurrer upon Evidence, to diſcharge the Jury without further Enquiry; though it is there admitted that it may be either enquired of by the ſame Jury conditionally, or by a Writ of Enquiry of Damages when the Demurrer is determined. And ſo it was held by Ld. Ch. B. *Montagu* at the Aſſizes in *Cambridgeſhire* 1682. Tri. per Pais 461. S. P. Ld. Raym. 60. Skin. 596.

The CASE.

THE Caſe upon the foregoing Record was recited thus. *Robert Newis* and *Scolaſtica* his Wife have ſued in this Court an Aſſize of Novel-diſſeizin againſt *William Lark* and *John Hunt*, complaining that they were diſſeized of their Freehold in *South-Mimmes* in the County of *Middleſex*, and they have made their Plaint of one Meſſuage, two Acres of Meadow, two Acres of Paſture, and two Acres of Wood with their Appurtenances, *&c.* And the Aſſize was taken by Default, and it was given in Evidence on the Part of the Plaintiffs, to prove that they were diſſeized, that one *Henry Clerk* Father of the Wife of the Plaintiff was ſeized of the Tenements put in View, and of divers other Lands and Tenements in *Uttexeter* in the County of *Stafford*, and in *Stanmer* in the County of *Hertford*, in his Demeſn as of Fee, and held them of the Biſhop of *London* in Socage. And being ſo ſeized, in the 4th and 5th Years of the Reign of King *Philip* and Queen *Mary* he made his laſt Will and Teſtament in Writing amongſt other Things, Part whereof follows in theſe Words. "Alſo this is the laſt Will and Teſtament of me the ſaid *Henry Clerk* for and "concerning the good Diſpoſition of all and ſingular my Meſſuages, Lands, Tenements, and He- "reditaments in the Counties of *Stafford* and *Middleſex*, or elſewhere within the Realm of *Eng-* "*land*, *&c.*" And by this laſt Will he gave to his Wife for her Life all his Tenements in the Pariſhes of *Oldnam-Buſh* and *Stanmer* in the Counties of *Middleſex* and *Hertford*. And he gave to *Francis Clerk* his Son one Meſſuage and all his Lands in the Pariſh of *Uttexeter* in the County of *Stafford*, in the Tenure of *John Taylor* and others, to have to the ſame *Francis* and to the Heirs of his Body lawfully begotten, the Remainder to *John* his Son and to the Heirs of his Body lawfully begotten, and ſo from Heirs to Heirs in Form following. Alſo he deviſed to his ſaid Son *John Clerk* as well all his Lands given to his ſaid Wife, after her Deceaſe, as all other his Lands and Heredi-

H. C. deviſes Land to his Son in Tail, Remainder to another of his Sons in Tail, Remainder to S. his Daughter in Tail, with divers Remainders over to others of his own Name, with this Clauſe, that if any of the Entailees alien, ſell, waſt, mortgage, or diſcontinue, &c. the ſame Eſtates, that then he or they ſhall be utterly excluded from any Benefit of the Deviſe thereof to him or them, and the Eſtate ſhall immediately come to the Party next in Tail; both the Sons commit a Forfeiture of their Eſtates, whereupon S. the Daughter (Wife of the Plaintiff) enters. And held that the ſaid Clauſe of Reſtraint in the Will is not a Condition requiring a Re-entry, but a Limitation which utterly diſſolves and determines the Eſtate, and therefore that the Plaintiffs (being next in Remainder) may well enter without being driven to their *Formedon* or other Suit, as they ſhould be upon a Diſcontinuance, becauſe here the Eſtate ends by collateral Limitation, ſo that the Act which ended it by the Limitation could not make a Diſcontinuance, for the doing of the Act and the End of the Eſtate come together at one and the ſame Inſtant. S. C. N. Bendl. 196. pl. 235. Swinb. 157. Nelſ. Lex. Teſtam. 423. *Note*, in 10 Co. 42. a. it is ſaid that in *Hill.* 36 *Eliz. Roll* 339, this ſame Matter came before the Court of K. B. and was there reſolved by the C. J. and two others of the J. contrary to the Reſolution here made. *Sed quære veritatem*, for no Doubt the Caſe there intended is that of *Bateman v. Allen* in Cro. E. 437. by the Report of which the Matter in Law never came in Queſtion, nor did the Judges give any Opinion at all upon it, for the Caſe went off upon a Defect in the ſpecial Verdict. And it appears in Moor 543. pl. 721. where this Caſe came before the Court of K. B. in *Hill.* 38 *Eliz. Roll* 602. that Judgment was given according to the Opinions of 3 of the J. againſt the C. J. agreeably with the Reſolution here reported, and no Mention is there made of any ſuch Judgment given in *Hill.* 36 *Eliz.* as the Ld. *Coke* ſpeaks of. Vide 2 And. 139. 4 Leon. 83. 2 Brownl. 72.

it ſee agreed acc. in Gulliver v. Astby 1. Blackst. Rep. 610. 613.

taments

taments not deviſed within the Realm of *England*: To have to the ſame *John Clerk*, and to his Heirs Males of his Body lawfully begotten, ſo that he pay at a certain Time to the ſaid *Francis* 30 *l.* And for Default of ſuch Iſſue, the Remainder to the ſaid *Francis* and to the Heirs Males of his Body lawfully begotten, and for Default of ſuch Iſſue, the Remainder to any other Heir or Heirs Males of his own Body lawfully begotten, from one to another ſucceſſively, and to the Heirs Males of the Body of ſuch Heirs lawfully begotten; and for Default of ſuch Iſſue, and when all ſuch Heirs are dead and ſpent, the Remainder to his Daughter *Scolaſtica* (who is now one of the Plaintiffs) and to the Heirs Males of her Body lawfully begotten, with divers other Remainders in Tail to divers having the Name of *Clerk*, and at the End the Remainder to the Maſter and Wardens of his Company of Pewterers of the City of *London*, (of which he was free) and to their Succeſſors for ever. And after that there is this Clauſe in his ſaid Will. "And leſt it might appear to ſome "not well digeſting the whole Meaning of this preſent Teſtament and laſt Will, that I have ſome-"what inconſiderately or not upon good Reſpects entailed theſe my ſaid Lands and Tenements "with their Appurtenances, I have thought good here alſo to declare the Conſiderations me there-"unto moving, of which the one is, for that I would the ſame my Lands and Tenements ſhould "as long as might be continue and be amongſt the Name of the *Clerks*, to the farther Memorial of "mine own Name. The ſecond is, that I would none of the Entailees aforeſaid touching the 3 "ſame to alien, bargain, ſell, waſt, ſeparate, or conſume the ſame or any Part of the ſame, but "every one ſucceſſively as the Thing ſhall deſcend and happen unto him, her, or them of the ſame "mine Entailees, honeſtly, quietly, huſbandly, and in reaſonable, frugal, and profitable wiſe dur-"ing his, her, or their Time, with Thanks towards me for ſuch my gentle Remembrance of them, "ſhould uſe and take the Commodity and Profit of the ſame towards his own ſo much Advance-"ment, and yet alter not nor hinder my ſemblable good Meaning towards him, her, or them "that ſhall ſucceed him, her, or them therein; ſince as equally, freely, and at mine own Election "I may mean and procure ſeverally the Benefit and Commodity of every of them, as beſt ſeemeth "me. According to which my Deviſe and Diſpoſing of ſuch my Lands and Tenements I will and "my whole Mind is, (notwithſtanding whatſoever is aforeſaid) that if any of the ſaid Perſons be-"fore entailed to my ſaid Lands or Tenements, or their Heirs, do unlawfully vex, diſquiet, or "trouble any other of them for the ſame my Lands or Tenements, or any Part of them, or mort-"gage, bargain, ſell, or pledge the ſame my Lands or Tenements, or any Part thereof, or his "Intereſt, Poſſibility, or Title of or in the ſame, in Part or in all, or in any undue wiſe entangle, "or incumber, or hurtfully diſmember, diſſipate, or waſt the ſame or any Part thereof, otherwiſe "than I ſhall leave it unto them to be uſed and enjoyed, that then and from thenceforth all and "every ſuch Perſon and Perſons, and his or their Heirs, ſo vexing, troubling, or diſquieting that "other Perſon or Perſons ſo entailed with him touching the ſame my Lands and Tenements, in "Part or in the whole, or mortgaging, ſelling, pledging, entangling, incumbering, hurtfully "diſmembering, diſſipating, or waſting the ſame my Lands and Tenements, or any Part of them, "ſhall forthwith be clearly diſcharged, excluded, and diſmiſſed as touching the ſaid Entail of mine, "and the Conveyance by Words aforegoing of the Entail of my ſaid Lands and Tenements to-"wards him or them to be of no Force, Benefit, or Advantage towards him or them, but the "ſame my Lands and Tenements immediately to deſcend and come unto the Party next in Tail "unto him or them, as effectually as if ſuch diſorderous Perſon or Perſons had never been mind-"ed of in this my preſent Teſtament and laſt Will." And afterwards the ſaid *Henry Clerk* died, the ſaid *John Clerk* being his Son and Heir, after whoſe Death the ſaid *John Clerk* entered into the Tenements put in View, and was thereof ſeized in Tail by virtue of the ſaid Teſtament and laſt Will, and he paid to the ſaid *Francis* the 30 *l.* according to the ſame laſt Will. And further it was given in Evidence that the ſaid *John Clerk* and *Francis* by an Indenture ſhewn forth for 300*l.* covenanted, bargained, and granted with the ſaid *William Lark*, that the ſaid *John Clerk* and *Joan* his Wife, before the Feaſt of *St. Luke* then next following, ſhould levy a Fine of the ſaid Tenements put in View to the ſaid *William Lark* and to his Heirs, to the Uſe of him and his Heirs, and that after the ſaid Fine levied, certain Perſons ſhould recover the ſame Tenements againſt the ſaid *William Lark*, in which Recovery he ſhould vouch to Warranty the ſaid *John Clerk*, who ſhould enter into the Warranty, and ſhould vouch over the ſaid *Francis Clerk*, who ſhould vouch over the common Vouchee, according to the Courſe of common Recoveries. And further a Bill was ſhewn in Evidence, by which it appeared that the ſaid *Francis* had received of the ſaid *John* his Brother 40*l.* for his good Will granted to the ſaid *William Lark* for the buying of the Tenements put in View and others; and alſo one Part of the Chirograph of the ſaid Fine levied to the ſaid *William Lark* in the 8th Year of the preſent Queen in Manner before covenanted was ſhewn in Evidence. And the ſaid *William Lark* being ſeized thereby, it was ſhewn that the Recovery with the Vouchers aforeſaid were had and executed againſt the ſaid *William Lark* by *William Gray* and *Robert Hart*. And afterwards in the 12th Year of the Reign of the preſent Queen the ſaid *John Clerk* died without Iſſue, after whoſe Death the ſaid Plaintiffs entered into the Tenements put in View, claiming them by Force of the ſaid Teſtament and laſt Will of the ſaid *Henry Clerk*, and by Reaſon of

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the Forfeitures of the ſaid *John Clerk* and *Francis*, and by virtue of the Condition and Limitation in the ſaid Teſtament and laſt Will by them broken and not obſerved; upon the Poſſeſſion of which Plaintiffs the ſaid *William Lark* and *John Hunt* re-entered, and expelled them. And it was further given in Evidence that the ſame *Scolaſtica* ſpecified in the ſaid Teſtament and laſt Will, and the ſame *Scolaſtica* now one of the Plaintiffs, is one ſame Perſon and not divers. Upon all which Matter it was ſaid on the Part of the Plaintiffs that the Jury ought to find for the Plaintiffs. And the ſaid *William Lark* and *John Hunt* demurred in Law upon the ſaid Evidence, and the Plaintiffs joined in Demurrer. And thereupon it was ſaid to the Jury by the Court that they ought to enquire of the Damages and Coſts to be adjudged to the Plaintiffs, if it ſhould happen that Judgment ſhould be given for them, whereupon they aſſeſſed for Damages 13 *s.* 4 *d.* and 20 *d.* for Coſts, if ſo be that Judgment ſhould be given for the Plaintiffs.

Mich. Term 13 & 14 Eliz.

And the Matter was afterwards argued at the Bar, *ſed non interfui.* And now this preſent *Michaelmas* Term 13 & 14 *Elizabeth* it was argued by all the Juſtices of the Common-Bench, at all whoſe Arguments I was preſent, except only at Part of the Beginning of the Argument of *Dyer* Chief Juſtice touching the Exceptions, and therefore as to that which he ſaid before my coming, I here report it from the credible Information of others. And beſides the Matter in Law, divers Exceptions were taken at the Bar to the Manner of giving the Evidence, to which the Court argued. The

Exception 1, Whether Part of a Teſtament may be given in Evidence. Tri. per Pais 463.

firſt Exception was, for that the whole laſt Will and Teſtament was not ſhewn, but Part of it only, for the ſhewing of it commences with this Word *(alſo) viz. alſo this is the laſt Will and Teſtament of me the ſaid* Henry *for and concerning the good Diſpoſition of all and ſingular my Meſſuages, &c.* which Word *(alſo)* purports that that which is rehearſed is but a Part, and that more went before. And the Words *(Part whereof here follows)* carry this Meaning too. And foraſmuch as the laſt Will is the Foundation of the Evidence, it was ſaid that the Plaintiffs ought to ſhew it fully and entirely as it is, for it may be that there is ſome other Matter of Subſtance precedent, as a Condition or other Circumſtance, limited to all that which comes after. For which Reaſon it was ſaid that the whole ought to be ſhewn.

[a] Vin. Abr. tit. Faits M. a. pl. 22. 23. 24. 25.

But all the Juſtices argued to the contrary. [a] For the Party in any Title, or Bar, or other Matter, where Land or other Thing may be gained or loſt, ſhall not be forced to ſhew more than that which ſerves his Purpoſe. As in Aſſize a Man ſhall plead in Bar a Feoffment which is upon Condition,

[b] See Ante 65 (f). and 105 (a). and the Books there cited.

without making Mention of the Condition in it. And ſo if an Obligation is upon Condition, the Party ſhall declare upon it without mentioning the Condition. [b] So if there is an Act of Parliament wherein there are divers Branches, a Man may make Mention of one Branch only, if ſo be it ſerves for him. [c] But *Harper* Juſtice ſaid, if in the Act there is a *Proviſo*, or an Exception,

[c] S. P. 10. H. 7. 9. a. 16. a. Bro. Pleadings 164. Ld. Raym. 120 *Per Treby* C. J. 4 Bac. Abr. 656. Vin. Abr. tit. Statutes E. 3. pl. 16.

or other Matter, which goes to every Branch, there the Party ought to plead ſuch *Proviſo*, or Exception, or other Matter, becauſe the ſame is Parcel of every Branch, ſo that the Branch is not perfect Law without it: [d] But in Matters of Record, where the Record in Part makes for the Party, as a Fine or Recovery of one Acre, where there are 20 Acres in the Record, there the whole Record ought to be ſhewn, becauſe the Original is entire, and ſo is the Record which is grounded upon it, and therefore it ought to be entirely ſhewn; but ſo is not the Matter here. And *Weſton* Juſtice ſaid, that this which is ſhewn purports that it is all of the Will which concerns the Land,

[d] Vin. Abr. tit. Faits M. a. pl. 26. See Ante 65 (d), and the Books there cited.

for the Stile is, *Alſo this is the laſt Will and Teſtament of me the ſaid* Henry *for and concerning the good Diſpoſition of all and ſingular my Meſſuages, Lands, &c. in the Counties of, &c. or elſewhere within the Realm of* England, *&c.* which Words *(all and ſingular)* and *(within the Realm of* England) contain all the Land, and ſhall be intended all that concerns the Land, and that nothing is omitted as to Land, and if that which is omitted concerns Goods or Chattles, it is nothing to the Purpoſe. Wherefore the Exception was diſallowed by the Court.

Exception 2. Whether the Chirograph of a Fine may be given in Evidence, being without Seal. Tri. per Pais 463. Vin. Abr. tit. Evidence. A. b. 34. pl. 1. 2 Sid. 145. 1 Finch 185, 186. 2 Finch 400. Hardr. 119. 1 Roll. Abr. 691. Q. pl. 3. 2 Mod. Entr. 359. a. pl. 10.

Another Exception taken was, for that the Fine levied by *John Clerk*, which was the Cauſe of the Loſs of the Land to him, was not ſhewn under the Seal of the Court or the Great Seal, but one Part indented of the Chirograph was ſhewn forth, which the Jurors are not bound to give Credit to, becauſe it wants a Seal. But all the Juſtices argued againſt the Exception. [e] For in ſuch general Iſſue the Jurors may find the Fine of themſelves, if they know of it, although it be not ſhewn by any of the Parties. And if it be true that there is ſuch a Fine, they may find it upon the Credit of any one who has ſeen it, and the Part indented which is ſhewn forth is the uſual Evidence of the Truth of ſuch Fine, and becauſe it is only an Inducement of Truth to the Jurors, the Party cannot demur upon it, for the Subſtance of the Matter is, that there was ſuch a Fine, which reſts amongſt the Records, and that is the Subſtance of the Matter, and the Part of the Chirograph is but an Image of the Truth. So that inaſmuch as the levying of the Fine, which is the Subſtance, is not denied, but confeſſed by the Demurrer, the Jury have good Cauſe to find it, and from thence it follows that the Defendants had no Cauſe to demur upon it. Wherefore the Juſtices diſallowed the Exception.

[e] So is the Law now clearly that the Jury may find Matters of Record, though not ſhewn in Evidence, contrary to the Opinions formerly, S. P. Hob. 227. 1 Leon. 206. 2 H. H. P. C. 207. Tri. per Pais 207. 1 Finch 185. 2 Finch 399, 400. Poſt 411 (d). See Vin. Abr. tit. Trial Q. f. pl. 3. 5.

The third Exception was, for that the Recovery was not ſhewn under the Seal, or at leaſt the Roll of it ſhould have been alledged particularly, ſo that the Court might ſee it, becauſe it is reſident in this Court, and they might have informed the Jury of it after they had peruſed it: And foraſmuch as the Recovery is the Foundation of the Plaintiff's Title, (for it deſtroyed as well the Eſtate of *Francis Clerk*, who came in as Vouchee, as the Eſtate of *John Clerk)* it ought to have been ſhewn in ſuch Manner as to enforce the Jury to believe it, and becauſe it is not, the Evidence is inſufficient in this Point. And of this Opinion was *Harper* Juſtice.

Exception 3.

Whether a Recovery may be given in Evidence without Seal. Tri. per Pais 464. 1 Finch 185, 186. 2 Finch 400. 2 Rol. Abr. 691. Q. pl. 3. 2 Mod. Entr. 359. a. pl. 10.

But all the other Juſtices argued to the contrary. For upon the general Iſſue, as this is here, the Jury may find Things which prove or diſprove the Seizin or Diſſeizin, whether they be Matters of Record or otherwiſe, if ſo be they precede the Seizin or Diſſeizin. For ſuch Records may be the Cauſe of the Seizin or Diſſeizin, for they make and deſtroy a Right, as Fines and Recoveries and ſuch like do; and therefore if the Parties don't diſcover them in the Pleading, the Jury could not give a right Verdict if they could not find them, [a] and whatever they may take Conuſance of of themſelves may be given in Evidence by Parol, or by Copies, or by other Argument of Truth. [b] But in Pleading a Man cannot make himſelf a Title in any Caſe by a Record, without ſhewing it under the Great Seal. [c] And if a Record be pleaded in Bar, the Party ſhall have a Day to bring it in under the Great Seal, as *Weſton* Juſtice ſaid, and ſo he ſhall plead it without ſhewing it: But ſuch Day to bring it in ſhall not be where it is given in Evidence, but the finding by the Jury is ſufficient, and [d] they may find it of themſelves, although it is not ſhewn to them in Evidence; [e] though perhaps they ſhall not be forced upon Pain of Attaint to find it, if it is not ſhewn to them under Seal, but nevertheleſs they may find it, and it ſhall be well done if it is true. [f] And as they may find it, ſo by the ſame Reaſon they may take Inſtruction concerning it from every Circumſtance that carries an Appearance of Truth. And when the Tenants demur, thereby they confeſs that there is ſuch a Record, [g] for a Demurrer upon Evidence goes to the Law upon the Matter, and not to the Truth of the Fact, for it admits that to be true, but denies the Operation of the Law thereupon, and if the Party will not confeſs the Truth of the Matter given in Evidence, then he ought to ſay ſo, and put it upon a Jury to be tried, and if they find it to be true where it is falſe, he ſhall have an Attaint; ſo that a Demurrer upon Evidence never denies the Truth of the Fact, but confeſſes the Fact, and denies the Law to be with the Party who ſhews the Fact. So here by the Demurrer he has confeſſed the Recovery, for which Reaſon it is not neceſſary to ſhew it under the Seal, or in the Roll, for it is admitted to be as it is alledged. And *Walſh* Juſtice in his Argument recited the Caſe in [h] 26 *Aſſ. pl.* 2. which was before cited at the Bar, and was thus; A Man, ſeized of a Meſſuage in *Viſe*, had Iſſue a Son and two Daughters, and died ſeized, having a Wife called *Amy*, and *Amy* kept herſelf in by Free-Bench, which Cuſtom held Place in the Town of *Viſe*, the Son, after the Death of the Father, committed Felony, and was arraigned and attainted before the Bailiffs of *Viſe*, and hanged, and had no Iſſue, *Amy* leaſed her Eſtate to one *R.* and died, and *R.* continued in Poſſeſſion eight Years after the Death of *Amy*; one of the Daughters died, leaving Iſſue the other Daughter, entered upon *R.* without cla ming any Thing to the Uſe of the Nephew, and *R.* ouſted her, and ſhe alone brought an Aſſize againſt *R.* and others, and Jointenancy was pleaded by one named in the Aſſize, and over to the Aſſize, and all this Matter was given in Evidence, and the Sole-tenancy was found, and the whole Matter aforeſaid was alſo found: And as to the Plaintiff's entering into the whole to her own Uſe, it was held that ſhe being ouſted ſhould have an Aſſize of the whole; and as to the other Matter, ſince the Felony whereof the Jury ſpoke was not pleaded, nor ſhewn forth in Evidence *ſub pede ſigilli*, the Court paid no Regard at all to it; wherefore it was awarded that the Feme Plaintiff ſhould recover together with Damages, *&c.* And he ſaid, if it be admitted that the Law was ſo there, yet it is not like to the preſent Caſe, for there the Aſſize was charged in one Court, and the Record of the Attainder was in another Court, but here the Jury was charged in this Court, and the Record of the Recovery is reſident in the ſame Court, ſo that if the Defendants would have denied it, it might have been preſently ſeen. And ſo there is a Diverſity. *But note, there is another Cauſe alſo alledged in the ſaid Book of Aſſizes*, viz. *for that it was not alledged that the ſaid Attainder before the Bailiffs of* Viſe *was in a Court of Record, and if this be not material, it ſeems to me that the ſaid Judgment was not warranted by Law; for in many Caſes in the Book of Aſſizes, and elſewhere almoſt infinitely, Juries have enquired of Matters of Record, and the Judgment has purſued it accordingly.* Wherefore the whole Court (except *Harper)* held that the Evidence was good, notwithſtanding the ſaid third Exception.

[a] S. P. agreed Alleyn. 18. Vin. Abr. tit. Evidence T. b. 45. pl. 3.

[b] S. P. Style 22a *Per Roll.* J. Vin. Abr. tit. Evidence A. b. 62. pl. 1. 2. T. b. 45. pl. 3.

[c] Co. Lit. 128. b.

[d] See Ante 410 (e) and the Books there cited. Vid. Dy. 239. pl. 41.

[e] 1 Finch 186. 2 Finch 400.

[f] S. P. agreed Alleyn 18.

[g] 1 Lev. 87. 2 Sid. 147. Heath Max. 95. Tri. per Pais 461, 464.

[h] Fitz. Aſſize 233.

The fourth Exception taken to the giving of the Evidence was, for that the Remainder is only limited to the Wife of the Plaintiff upon Failure of Iſſue, or upon Forfeiture of *John Clerk* and *Francis*, and alſo upon Default of Heir Male of the Body of the Deviſor lawfully begotten; for which Reaſon the Plaintiffs in their Evidence ought to aver that *Henry Clerk* had no other Iſſue Male but the ſaid *John* and *Francis*, and as it is, it ſtands indifferent, and may be taken as well that he had as that he had not, and if he had any other Iſſue Male, then the Wife of the Plaintiff ſhall not take any Advantage of the Determination of the Eſtates of the ſaid *John* and *Francis*, but ſuch Iſſue Male ſhall take Advantage of them; wherefore, in order to make themſelves next to the Eſtates determined, and to enable themſelves to take Benefit of them, the Plaintiffs ought to aver that the ſaid *Henry Clerk* had no other Iſſue Male. As if Land is given

Nota bene by the Reporter.

Exception 4.

A Remainder in Tail is deviſed to A. upon Forfeiture of B. and C. and upon Failure of Heir Male of the Deviſor; B. and C. commit a Forfeiture of their Eſtates, the Deviſor dies; Whether or no it ſhall be neceſſary for A. who makes Title to the Remainder in Tail, in giving the ſame in Evidence to aver that the Deviſor died without Iſſue Male. Vide Godb. 36.

to a Man and to his Heirs Males of his Body begotten, the Remainder to another in Fee, if he in the Remainder brings a *Formedon* in the Remainder, he ought to aver in his Count, and alſo ſhew in the Writ, that all the Iſſues are dead; and ſo ought the Plaintiffs here to ſhew in their Evidence that *Henry Clerk* had no other Iſſue Male. And of this Opinion was *Harper* Juſtice.

But all the other Juſtices argued to the contrary. For they held that all which the Plaintiffs gave in Evidence was to the Intent to perſuade the Jury that the Plaintiffs had a good Title and Right of Entry. [a] And to this End all the Words of Evidences ought to be inclined, for it cannot be preſumed that a Man will ſhew a Thing which makes againſt himſelf, but which makes for him, and what he ſays ſhall be applied as he intends it, *viz.* to his own Advantage, or elſe it would be conſtrued contrary to his Intent; [b] but if it was in a Writ or Declaration, or other Pleading, Certainty ought to be ſhewn, for there the Party muſt anſwer to it, and the Court muſt adjudge upon it, and that which the Party ſhall be compelled to anſwer to, [c] and which is the Foundation whereupon the Court is to give Judgment, ought to be certain, or elſe the Party would be driven to anſwer to what he does not know, and the Court to give Judgment upon that which is utterly incertain. But where the Matter is ſo far gone that the Parties are at Iſſue, or that the Inqueſt is awarded by Default, ſo that the Jury is to give a Verdict one Way or other, there, if the Matter is doubtful, they may found their Verdict upon that which appears the moſt probable, and by the ſame Reaſon that which is moſt probable ſhall be good Evidence. [d] So here, inaſmuch as it is not ſhewn that *Henry Clerk* had any Iſſue Male beſides the ſaid *John* and *Francis*, it ſhall not be intended that he had any other, and if it was really ſo that he had any other Iſſue Male, the Defendants ſhould have diſcovered it to the Jury on their Part, and without that it ſhall not be intended. Wherefore the whole Court (except *Harper*) diſallowed the ſaid fourth Exception.

[a] 2 Rol. Abr. 676. pl. 18.

[b] See Ante 84. (*) and the Books there cited.

[c] 2 Rol. Abr. 676. pl. 18.

[d] Kitch. 451.

The Matter in Law.

And as to the principal Matter, firſt it was held by all the Juſtices, that where *Henry Clerk* by his ſaid laſt Will deviſed that if any of them, to whom he had limited his Land, entangle or incumber it otherwiſe than he had left it to them, that ſuch Perſon ſo doing ſhould be diſcharged, excluded, and diſmiſſed touching the Entail, and that the Entail as to him ſhould be of no Force, the Acts which are here done, *viz.* the Bargain, Fine, and Recovery are ſuch Acts as give Title and Occaſion to defeat the Eſtates-Tail limited to *John* and *Francis Clerk*: For by the Fine with Proclamations the Entail of *John* is barrable, and by the Recovery the Tails as well of *Francis Clerk* as of *John Clerk*, as to them and the Heirs Males of their Bodies, are defeated, and ſo within the Words and Intent of the Penalty of the ſaid laſt Will of *Henry Clerk*. But the great Doubt was, whether the Penalty, which *Henry Clerk* has added to the Act done to take away the Tail, be a Condition, or a Limitation and no Condition, and how it ſtands with Law, and who ſhall defeat the Tails, and by what Means. And as to this, all the Juſtices argued that it is no Condition, for if it ſhould be a Condition, and ſhould be broken by any in Poſſeſſion or in Remainder, then the Heir, to whom the Privity of Conditions in Inheritances deſcends, ſhould enter, and thereby defeat all the Eſtates. For if a Man makes a Leaſe for Life, the Remainder in Tail, the Remainder in Tail, the Remainder in Fee, upon Condition that ſome of them in the Remainder ſhall do ſuch an Act, there, if it is not done, the Feoffor and his Heirs may enter, and thereby defeat as well the Eſtate in Poſſeſſion as all the Remainders, [e] for he that re-enters for a Condition broken is in of ſuch Eſtate as he had before the Condition made, from whence it follows that he has defeated all the Eſtates. But here it was not the Deviſor's Intent that all the Eſtates-Tail ſhould be utterly defeated, for in his Declaration and Diſcourſe made after the Limitation of the Eſtates-Tail he expreſſes that his Mind was, that the ſaid Hereditaments ſhould continue in the Name of the *Clerks*, to the Memorial of his own Name; and further he declares, that he would not have the Eſtates defeated, but that they ſhould endure in frugal and profitable Manner, with Thanks towards him for ſuch his gentle Remembrance of them, and not to hinder his Meaning towards the others who ſhould ſucceed; and beſides this he declares, that if any of them attempt any Act contrary to his Limitation, the Tenements ſhall come to the Party next in Tail, as if ſuch diſorderous Perſon had never been mentioned in his Will. From which Clauſes it manifeſtly appears to all to be his Intent, that the Eſtate-Tail of one ſhould not be defeated by the Act of another, and the Words of every Man expreſſed in his Will ſhall be taken and expounded according to his Intent and Meaning, from whence it follows [f] that the Penalty expreſſed ſhall not be a Condition to defeat all the other Eſtates. [g] And hereupon the Caſe in 29 *Aſſ. pl.* 17. was cited by *Harper* and *Dyer*, where a Man ſeized in Fee of Lands deviſeable deviſed them to one for Term of his Life, and that he ſhould be Chaplain, and ſhould ſing for his Soul all his Life, ſo that after his Death the ſaid Tenements ſhould remain to the Commonalty of the ſame Town, to find a Chaplain perpetual for the ſame Tenements, and he died, and the Deviſee being of ſufficient Age to be a Chaplain entered into the Tenements, and held them for ſix Years, but was no Chaplain, and the Heir of the Deviſor ouſted him, and the Deviſee brought an Aſſize, and the Heir pleaded to the Aſſize, and all this Matter was found by the Aſſize, and the Juſtices encouraged the Aſſize as much as they could to find for the Plaintiff, and at laſt they ſaid that the Plaintiff was ſeized and diſſeized, for there it ſeemed to the Court that the Limitation that he ſhould be Chaplain, and ſhould ſing for him, was no Condition, for the Breach whereof the Heir might enter, for if

[e] M. 8. H. 7. 7. b. *Per Keble.* Bro. Condition 134. Co. Litt. 202. a.

[f] Treat. of Wills 46.

[g] Fitz. Aſſize 281. Bro. Condition 111. Vide et Nota 10 Co. 40. a. b. 41. a. 2 And. 139. 2 Brownl. 68. Perk. § 563. Dy. 127. pl. 56.

he might enter, thereby the Remainder would be defeated, and it appears that it was not the Intent of the Deviſor to defeat the Remainder, becauſe it was given to find a Chaplain perpetual, and the Chaplain could not be found perpetually if the Remainder was annulled. [a] From whence it appears that Words in a Will, which ſeemingly tend to a Condition, ſhall not in the Law be taken for a Condition, when it appears to be the Intent of the Party that the whole Eſtate ſhall not be defeated. So here the Words of the Penalty ſhall not make a Condition to defeat all the Eſtates.

[a] Vin. Abr. tit. Deviſe E. c. pl. 2. See like Point adjudged upon this Ground, 3 Co. 21. a. *Wellock v. Hammond.* Pollexf. 558. 2 Brownl. 72, *arguendo.* Dy. 316. pl. 5. Swinb. 161. Godolph. Orph. Leg. 364. § 5. Nelſ. Lex Teſtam. 317. Treat. of Wills 47.

Another Reaſon was alſo given in Proof hereof, and that was, becauſe the Tail was firſt appointed to *John Clerk*, who was his eldeſt Son and Heir, and it was the Intent of the Deviſor that he ſhould be reſtrained from diſcontinuing or barring his Tail, as well as any of the others, and if it ſhould be taken to be a Condition, and that there was no other Penalty for the Breach of it but Entry only, then if the eldeſt Son himſelf, who is Donee and Heir, makes a Feoffment, thereby the Condition is extinct, for the Title of the Condition paſſes in the Land, ſo that he cannot enter for the Condition broken by himſelf contrary to his own Feoffment, and as he is at Liberty to make a Feoffment, ſo is he to ſuffer a Recovery, and thereby to bar all the Remainders, which would be contrary to the Intent of the Deviſor, who had a Mind that he ſhould be reſtrained as well as the others; and therefore, if his Intent may hold Place, it ſhall not be a Condition, but there ſhall be ſome other Penalty to the eldeſt Son, which is greater to him than a Condition carries along with it, if he breaks the Intent of the Deviſor. And ſo all the Juſtices unanimouſly agreed that it was not a Condition which implies a Re-entry.

Further it was moved, that if the Penalty ſhall not amount to a Condition containing a Re-entry, whether or no it ſhall be a Limitation in Eſtate, and if it be a Limitation, whether Entry is neceſſary before it be ended, and whether the next in Remainder be privy enough to make Entry. [b] For the Lord *Dyer* ſaid, if a Man makes a Gift in Tail, upon Condition that if the Donee does ſuch an Act his Eſtate ſhall ceaſe, *Frowick* holds in 21 *H.* 7. that if he does the Act, his Eſtate ſhall not ceaſe before Entry, becauſe it is an Eſtate of Inheritance, which ſhall not ceaſe by Parol without an Entry in Fact, but otherwiſe it ſhould be if the Eſtate was but for [c] Life, by the Opinion of *Frowick*, as he cited it, for an Eſtate for Life may paſs by Parol, as by Surrender, and ſo may be determined by Parol.

[b] H. 21. H. 7. 12. a.

[c] Vide Contra Ante 135 (e) and the Books there cited. Pollexf. 78.

And as to this all the Juſtices argued, that the Clauſe in the Will which ſaith, "That the Per-"ſon mortgaging or entangling ſhall be clearly diſcharged, excluded, and diſmiſſed touching the "Entail, and that the Conveyance of the Entail ſhall be of no Force, Benefit, or Advantage to-"wards him or them," ſhall be taken and expounded in Law as a Limitation, that is to ſay, it ſhall be taken in Senſe to be a Deviſe to him in Tail, until he mortgage, alien, pledge, entangle, incumber, or does the other Acts there expreſſed. And when he ſhall do any of theſe Acts, then the Eſtate ſhall end as fully as if he had died without Iſſue Male; ſo that after the Act done the Right of the Tail ſhall ceaſe, and the Tail is merely diſſolved. As if Land is given to a Man in Tail as long as *J. S.* ſhall have Iſſue of his Body, or until *J. S.* ſhall die without Iſſue of his Body, there if *J. S.* dies without Iſſue, the Land ſhall revert, and the Freehold in Law ſhall be preſently caſt upon the Donor, ſo that he has the Poſſeſſion in Law before Entry. And as fully is the Eſtate and Right of the Entail ended in this Caſe here, when he does any of the Acts, for when the Intent is ſhewn by Words, and the Words are not aptly put, then ſuch Senſe ought to be put upon the Words as is ſuitable to the Intent; and foraſmuch as in Senſe ſuch Words amount to Limitations, they ſhall be taken as a Limitation, and eſpecially when the Caſe is upon a Deviſe, where the [d] Intent only is regarded, and the Words, although they are not apt in Law for the Matter, ſhall be drawn to the Intent. [e] For, as *Harper* ſaid, the Deviſor ſhall be accounted *inops conſilii*, becauſe Men moſt commonly make their Wills when they are at the Point of Death, and have not Time to ſeek Counſel, for which Reaſon the Law ſhall be their Counſel, and ſhall interpret the Words, and direct the Operation of them according to the Intent of the Party. [f] For in a Man's laſt Will he has Power like unto an Act of Parliament, as *Dyer* termed it, ſo that the Law ſubmits itſelf to the Matter, Order, and Form limited in laſt Wills, and requires that the ſame ſhall be obſerved. Wherefore inaſmuch as it appears here to be the Intent of the Deviſor, that he who does any of theſe Acts ſhall loſe his Eſtate-Tail, the Law, which is deſirous that the Intent ſhould be obſerved, ſays that the Tail is limited to continue until the Act prohibited is done; and ſo it is conſonant to Law. And *Dyer* reſembled this to the Caſe of an Action *cauſa matrimonii prælocuti*, where the Eſtate ſhall be defeated by the Intent, without an expreſs Condition in Deed. [g] And ſo where Land is given to Huſband and Wife during the Coverture, or as long as ſuch a one is Abbot of ſuch a Place, theſe are Times of Limitations, and the Eſtate ſhall end if the Huſband or Wife die in the one Caſe, and if the Abbot be depoſed in the other Caſe. [h] And each of the Juſtices cited the laſt Caſe which *Fitzherbert* puts in the Writ of *ex gravi querela* in his *Natura Brevium*, which is thus; A Man deviſes Land in *London* to his Wife for Life, upon Condition that if ſhe marries the Land ſhall remain to his Son in Tail, and for Default of ſuch Iſſue, the Remainder to the right Heirs of the Donor in Fee, the Wife takes Huſband, and ſhe and the Huſband occupy the Land, he in Remainder dies without Heir of his Body, the right Heir of the Donor ſhall have a ſpecial Writ of *ex gravi querela*, directed to the Mayor and Sheriffs of *London*, rehearſing this ſpecial Deviſe and the ſaid Matter, commanding them to call the Parties, and to hear them, &c. and

[d] See Ante 162 (m) and there Books there cited.

[e] See Ante 162, 163. Poſt 550.

[f] Cro. E. 525. Bridgm. 135. Treat. of Wills 1. Forteſc. Rep. 21.

[g] Litt. § 380. 382. 10 Co. 41. b. 42. a. 1 Finch 86. 2 Finch 105. Ante 242 (t).

[h] F. N. B. 201. c. 10 Co. 41. a. Dy. 127. pl. 53.

and to do right: So, he ſays, it appears that he in Remainder ſhall have Advantage of the Condition if it be broken, but that ſhall be by way of ſuing this Action, and not of Entry by Force of the Condition not performed, and the ſaid Writ appears in the *Regiſter*: And all this appears in the ſaid *Natura Brevium*. And the Juſtices ſaid that the Words of the Condition there mentioned are not properly a Condition, but Words of Limitation, ſo that in Senſe the Caſe is thus; A Man deviſes Land to his Wife for Term of her Life, if ſhe ſo long continue ſole, and if ſhe marries, the Remainder in Tail, the Remainder to his own right Heirs, ſo that there the Marriage is the Limitation which determines the Eſtate, and the Remainder there commences upon the Eſtate ended. But *Dyer* ſaid that where it ſeemed to *Fitzherbert* in that Caſe that the Heir of the Donor might not enter, in his Opinion he might well enter. And ſo this is a good Precedent for our Caſe, that Words of Condition there put in a Will ſhall not be taken as a Condition, but as a Limitation, for ſo they are moſt conſonant to Law. [a] And *Dyer* cited a Conveyance which *Fitz-James*, Chief-Juſtice of the King's-Bench, cauſed to be made to his Wife in *Anno* 28 *H.* 8. which he had ſeen, whereby *Elizabeth* his Wife had an Eſtate for Life with Remainder over, upon Condition that if ſhe ſhould make a Diſcontinuance of other Land which was aſſured to her, that then her Eſtate ſhould ceaſe, and he in Remainder ſhould enter. And it is to be preſumed that he being Chief-Juſtice made this Eſtate with the Aſſent of the other Juſtices who were his Companions, and that they took it that the Condition there expreſſed was not a Condition, but a Limitation which ſhould end the Eſtate of his Wife, ſo that that being determined, he in Remainder ſhould enter. And if it ſhall be ſo in that Caſe where it was by Deed, *a fortiore* ſhall it be ſo here where it is by laſt Will, in which the Intent rules the Words, and not the Words the Intent. And *Harper* put many Caſes to prove that the [b] Intent in Deviſes ſhall make Eſtates to paſs contrary to the Rules of the Common Law in Deeds or other Gifs. [c] As a Deviſe to one for Life, where there is no ſuch Perſon, the Remainder in Fee, he in Remainder ſhall take the Land, although there is no Eſtate precedent. [d] And if Land is deviſed in Tail, the Remainder in Tail, and the firſt Deviſee diſagrees, he in Remainder ſhall have it. [e] And if one deviſes Land to a Man after the Death of his Wife, the Wife ſhall have an Eſtate for Life, although it be not given to her, and this is by Reaſon of the Intent. [f] And he alſo cited the Caſe in 10 *H.* 7. where *Ceſtuy que uſe* deviſed that his Wife Executrix ſhould ſell his Land, and died, and ſhe took another Huſband, and ſhe ſold the Land to her ſaid ſecond Huſband, and the Sale was adjudged good. [g] And he alſo cited the Caſe in 34 *Ed.* 3. where a Man had Iſſue a Son and a Daughter, and deviſed Land deviſeable to one for Life, upon Condition that if the Son diſturbed the Tenant for Life, or the Executors of their Adminiſtration, then the Land ſhould remain to the Daughter, and he died, and the Daughter, after the Death of the Tenant for Life, brought a *Formedon* in Remainder againſt the Son, and alledged that he had diſturbed the Tenant for Life and the Executors, and the Son traverſed it, and thereupon Iſſue was joined. So that there the Condition took away the Fee out of the Son, and put it in the Daughter by the Allowance of the Law, in order to perform the Intent of the Deviſe, although the Remainder did not veſt when the firſt Eſtate took Effect. And upon this Principle *Weſton* cited the Caſe which is alledged by *Fitzherbert tit. Deviſe pl.* 18. and is there cited to be in 28 *H.* 6. *viz.* [h] If Land is deviſed to a Man and to his Heirs Males of his Body, and he has Iſſue a Daughter, who has Iſſue a Son, this Son ſhall be inheritable, and yet of a Gift in Tail the Law is otherwiſe, and this by the Opinions of all the Juſtices in the Exchequer-Chamber. But *Dyer* denied the Law to be ſo, for he ſaid there does not appear to be any Intent of the Deviſor that the Son ſhould inherit, and he ſaid that the Caſe is not in the Book at large, but *Fitzherbert* alledged it *verbatim* out of *Statham*. And many other good Caſes were cited by *Harper* and the other Juſtices, which I have forebore to recite at large, becauſe it is my Deſign only to make a brief *Memorandum* of the Cauſe of the Reſolution of the Juſtices.

[i] And *Weſton* was in ſome Doubt in this Caſe, whether, if *Francis Clerk* had had a Son, his Son ſhould have entered and had the Land by the Intent of the Deviſor, and thereupon whether it ſhould be neceſſary for the Plaintiffs to ſhew in Evidence that *Francis* had no Iſſue; but *Dyer* ſaid that the Words of the Will are, "That ſuch Perſon and Perſons, and his and their Heirs, ſo "vexing, *&c.* ſhall forthwith be clearly diſcharged, excluded, *&c.*" which Word *(Heirs)* manifeſts his Intent to be, that for the Offence of the Anceſtor the Heir ſhall be diſinherited: And ſo, he ſaid, we ſee that for the Tranſgreſſion of the Father God will puniſh the Children *unto the third and fourth Generation*, as he ſaith in the Commandments, but that is to be underſtood in this World, for, as touching the Soul, the Son ſhall not bear the Iniquity of the Father.

And all the Juſtices agreed upon the Matter in Law, *viz.* that the ſaid Clauſe of Reſtraint ſhall be a Limitation which ſhall determine the Eſtates, and not a Condition requiring Re-entry, and that by the ſaid Acts, *viz.* the Bargain, Fine, and Recovery, the Eſtates-Tail were ended, and that the Plaintiffs might enter, and ſhould not be driven to any *Formedon* or other Suit, as they ſhould be upon a Diſcontinuance of any other Eſtate-Tail general by Feoffment or Fine, and by dying without Iſſue after, for here the Eſtate ended by collateral Limitation, ſo that the Act which ends the Eſtate by the Limitation cannot make a Diſcontinuance, for the doing of the Act and the End of the Eſtate come together at one and the ſame Inſtant; for the Fine levied by *John* determined his Intereſt, and was no Diſcontinuance to *Francis*, becauſe the Eſtate-Tail of *John* was not in *eſſe* longer than

[a] Moor 252.

[b] S. P. 2 Rol. R. 424. 1 And. 189. Rep. *temp.* Hardwick 29, 30. Vin. Abr. tit. Deviſe F. a. pl. 4. Swinb. 141. Wentw. Off. of Exec. 420. Treat of Wills 30.

[c] T. 9. H. 6. 24. b. *Per Godred.* Treat. of Wills 30, 31, 55. Andrew's Rep. 267. Vin. Abr. tit. Remainder C. 2. pl 1. Same Law where the particular Eſtate is deviſed to an incapable Perſon, as a Monk, Dy. 127. pl. 54. Perk. § 567. 2 Brownl. 247. Strange 332. Swinb. 182. Treat. of Wills 55.

[d] T. 37. H. 6. 36. a. Dy. 310. pl. 79. 1 Co. 101. a. Cro. E. 423. 2 Brownl. 247. 1 Eq. Abr. 216. pl 4. Vin. Abr, tit. Remainder C. 2. pl. 2. Treat of Wills 16. Law of Teſtaments, &c. 173.

[e] See Ante 158 (c) and the Books there cited.

[f] P. 10. H. 7 20. pl. 9. Bro. Executors 175. 2 Brownl. 67.

[g] H. 34. Ed. 3. Fitz. Formedon pl. ult. 4 Bac. Abr. 322. Vin. Abr. tit. Remainder H. 2. pl. 1. Ante 27 (d).

[h] S. P. accord. M. 11. H. 6. 12. b. 13. a. Bro Deviſe 32. 30 H. 8. Bro. Ibid 29. Cowel's Inſt. 114. Nelſ. Lex Teſt. 305, 533. Sed Contra Co. Litt. 25. a. Hob. 32, 33. Godolph. Orph. Leg. 332, § 3. 336, 357, § 11. Wentw. Off. of Exec. 417. 420. Treat. of Wills 37. Law of Teſtaments, &c. 69, 70. where the Caſe of 28 H. 6. here cited is denied to be Law.

[i] Godb. 102.

than the Fine took Effect, and it being determined could not be diſcontinued as to him, or the other, or him in Remainder, and the Recovery determined the Eſtate of *Francis* which preceded, and ſo there is no Diſcontinuance to retard the Entry of the Plaintiffs.

And afterwards Judgment was prayed for the Plaintiffs, and the Court ſaid that they ſhould have Judgment, and they were of Opinion to give Judgment for them. And then it was ſhewn that there was a Fault in the original Writ, for the Writ was, *And ſummon you them by good Summoners, that they may be then before our aforeſaid Juſtices at* Weſtminſter, *&c.* and in the Writ there was no Mention before made of the Juſtices, ſo that *(aforeſaid)* was ſuperfluous, * and it was ſaid that it made the Writ abatable. And this Exception only delayed the Judgment, but did not diminiſh the Credit of the Opinions of the Juſtices touching the principal Matter. Which Writ, with the Return thereof and the Panel, here follows.

* See Hob. 282. 4 Mod. 160, Booth 266. Heath's Max. 163. See Ante 150, at the Top.

Elizabeth by the Grace of God of *England*, *France*, and *Ireland* Queen, Defender of the Faith, &c. To the Sheriff of *Middleſex* greeting. *Robert Newis* and *Scolaſtica* his Wife have complained to us, that *William Lark* Gentleman and *John Hunt* unjuſtly and without Judgment have diſſeized them of their Freehold in *South-Mimmes* within 30 Years now laſt paſt: And therefore we command you that if the aforeſaid *Robert* and *Scolaſtica* ſhall make you ſecure of proſecuting their Claim, then that you cauſe that Tenement to be reſeized of the Chattles which within it were taken, and it with the Chattles to be in Peace until *Wedneſday* next after one Month of *Eaſter* next to come. And in the mean time that you cauſe 12 free and lawful Men of that Neighbourhood to ſee the ſaid Tenement, and their Names to be impannelled; and ſummon you them by good Summoners that they may be then before our (aforeſaid) Juſtices at *Weſtminſter*, ready therein to make Recognition. And put by Gages and ſafe Pledges the aforeſaid *William* and *John*, or their Bailiffs, if they cannot be found, that they may be then there to hear that Recognition. And have you there the Summoners, the Names of the Pledges, and this Writ. Witneſs ourſelf at *Weſtminſter* the 23d Day of *March* in the 12th Year of our Reign.

Lutwych.

By *R. Rede*, becauſe it is affirmed that the Tenements within ſpecified do not exceed the Value of 40 s. by the Year.

Pledges of proſecuting { John Doe. / Richard Roe.

The within named *William Lark* and *John Hunt* have nothing, nor either of them has any Thing in my Bailiwick, by which they or either of them may be attached, nor have they or either of them any Bailiff or Bailiffs, nor are they or either of them found in my ſame Bailiwick. The Reſidue of the Execution of this Writ appears in a certain Panel to the Writ annexed.

The Anſwer of { Henry Becher / William Dan } Sheriffs.

The Names of the Recognitors of the Aſſize of Novel Diſſeizin between *Robert Newis* and *Scolaſtica* his Wife Plaintiffs, and *William Lark* Gentleman and *John Hunt* Defendants, for Tenements in *South-Mimmes*.

Summoners of the Jurors { John Doe. / Richard Roe.

Manucaptors of the Jurors { John Ben. / Richard Fen. / William Pye, and / Hugh Fly.

The Endorſement on the Back of the Names of the Jury.

Let the Aſſize be taken by Default, &c.

Adjourned until *Wedneſday* next after the Feaſt of the Apoſtles *Philip* and *James*, and further adjourned until *Friday* next after the Feaſt of the *Aſcenſion* of our Lord.

A Report of a Judgment given, and of the Cauſes thereof, in the King's Bench *in* Trinity *Term in the* 14*th Year of the Reign of Queen* Elizabeth, *upon a ſpecial Verdict found in a Bill of* Ejectione firmæ *there brought by* Anticle Bracebridge *Plaintiff againſt* Richard Cook *otherwiſe* Smith *Defendant, upon an Ejectment of a Houſe and* 30 *Acres of Land,* 20 *Acres of Meadow, and* 40 *Acres of Paſture with the Appurtenances in* Kinſbury *in the County of* Warwick. *And the Record is entered in* Michaelmas *Term* 13 & 14 Elizabeth, Rot, 325, *and was as follows.*

Warwick. Same Precedent Raſt. Entr. 256. pl. 13.

BE it remembered, that otherwiſe, viz. in the Term of *St. Michael* laſt paſt, before the Lady the Queen at *Weſtminſter* came *Anticle Bracebridge* Gentleman by *Richard Beſt* his Attorney, and produced here in the Court of the ſaid Lady the Queen then there his certain Bill againſt *Richard Cook* otherwiſe *Smith* in the Cuſtody of the Marſhal, &c. of a Plea of Treſpaſs and Ejectment of a Farm; and there are Pledges of proſecuting, viz. *John Doe* and *Richard Roe*. Which ſaid Bill follows in theſe Words, *ſs. Warwick ſs. Anticle Bracebridge* Gentleman complains of *Richard Cook* otherwiſe *Smith* in the Cuſtody of the Marſhal of the Marſhalſea of the Lady the Queen before the Queen herſelf, for this, viz. whereas one *Thomas Bracebridge* of *Kinſbury* in the County aforeſaid Eſquire was ſeized in his Demeſn as of Fee of and in one Meſſuage with the Appurtenances in *Kinſbury* aforeſaid, and of and in 30 Acres of Land, 20 Acres of Meadow, and 40 Acres of Paſture with the Appurtenances in *Kinſbury* aforeſaid, late in the Tenure or Occupation of *Thomas Smith*; and being ſo ſeized thereof, the ſame *Thomas Bracebridge* the 26th Day of *Auguſt* in the 4th Year of the Reign of Lord *Edward* 6. late King of *England*, at *Kinſbury* aforeſaid, by his certain Indenture ſealed with the Seal of him the ſaid *Thomas*, bearing Date the ſame Day and Year, demiſed, granted, and to Farm let the Meſſuage aforeſaid and other the Premiſſes with the Appurtenances to *George Griffith* of *Wichenore* in the County of *Stafford* Knight, by the Name of one Meſſuage or Tenement called the *Cliff* in *Kinſbury* aforeſaid then in the Tenure of the ſaid *Thomas Smith:* To have and to hold the aforeſaid Meſſuage and other the Premiſſes with the Appurtenances to the aforeſaid *George Griffith* Knight, his Executors and Aſſigns, from the Feaſt of *St. Michael* the Archangel next following the Date of the ſaid Indenture, unto the End and Term of 70 Years from thence next following and fully to be compleat. By virtue of which ſaid Demiſe the ſame *George* into the Meſſuage aforeſaid and other the Premiſſes with the Appurtenances, after the aforeſaid Feaſt of *St. Michael* the Archangel, entered, and was thereof poſſeſſed; and being ſo thereof poſſeſſed, the ſame *George* afterwards, viz. the 14th Day of *November* in the aboveſaid 4th Year of the Reign of the ſaid late King *Edward* 6. at *Kinſbury* aforeſaid, by his certain Indenture ſealed with the Seal of him the ſaid *George Griffith*, bearing Date the ſame Day and Year, demiſed, granted, and to Farm let the Meſſuage aforeſaid and other the Premiſſes with the Appurtenances, by the Name of his ſaid late Meſſuage or Tenement with the Appurtenances called the *Cliff* in *Kinſbury* aforeſaid, to the aforeſaid *Anticle Bracebridge:* To have and to hold the aforeſaid Meſſuage and other the Premiſſes with the Appurtenances to the aforeſaid *Anticle Bracebridge*, his Executors and Aſſigns, from the Feaſt of the *Annunciation* of the bleſſed Virgin *Mary* next following the Date of the ſaid Indenture for and during the whole Term aforeſaid of the ſaid *George* then to come of and in the Premiſſes. By virtue of which ſaid Demiſe and Grant the ſame *Anticle Bracebridge* into the Meſſuage aforeſaid and other the Premiſſes with the Appurtenances, after the aforeſaid Feaſt of the *Annunciation* of the bleſſed Virgin *Mary*, entered, and was thereof poſſeſſed, until the aforeſaid *Richard Cook* otherwiſe *Smith* afterwards, viz. the 26th Day of *November* in the 12th Year of the Reign of the ſaid Lady the Queen now, with Force and Arms, &c. into the Meſſuage aforeſaid and other the Premiſſes with the Appurtenances upon the Poſſeſſion of the ſaid *Anticle* thereof entered, and the ſaid *Anticle* from his Farm aforeſaid, his Term aforeſaid therein not yet ended, ejected, expelled, and amoved, and the ſaid *Anticle* from the Poſſeſſion thereof held out, and yet holds out, and other Wrongs to him did, againſt the Peace of the ſaid Lady the Queen now, and to the Damage of the ſaid *Anticle* 60 *l.* and therefore he brings Suit, &c.

And now this Day, viz. *Tueſday* next after the Octave of *St. Michael* in this ſame Term, until which Day the aforeſaid *Richard Cook* had Leave to imparl to the Bill aforeſaid, and then to anſwer, &c. before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Anticle* by his Attorney aforeſaid as the aforeſaid *Richard Cook* otherwiſe *Smith* by *Michael Lowe* his Attorney. And the ſame *Richard Cook* otherwiſe *Smith* defends the Force and Injury when, &c. and ſays that he is not guilty thereof, and of this he puts himſelf upon the Country, and the aforeſaid *Anticle* likewiſe, &c. Therefore let a Jury come thereon before the Lady the Queen at *Weſtminſter* on *Wedneſday* next after the Octave of *St. Hillary*, and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame Day is given to the Parties aforeſaid there, &c. Afterwards at the Day and Place within contained before *James Dyer* Knight Chief Juſtice of the Lady the Queen of the Bench, and *Nicholas Barham* one of the Serjeants of the ſaid Lady the Queen at Law, Juſtices of the Lady the Queen aſſigned to take Aſſizes in the County of *Warwick*, by the

Iſſue on Not Guilty.

Poſtea.

Form

Form of the Statute &c. came as well the within named *Anticle Bracebridge* by *Thomas Foſter* his Attorney, as the within written *Richard Cook* by *Thomas Callow* his Attorney. And the Jurors of the Jury whereof Mention is within made being called likewiſe came. Who to ſay the Truth of the within contained being choſen, tried, and ſworn, ſay upon their Oath that the within named *Thomas Bracebridge* was ſeized of the Tenements aforeſaid within ſpecified with the Appurtenances in his Demeſn as of Fee. And being ſo thereof ſeized, the ſame *Thomas Bracebridge* within ſpecified, the 26th Day of *Auguſt* in the 4th Year of the Reign of the within named late King *Edward* 6. within ſpecified, demiſed to the within named *George Griffith* the Tenements aforeſaid with the Appurtenances: To have and to occupy to the ſame *George Griffith* and his Aſſigns from the within ſpecified Feaſt of *St. Michael* the Archangel then next following until the End and Term of 60 Years from thence next following and fully to be compleat. By virtue of which Demiſe the ſame *George Griffith* was of the Tenements aforeſaid with the Appurtenances poſſeſſed; and being ſo thereof poſſeſſed, and the aforeſaid *Thomas Bracebridge* being ſeized of the Reverſion of the Tenements aforeſaid with the Appurtenances in his Demeſn as of Fee and Right, the ſame *George* the within written 14th Day of *November* in the aboveſaid 4th Year of the Reign of the aforeſaid late King *Edward* 6. granted all his Eſtate, Intereſt, and Term of Years, which he then had to come of and in the Tenements aforeſaid with the Appurtenances, to the aforeſaid *Anticle Bracebridge*, and to one *Joice* then Wife of the aforeſaid *Thomas Bracebridge*. By virtue of which Grant the aforeſaid *Thomas Bracebridge* and *Joice* in Right of the ſame *Joice*, and the ſame *Article* in his own proper Right, were of the Premiſſes aforeſaid poſſeſſed. And they being ſo thereof poſſeſſed, the aforeſaid *Joice* afterwards died, after whoſe Death the aforeſaid *Thomas Bracebridge* likewiſe died, after whoſe Deaths the aforeſaid *Anticle Bracebridge*, claiming the Tenements aforeſaid with the Appurtenances by Reaſon of the Grant aforeſaid by the aforeſaid *George Griffith* to the ſame *Anticle* and to the aforeſaid *Joice* in Form aforeſaid made, into the ſame Tenements with the Appurtenances entered, and was thereof poſſeſſed, until the aforeſaid *Richard Cook*, the within written 26th Day of *November* in the within written 12th Year of the Reign of the ſaid Lady the Queen now, into the Tenements aforeſaid with the Appurtenances upon the Poſſeſſion of the aforeſaid *Anticle* thereof re-entered, and the ſaid *Anticle* from his Farm thereof ejected. But whether the Entry and Ejectment of the aforeſaid *Anticle* be an Ejectment of the whole Tenements aforeſaid with the Appurtenances, or of a Moiety of the ſame Tenements with the Appurtenances, or not, the ſame Jurors are wholly ignorant, and therein they pray the Advice and Diſcretion of the Juſtices aforeſaid and of the Court, &c. And if upon the whole Matter aforeſaid in Form aforeſaid found it ſhall ſeem to the ſame Juſtices that the ſame Ejectment of the aforeſaid *Anticle* is an Ejectment of the ſame *Anticle* out of the whole Tenements aforeſaid with the Appurtenances, then the ſame Jurors ſay upon their Oath that the aforeſaid *Richard Cook* is guilty of the Treſpaſs and Ejectment within ſpecified in the whole Tenements aforeſaid with the Appurtenances, as the ſame *Anticle* within complains againſt him, and then they aſſeſs the Damages of the ſaid *Anticle* by Occaſion of the ſaid Treſpaſs and Ejectment, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to 6 *l.* and for thoſe Coſts and Charges to 20 *s.* And if upon the whole Matter aforeſaid it ſhall ſeem to the Juſtices aforeſaid that the ſame Ejectment of the aforeſaid *Anticle* is an Ejectment of the ſame *Anticle* out of the Moiety only of the ſame Tenements with the Appurtenances, then the ſame Jurors ſay upon their Oath that the aforeſaid *Richard Cook* is guilty of the Treſpaſs and Ejectment within written of and in the Moiety of the Tenements aforeſaid with the Appurtenances, as the ſame *Anticle* within complains againſt him, and then they aſſeſs the Damages of the ſaid *Anticle* by Occaſion of the ſaid Treſpaſs and Ejectment thereof, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to 60 *s.* and for thoſe Coſts and Charges to 20 *s.* &c. and then the ſame Jurors further ſay that the aforeſaid *Richard Cook* is not guilty of the Treſpaſs and Ejectment within ſpecified of and in the other Moiety of the Tenements aforeſaid with the Appurtenances, as the ſame *Richard* within has alledged, &c.

Special Verdict.

THE CASE.

IT appears by the Record that the Plaintiff has declared upon a Leaſe for 70 Years made by *Thomas Bracebridge* to Sir *George Griffith* Knight the 26th Day of *Auguſt Anno* 4. *Edw.* 6. to have and to hold from the Feaſt of *St. Michael* the Archangel then next following; by Reaſon whereof Sir *George*, after the ſaid Feaſt of *St. Michael*, entered, and was poſſeſſed. And being ſo poſſeſſed, he the 14th Day of *November* in the ſaid 4th Year of the Reign of King *Edw.* 6. demiſed and granted the ſaid Tenements to the ſaid Plaintiff, to have and to hold from the Feaſt of the *Annunciation* of our Lady then next following during all the ſaid Term then to come; by Reaſon whereof the Plaintiff after the ſame Feaſt entered, and was poſſeſſed until the Defendant the 26th Day of *November* in the 12th Year of the Reign of the preſent Queen ouſted him. The Defendant pleaded, not guilty, and the Matter was tried by *Niſi Prius* in the County of *Warwick*, where the Jury gave a ſpecial Verdict, and found that the ſaid *Thomas Bracebridge* was ſeized in Fee, and made the Leaſe to the ſaid Sir *George Griffith*, as it was alledged in the Declaration; but they found

Husband makes a Leaſe for Years, the Leſſee grants the Term to the Wife of the Leſſor and to a Stranger, the Husband and Wife die, the Stranger ſurvives, adjudged that he ſhall have the whole by Survivorſhip, for the immediate Eſtate of Inheritance in the Husband did not merge the Wife's and ſo the Stranger has Title to the whole by Survivorſhip. S. C. Vin. Abr. tit. Merger G. pl. 6.

Moiety of the Term, and ſo diſſolve the Jointenancy between the Wife and the Stranger, but the ſame continued notwithſtanding the Coverture,

further, that the ſaid Sir *George* made the Grant the ſaid 14th Day of *November* to the ſaid Plaintiff and to *Joice* then Wife of the ſaid *Thomas Bracebridge* the Leſſor, by Reaſon whereof the ſaid *Thomas Bracebridge* and *Joice* in Right of the ſaid *Joice*, and the Plaintiff in his own proper Right, were poſſeſſed of the Premiſſes, and afterwards the ſaid *Joice* died, and after that the ſaid *Thomas Bracebridge* died, whereby the ſaid Plaintiff claiming the whole continued in Poſſeſſion until the Defendant the ſaid 26th Day of *November* ouſted him. But whether this Ouſter ſhall be ſaid an Ejectment of the Plaintiff out of all the Tenements, or only out of the Moiety of them, or not, the Jurors were ignorant, and they prayed the Advice and Diſcretion of the Juſtices, and if it ſhould ſeem to the Juſtices that the ſaid Ejectment ſhall be ſaid an Ejectment of the Plaintiff out of all the Tenements, then they ſaid that the Defendant was guilty of the Treſpaſs and Ejectment within ſpecified, as the Plaintiff has alledged, and then they aſſeſſed Damages to 6 *l.* and Coſts to 20 *s.* And if it ſhould ſeem to the Juſtices that the ſaid Ejectment ſhall be ſaid an Ejectment of the Plaintiff out of the Moiety of the Tenements only, then they ſaid that the Defendant was guilty of the Treſpaſs and Ejectment for the Moiety, and then they aſſeſſed Damages to 3 *l.* and Coſts to 20 *s.* and then they ſaid that he was not guilty of the Treſpaſs and Ejectment within ſpecified of and in the other Moiety of the ſaid Tenements.

And whether the Plaintiff ſhould have Judgment upon this Verdict for the Moiety only, or for the whole, was often debated the laſt *Eaſter* Term, and this Term alſo. And for the one Moiety the Title of the Plaintiff was held to be good without Queſtion, but the Doubt lay upon the other Moiety which the Wife had, viz. whether the Title of the Plaintiff ſhould be good as to that, or not, for if the Plaintiff has not a good Term in that Moiety, then he cannot have Judgment to recover the ſame Moiety. And as to the Right and Title thereof the Matter was divided into two diſtinct Points.

The Points of the Caſe.

The firſt was, when Sir *George Griffith* had a Leaſe for Years of the whole, and granted over his Eſtate to a Feme-covert and another, (admitting that the Huſband had not the Reverſion thereof) whether or no thereby the Term remained in Jointure, or if the Jointure was diſſolved by the Intereſt of the Huſband.

The ſecond was, (admitting that it continued in Jointure in ſuch Caſe) whether or no the immediate Freehold and Inheritance which the Huſband had ſhall merge the Term which the Wife had in the Moiety, and ſo diſſolve the Jointure between the Wife and *Anticle* the Plaintiff.

[a] 1 Finch 30. 2 Finch 42. 1 Bac. Abr. 287. Vin. Abr. tit. Jointenants E. pl. 18.

[b] Co. Litt. 185. b. Plowd. Quær. § 265.

[c] Ante 191 (g).

[d] 1 Finch 30. 2 Finch 42. Vide Co. Litt. 46. b. 3 Bulſt. 164.

[e] Co. Litt. 351. a. 1 Rol. Abr. 344. pl. 4. Cro. C. 344. 1 Finch 30. 2 Finch 43. Godolph. Orph. Leg. fo. 31. § 4. Swinb. 188. Off. of Exec. 196, 425. 1 Bac. Abr. 287. againſt the Opinion of *Hankf.* P. 2. H. 4. 19. b.

[f] M. 7. H. 6. 1, 2. pl. 6. Fitz. Charge 1. Bro. 41. M. 9. H. 6. 52. Fitz. Ibid. 2. Bro. 1. Co. Litt. 184. b. 351. a. 1 Rol. Abr. 344. pl. 5. 346. J. pl. 2. 1 Finch 30. 2 Finch 43. 1 Vern. 396. 1 Bac. Abr. 287.

[g] M. 21. H. 7. 29. pl. 4. *per Fineux.* Dr. & Stud. lib. 1. cap. 7 fo. 23. Dy. 7. pl. 5. Co. Litt. 185. b. 300. a. 351. b. 2 Brownl. 91. 1 Finch 29, 30. 2 Finch 42, 43. Godolph. Orph. Leg. 30. 1 Bac. Abr. 289. Cowel's Inſt. 26.

[h] 1 Finch 30. 2 Finch 43.

[i] That the Inheritance in the Huſband does not extinguiſh the Term for Years in the Caſe here, See Co. Litt. 338. b. 1 Rol. Abr. 934. pl. 11, 12. 2 Rol. R. 472. Cro. J. 275. 3 Bac. Abr. 455, 456. Godb. 2, *per Manwood.* 4 Leon. 38, *per Idem.* Jenk. 73. Hetl. 36.

[k] Vin. Abr. tit. Merger G. pl. 6.

And as to the firſt Point, the Court held the Law to be, [a] that if a Man who has a Leaſe for Years grants his Term to a Feme-covert and another, [b] or if a Feme-ſole and another are Jointenants for Years, and ſhe takes Huſband, the Jointure is not diſſolved, but continues, and the Survivor of the Wife or of the Stranger ſhall have the whole Term in that Caſe, becauſe a Term for Years is a Chattle real, in which Caſe the Marriage of the Wife ſhall not [c] deveſt the Term out of the Wife, but ſhe has an Eſtate in it as ſhe had before, ſo that if a Stranger ouſts them, [d] the Wife ought to join with the Huſband in bringing an *Ejectione firmæ*, and the Wife ſhall have Judgment as well as the Huſband: [e] And if a Woman who has a Term for Years takes Huſband, the Huſband cannot deviſe the Term to another by his Teſtament, for the Wife at the Time of his Death, and before his Death, had an Eſtate in her, which ſhall prevent the Deviſe and fruſtrate it; [f] and if the Huſband in his Life time had granted a Rent-charge out of the Term, the Wife Survivor ſhould avoid the Charge and all other Incumbrances, for ſhe being the Survivor is remitted to the Term, which the Coverture does not deveſt out of her. [g] But otherwiſe it is of Chattles perſonal, for if a Woman who has perſonal Goods takes Huſband, the Law deveſts the Property out of the Wife, and veſts it in the Huſband only. [h] And ſo is it if a Stranger gives perſonal Goods to a Feme-covert and to another, the Jointure is preſently ſevered by the Law, ſo that the whole ſhall not go to the Survivor of the Wife or the other, but the Huſband and the other are Tenants in Common preſently, and the Title of ſuch of them as firſt dies ſhall go to the Executors: For Chattles perſonal are eſteemed in Law of leſs Value, and are of a baſer Degree than Chattles real, and ſo there is a Diverſity between them. Wherefore here inaſmuch as this is a Chattle real, the Coverture of the Wife makes no Severance of the Jointure, nor is it any Impediment to the Plaintiff's having the whole as Survivor, if ſo be the other Point does not hurt him.

And as to this, it was ſaid that the Caſe is no other than this, viz. [i] if the Leſſor, who has the Fee-ſimple, marries with a Woman his Leſſee for Years, or if the Huſband makes a Leaſe for Years, and the Leſſee grants his Eſtate to the Wife of the Leſſor, whether this ſhall extinguiſh the Leaſe for Years, or not, for if it ſhall, the Moiety of the Leaſe in our Caſe is extinguiſhed and merged by the immediate Inheritance which the Huſband had in the Land. And the Court held the Law to be, [k] that the immediate Eſtate of Inheritance which the Huſband here had ſhall not merge or extinguiſh the Moiety of the Term which the Wife had, any more than in the other Caſes aboveſaid, becauſe he had the Inheritance in his own Right, and the Term in Right of his Wife, in which Caſe the Freehold and Inheritance of the Huſband, wherein the Wife has nothing, ſhall not merge the Term of the Wife. For the Law which carries in itſelf Reaſon and Equity will not do Prejudice to another, and here the Wife is other than the Perſon who has

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the Inheritance, and the Marriage of Huſband and Wife is a laudable Thing, for which Reaſon the Law will not prejudice the Wife in her Chattles real, which are Things of Continuance, and of more Value and Worth than Things perſonal. [a] Nevertheleſs the Huſband himſelf might have given away the Wife's Term by an expreſs Act, as if he had made a Feoffment of the Land, or a new Leaſe, or the like, [b] but foraſmuch as he has not done this nor any Thing elſe with the Land, and has made no Diſpoſition at all of it, but has left it to the Judgment of the Law, the Law will preſerve the Eſtate of the Wife, which Eſtate, as to her, is disjoined from the Freehold and the Fee ſimple.

[a] That the Huſband may during his Life diſpoſe of the Chattles real of his Wife, Dr. & Stud. lib. 1. cap. 7. Co. Litt. 46. b. 300. a. 351. a. Cro. C. 344. 1 Finch 29, 30 2 Finch 43. 1 Rol. Abr. 343. F. pl. 2. 1 Bac. Abr. 286.

[b] 1 Bac. Abr. 287.

And yet it was objected on the Part of the Defendant, that during the Coverture the Term which the Wife had in the Moiety was ſuſpended, ſo that upon the Ouſter *Anticle* the Plaintiff alone ought to have an *Ejectione firmæ* for the Moiety, and the Huſband and Wife could not join in the Suit, but the Huſband ſhould be driven to his Action real upon the Ouſter, and could have no Action in Reſpect of the Term, becauſe the Term was ſuſpended for the Moiety: And foraſmuch as during the Coverture the Term was ſuſpended for the Moiety, the Huſband (it was ſaid) might have had an Action of Debt againſt *Anticle*, or might have diſtrained him for the Moiety of the Rent reſerved, if any Rent was reſerved, for that which is ſuſpended is not in *Eſſe* for the Time, and if the one Moiety of the Term was not in *Eſſe* during the Time of the Coverture, from thence it follows that for the Time there was a Severance of the Jointenancy of the Term, and if ſo, then *Anticle* the Plaintiff, during the Coverture, ought to have paid the Moiety of the Rent reſerved for that Moiety which was in *Eſſe*, and from thence the Counſel for the Defendant inferred, that if, during the Coverture, there was a Severance of the Jointure, becauſe the one Moiety was in *Eſſe*, and the other was ſuſpended, then *Anticle* the Survivor ſhall not have the whole by Survivorſhip, [c] for no Jointenant ſhall have the Part of the other as Survivor, except the Thing be in Jointure at the Inſtant of the Death of him that dies firſt: [d] As if a Man has a Rent in Fee out of Land, and grants it to the Tenant of the Land and to another in Fee, if the Tenant of the Land dies, the other ſhall not have the whole as Survivor, becauſe the Rent as to the Moiety merged in the Land, and for the other Moiety was in *Eſſe*; and foraſmuch as it was not in Jointure at the Time of the Death of him that died firſt, the Survivor ſhall have only the Moiety of the Rent which he had before; ſo here, (it was ſaid by them) if the Moiety of the Wife was ſuſpended, and not in Jointure with the other Moiety at the Time of the Death of the Wife, then *Anticle* the Survivor cannot have the Moiety which the Wife had.

[c] S. P. Co. Litt. 188. a.

[d] S. P. 1 Rol. Abr. 924. pl. 6. L. P. Co. Litt. 188. a. Davis 5. a.

But this Objection and the Reaſoning thereof was not allowed, becauſe the Term here cannot be reſembled to the Caſe of a Rent. For when a Rent is granted to the Tenant of the Land and to another, the Rent for the Moiety is merely extinct for ever, if the Tenant has as great an Eſtate in the Land as he has in the Rent, and if ſo be he has a leſſer Eſtate, then the Moiety of the Rent is ſuſpended for the Time, and that which is ſuſpended is not in *Eſſe* for the Time, and that which is not in *Eſſe* cannot be in Jointure for the Time of its Non-exiſtence. But here the Land was in Jointure, and was always in *Eſſe*, and could not be in Suſpenſe, or want Exiſtence, but here there were divers Times in the Land, for *Anticle* and the Wife had one Time in the Land, *viz.* a Leaſe for 70 Years, and the Huſband after that had another Time in the Land, *viz.* a Time infinite, which was a Fee-ſimple, [e] which Time infinite ſhould merge any other leſſer Time which the Huſband had ſingly in the Land in his own Right, as a Time for Years or for Life; but here the leſſer Time was not in him ſingly, but it was in his Wife and *Anticle*, and he had nothing in that leſſer Time but by Reaſon of his Wife, and then his greater Time, which is infinite, ſhall not merge the leſſer Time which his Wife and *Anticle* had, but it ſhall continue for the Benefit of the Wife, and for the Preſervation of her Intereſt: So that there is no Suſpenſion of the Time, but there is firſt one Time, *viz.* 70 Years in the Wife and *Anticle*, and afterwards another diſtinct Time in the Huſband, *viz.* a Time infinite commencing after the firſt Time, which ſhall not drown the firſt Time, but the ſame ſhall continue by good Reaſon for the Benefit of the Wife and *Anticle*, inaſmuch as the ſeveral Times are to ſeveral Purpoſes, and tend to ſeveral Benefits.

[e] Davis 4. b.

But as to the Caſe put of having the Moiety only of the Rent, during the Coverture, which *Thomas Bracebridge* reſerved, that is upon another Reaſon, *viz.* foraſmuch as *Thomas Bracebridge*, the Huſband, had the Occupation of the Land *per my et per tout* for the one Moiety, and *Anticle* had the like for the other Moiety, it was reaſonable that *Anticle* ſhould pay the Moiety of the Rent for the Moiety of the Profits of the Land which he had, and that the Huſband ſhould loſe the other Moiety of the Rent, becauſe he had the Moiety of the Profits of the Land, ſo that the Reaſon thereof ſtands upon Apportionment, which is another Ground of Law than the Suſpenſion or Extinguiſhment of the Land.

And although it ſhould be admitted, that upon an Ejectment, during the Coverture, the Huſband and Wife ſhould not join with *Anticle* in an *Ejectione firmæ*, that is upon another Ground of Law alſo, for inaſmuch as the Ejectment is a Diſſeizin to the Huſband of the whole Land, he ſhall have an Aſſize or a Writ of Entry upon a Diſſeizin for the whole Land, and ſhall take from the Diſſeizor all that he had gained by the Diſſeizin, *viz.* the Fee-ſimple, which Suit being of a higher Nature, the Law adjudges it more fit for the Huſband to take it, than the other Suit of *Ejectione firmæ*, by which he could but recover Part of the Eſtate taken from him, and *Anticle* might have an *Ejectione firmæ* for his Moiety, and recover his Damages for the ſame; ſo that the Severance in the Action reſts upon another Conſideration. [f] And *note* that if two, who have Land to them

[f] M. 46. Ed. 3. 21. b. *Per Finchden.* H. 34. H. 6. 31. b. *Per Danvers.* M. 3 Ed. 4. 10. a. Dy. 9. pl. 23. Co. Litt. 188. a. 5 Co. 40. b. Bac. Max. reg. 18.

and to the Heirs of one of them, lose by Default, the one shall have a *Quod ei deforceat*, and the other a Writ of Right.

[a] Vin. Abr. tit. Merger A. 2. pl. 3.

[a] * And it was said at the Bar, if Parson, Patron, and Ordinary make a Lease for Years of the Glebe-land of the Parsonage, and afterwards the Parson dies, and the Lessee for Years is made Parson, and afterwards he dies, his Executors shall not have the Residue of the said Term which is to come, because the Term was [a] extinct by the Freehold of the Land which the Parson had in him, which *Catline* Chief Justice denied, for he said that he had the Term in his own Right, and in the Capacity of his natural Body, and the Inheritance he had as Parson, which is in another Capacity, and therefore the Land shall not be extinct; but some at the Bar said that he had both in his own Right, and to his own Use, and therefore they said it is reasonable that it should be extinct, notwithstanding that he has them in several Capacities, and it is not like to the Case where the [b] Lessor has a Term for Years as Executor of the Lessee, [c] for there, if he dies, the Term shall be revived.

[a] That the Term is extinguished in this Case, 1 Rol. R. 247. 2 Rol. R. 472. 3 Leon. 111. Winch. 120. cites *Rudd*'s Case. Hutt. 105. Jenk. 200. 3 Bac. Abr. 455. And Co. Litt. 338. b. L. P. agrees with the Reason hereof.

And the Court were of Opinion that *Anticle* the Plaintiff, being the Survivor, should have the whole Term, as is said above, and therefore they gave Judgment that he should recover as well the Moiety which the Wife had, as the other Moiety. Which Judgment was as follows.

That it is not extinguished, Lane 101, *Per Bromley* J. 1 Leon. 334. arg. 2 Rol. R. 10, 472. arg.

[b] For there the Term is not extinguished, S. P. Bro. Surrender 52. Co. Litt. 338. b. 3 Bac. Abr. 456. But *Note*, if the Executor of Lessee for Years purchases the Inheritance, this merges the Term, for the Purchase is his own express Act, and Baron *Clerk* even held 3 Leon. 112. that though in such Case the Inheritance descended on the Executor, this would likewise merge the Term. *Sed quære de hoc.*

[c] S. P. 2 Rol. R. 472. 3 Leon. 111. *Note*, though the Term is not extinguished in this Case, yet hereby it seems to be insinuated that the Term is suspended during the Life of the Lessor, in that it is here said to be *revived after his Death.*

The rest of the Record.

And because the Court of the Lady the Queen here is not yet advised of giving their Judgment of and upon the Premisses, Day therefore is given to the Parties aforesaid before the Lady the Queen at *Westminster* until *Friday* next after the Morrow of the *Holy Trinity*, to hear their Judgment thereon, because the Court of the said Lady the Queen here thereof not yet, *&c.* At which Day before the Lady the Queen at *Westminster* came the Parties aforesaid by their Atornies aforesaid, whereupon all and singular the Premisses being seen, and by the Court of the Lady the Queen here more fully understood, and mature Deliberation being thereupon had, for that it seems to the Court of the Lady the Queen here, upon the whole Matter aforesaid in Form aforesaid found, that the aforesaid Ejectment of the aforesaid *Anticle* is an Ejectment of the whole Tenements aforesaid with the Appurtenances, therefore it is considered that the aforesaid *Anticle* recover against the aforesaid *Richard Cook* his Term aforesaid yet to come of and in the said Tenements wholly with the Appurtenances, and the aforesaid first Damages by the Jurors aforesaid in Form aforesaid assessed, and also 9 *l.* for his Costs and Charges aforesaid to the same *Anticle* by the Court of the Lady the Queen here with his Assent of Increase adjudged. Which said Damages in the whole amount to 15 *l.* And the aforesaid *Richard Cook* be taken, *&c.*

Judgment.

A. leases Land for 40 Years if Lessee lives so long, and afterwards leases the same to another without Deed for 70 Years, this is a good Lease for as many of the Years as shall remain after the first Term ended either by Efflux-ion of Time or by the Death of the first Lessee, and shall then commence notwithstanding it is made without Deed, but till the first Term ended it is but executory and not executed. S. P. 3 Bac. Abr. 439. Vide Post 432. (d). Bro. Leases 35, 48. Vin. Abr. tit. Estate B. b. 10. *per totum.* Dy. 58. pl. 3. 350. pl. 18. 2 Rol. Abr. 121. pl. 7.

AFTER this Judgment was given and executed, the Matter was revived again upon other Points: For one *Henry Clowse* had ousted *Anticle Bracebridge* of 40 Acres of Pasture Parcel of the Premisses, for which *Anticle* brought a new *Ejectione firmæ* in the King's Bench against him for the 40 Acres of Pasture, as appears by the Record thereof in *Trinity* Term 17 *Elizabeth*, *Roll* 205. And he declared that *Thomas Bracebridge* and *Jane* his Wife, the 12th Day of *May* in the 32d Year of the Reign of King *Henry* 8. at *Kinsbury* leased the said 40 Acres of Pasture to *Robert Perrot* and *Joan* his Wife from the Feast of the *Purification* of our Lady then next following unto the End of 40 Years then next to come, if the said *Robert* and *Joan* or one of them should so long live, by Force whereof they after the said Feast of the *Purification* entred, and were thereof possessed. And they being so possessed, and the said *Thomas Bracebridge* being seized of the Reversion, the same *Thomas Bracebridge* the 26th Day of *August* in the 4th Year of the Reign of King *Edward* 6. leased the same Tenements to *George Griffith* Knight, to have and to hold to the same *George Griffith* from the Feast of *St. Michael* the Archangel then next following unto the End and Term of 70 Years from thence next to come, whereby the said Sir *George* was possessed of such Interest of the Term depending upon the Estate of the said *Robert Perrot* and *Joan*. And afterwards the said Sir *George*, the 14th Day of *November* in the said 4th Year of the Reign of King *Edward* 6. granted all his Term and Interest of and in the said Tenements to one *John Bracebridge*, to have from the Feast of the *Annunciation* of our Lady then next following during the said Term granted to the said Sir *George* in Form aforesaid; which *John Bracebridge* the 6th Day of *April* in the 12th Year of the Reign of the present Queen *Elizabeth* granted all his said Estate and Interest to *Anticle* the Plaintiff. And afterwards the 20th Day of *January* in the 15th Year of the present Queen *Perrot* and his Wife died, and the said *Anticle* entered and was possessed until the said *Henry Clowse* the 10th Day of *April* in the 17th Year of the present Queen entred into the Tenements, and ejected the said *Anticle*. To this the Defendant pleaded, not guilty, and at *Nisi prius* in the County of *Warwick* the Jurors found the Defendant guilty of the Trespass and Ejectment for the Moiety of the said Tenements, and for so much they assessed Damages. And as to the other Moiety they gave a special Verdict, and found that the said *Thomas Bracebridge* was seized in Fee of the Manor of *Kinsbury* whereof the 40 Acres were Parcel, and being so seized, he and the said *Jane* made the said Lease to *Perrot* and his Wife, as in the Count is declared, and afterwards *Jane* died, and the said *Thomas Bracebridge* took to Wife *Joice*. And the said *Thomas Bracebridge* being so seized of the Manor and of the Reversion

Reverſion made the Leaſe in the ſaid 4th Year of the Reign of King *Edward* 6. to the ſaid Sir *George Griffith* for 70 Years, as it is alledged in the Count; and Sir *George* the ſaid 14th Day of *November* in the ſaid 4th Year of the Reign of King *Edward* 6. granted his Term and Intereſt in the ſaid 40 Acres of Paſture to the ſaid *John Bracebridge* and *Joice* then Wife of the ſaid *Thomas Bracebridge*, to have and to hold to them from the Feaſt of the *Annunciation* of our Lady then next following for and during the whole Term granted to the ſaid Sir *George*. And the ſaid *Perrot* and his Wife being poſſeſſed of the ſaid 40 Acres, as is aforeſaid, and the ſaid *Thomas Bracebridge* being ſeized of the Manor, and of the Reverſion of the 40 Acres as Parcel of the ſaid Manor, the ſame *Thomas Bracebridge* the 16th Day of *Auguſt* in the 5th Year of the Reign of King *Edward* 6. by his Deed indented tripartite gave and granted to the ſaid Sir *George Griffith* and others the ſaid Manor and all his Lands, Tenements, Reverſions, and other his Hereditaments whatſoever in *Kinſbury* aforeſaid and elſewhere in the County of *Warwick*, to have and to hold to them and to their Heirs to their own proper Uſe for ever, upon Condition that they ſhould pay to the ſaid *Thomas Bracebridge* within 15 Days then next following for the ſaid Tenements and Hereditaments 10,000 *l.* and if they ſhould fail of Payment, that then after the 15 Days the Feoffees and their Heirs and Aſſigns ſhould ſtand ſeized of the ſaid Manor, Lands, Tenements, Reverſions and Hereditaments to the Uſe of the ſaid *Thomas Bracebridge* for Term of his Life, without Impeachment of Waſt, and after his Death to the Uſe of *Thomas Bracebridge* his Son, and to the Heirs Males of his Body begotten, with Remainder over to *John Bracebridge* his Son, and to the Heirs Males of his Body, and ſo to *Anticle* another of his Sons, with Remainder in Fee to the right Heirs of *Thomas Bracebridge* the Father, to which Feoffment *Perrot* and his Wife attorned, and the ſaid Sum of 10,000 *l.* was not paid within the 15 Days according to the Condition, by Reaſon whereof, and by a Statute made the 4th Day of *February* in the 27th Year of the Reign of King *Henry* 8. the ſaid *Thomas Bracebridge* the Father was ſeized of the ſaid Manor, Lands, and Tenements for his Life, the Remainder to the ſaid *Thomas* the Son, and to his Heirs Males of his Body, with the other Remainders over. And afterwards *Robert Perrot* died, and *Thomas Bracebridge* and *Joice* his Wife died, and the ſaid *John Bracebridge* ſurvived the ſaid *Joice*, and afterwards the ſaid *Thomas Bracebridge* the Son, after the Death of his Father, entered into the ſaid Manor, Lands, and Tenements to him entailed as before, and was thereof ſeized in Tail. And afterwards the ſaid *Joan Perrot* being poſſeſſed of the 40 Acres, the ſaid *John Bracebridge* afterwards, *viz.* the 6th Day of *April* in the 11th Year of the Reign of the preſent Queen *Elizabeth*, gave and granted to the ſaid *Anticle* all his Right, Intereſt, and Term of and in the ſaid other Moiety of the ſaid 40 Acres. And further they ſaid that the ſaid *Thomas Bracebridge* the Son, the 25th Day of *January* in the 13th Year of the Reign of Queen *Elizabeth* leaſed the ſaid other Moiety of the ſaid 40 Acres to one *Edward Buckingham*, to have and to hold from the Feaſt of the *Annunciation* of our Lady then next to come unto the End and Term of 5 Years from thence next following. And afterwards, *viz.* the 20th Day of *January* in the 15th Year of the Reign of Queen *Elizabeth*, the ſaid *Joan Perrot* died, after whoſe Death the ſaid *Anticle* now Plaintiff entered into the ſaid 40 Acres of Paſture, claiming the other Moiety thereof, upon whoſe Poſſeſſion the ſaid *Henry Clowſe*, as Servant to the ſaid *Edward Buckingham* and by his Command, at the ſame Time when, *&c.* entered into the ſaid 40 Acres, claiming the other Moiety thereof in the Right of the ſaid *Edward*, and thereout ejected the ſaid *Anticle*. And if it ſhould ſeem to the Court that the Entry of *Clowſe* was not lawful for the ſaid other Moiety, then they ſaid that he was guilty, and they divided Damages for the ſeveral Moieties, and concluded upon the Matter, referring it to the Judgment of the Court.

And Judgment was prayed for the Plaintiff for the whole, for as to the one Moiety, *viz.* that which *John Bracebridge* had, there was no Queſtion at all made, but the whole Doubt lay upon the other Moiety which *Joice* had, and which *John* claimed as Survivor, and thereupon the Counſel for the Plaintiff prayed their Judgment for the ſaid other Moiety. For firſt of all it was affirmed by the Counſel for the Plaintiff, and admitted by the Counſel for the Defendant, and alſo by the whole Court, [a] that the Leaſe made for 70 Years by *Thomas Bracebridge* to Sir *George Griffith* of the 40 Acres which *Perrot* and his Wife then held was good for all of the 70 Years that ſhould remain after the firſt Term ended, notwithſtanding that the Leaſe for 70 Years was made without Deed. For *Thomas Bracebridge*, who made the Leaſe for 70 Years, had in him at the Time of making it the Reverſion of the 40 Acres in Fee-ſimple, and in Reſpect thereof he had Power to contract with another for any Eſtate to be derived out of that Reverſion. Then when he demiſed the Land to Sir *George*, to have for 70 Years from the Feaſt of St. *Michael* the Archangel then next following, this would have been a good Leaſe for the whole Term if the former Leaſe made to *Perrot* and his Wife had not ſtood in the Way, and that can ſtand in the Way no longer than it continues, and during its Continuance the ſecond Leaſe ſhall not take Effect in Poſſeſſion, but ſhall be void as to the Leſſor and the ſecond Leſſee alſo. For if the Leſſor would ſue the ſecond Leſſee for the Rent reſerved, he ſhould not have it during the firſt Leaſe, for during that Time the Contract does not take Effect, for the Leſſor had no Power over the Land during that Time, and therefore the Leſſee ſhould avoid the Demand, and ſay that the Leaſe which he claims is executory after the firſt Leaſe determined, and is not now executed, and in the mean Time he ſhall not have the Rent. [b] But otherwiſe it ſhould be if the ſecond Leaſe had been by Indenture, for then as well the Leſſee as the Leſſor is eſtopped to ſay but that the Leaſe commenced at the Day limited, becauſe the Words of the Indenture touching the Commencement of the Leaſe are

[a] S. P. 3 Bac. Abr. 439. Poſt 432 (d).

[b] Litt. R. 281. Skin. 261. 3 Bac. Abr. 439. Poſt. 474 (b). Vide Carth. 248.

are ſo. [a] But if the ſecond Leaſe had been made by Deed-Poll, and the firſt Leſſee had attorned to the ſecond Leſſee, the Reverſion of the Land ſhould have paſſed to the ſecond Leſſee together with the firſt Rent, [b] for the Demiſe of the Land is ſufficient to convey the Reverſion where there is a Deed and Attornment alſo. But here the ſecond Leaſe is made without any Indenture or Deed-Poll, in which Caſe the firſt Term ſhall conſume as many of the Years of the ſecond Term as ſhall incur during the firſt Term, and the ſecond Term is but executory for the Years only that ſhall remain after the firſt Term ended, and for them it ſhall be good, whether the firſt Term be ended by Efflux-ion of Time, or by the Death of *Perrot* and his Wife, which is a Condition Parcel of the Limitation that ſhall end their Leaſe. [c] As if a Man makes a Leaſe for Life, and afterwards makes a Leaſe to another for 21 Years to begin preſently, there if the firſt Tenant for Life dies or [d] ſurrenders, the ſecond Leaſe ſhall begin preſently both in the one Caſe and in the other, for at the Time of the Contract there was a Poſſibility for the Leaſe to begin to be executed before the Death of the Tenant for Life, *viz.* by his Surrender, or Forfeiture, or the like.

[a] Hutt. 105. 3 Bac. Abr. 439. Poſt 433 (f).

[b] Vin. Abr. tit. Reverſion I. pl. 2. Vide Ante 155 (b).

[c] P. 37. H. 8. Bro. Leaſes 48. 1 Co. 155. a. Moor 344. Cro. E. 160. Off. of Exec. 230, 231. Poſt 433. Vide 1 Saund. 151. Hardr. 412. Contra Plowd. Quær. 122, 161.

[d] *Quære* hereof, for this ſeems not Law, unleſs it be taken that the ſecond Leaſe was by Indenture, in which Caſe, by Reaſon of the Eſtoppel, it took effect between the Parties preſently, and therefore ſhall come in Poſſeſſion whenever the firſt Leaſe is out of the Way *quocunque modo*, but if the ſecond Leaſe was only by Deed-Poll without the Attornment of the firſt Leſſee, or by Parol, then it can only take Effect in Poſſeſſion upon the Determination of the firſt Leaſe by the Death of the Leſſee, according to the expreſs Limitation, and not upon any ſooner or other Determination by Surrender, Forfeiture, or otherwiſe. Vide Poſt 433 (e). 3 Bac. Abr. 440.

Nota bene by the Reporter.

[e] S. P. Hutt. 105. Moor 344. Litt. R. 281. Hardr. 411. Dy. 35. pl. 29. in Margine. Shep. Pract. Counſ. 71. 3 Bac. Abr. 438, 439. Vin. Abr. tit. Eſtate B. b. 10. pl. 9. Poſt 432 (a), 521 (b).

[e] *It ſeems to me (Reader) that if one makes a Leaſe the 1ſt Day of* May *for 21 Years enſuing from the 1ſt Day of* June, *which is defeaſible on Condition to be performed on the Part of the Leſſor, and the 2d Day of* May *he makes another Leaſe without Deed for 21 Years enſuing from the ſaid 1ſt Day of* June, *there although the Condition is performed, and thereby the firſt Leaſe is avoided, or although the firſt Leſſee ſurrenders his Term, yet the ſecond Leſſee ſhall never have the Land by Force of the ſecond Leaſe, becauſe the Leſſor had no Power to contract with the ſecond Leſſee at the Time the ſecond Leaſe was made, for during the ſecond Leaſe another had the Land and the Poſſeſſion, and the Contract could not be good upon the Poſſibility of the Condition being performed, or the firſt Leaſe ſurrendered, whereby the ſame would be avoided. But in the Caſe at Bar the Leaſe to* Perrot *and his Wife was for* 40 *Years, if they or one of them ſhould ſo long live, which Words (if one of them ſhould ſo long live) are not perhaps a collateral Condition, but rather Parcel of the Limitation of the Time of the Term, in which Caſe the Term of* 70 *Years ſhall commence immediately after that Limitation is determined; ſo that the Plaintiff has Part of the* 70 *Years (as he has by his own ſhewing in his Declaration) if the Leaſe had commenced at ſuch Term, whereupon he may well found his* Ejectione firmæ. *And ſo perhaps there is a Diverſity between the Condition aforeſaid added to the Limitation, and a Condition* dehors, *or a Surrender, which determines the Term; for if the firſt Term of* Perrot *and his Wife had been ſo ended,* viz. *by collateral Condition, it ſeems that the* 70 *Years ſhould never have commenced.*

And ſo (as it is ſaid before) it was agreed on all Sides that the ſecond Leaſe was good for as many of the Years as remained after the Death of *Perrot* and his Wife, and that the Term was commenced, notwithſtanding the 40 Years are not ended by Effluxion of Time, but by Death, and although the ſecond Leaſe was not made by any Writing or Deed. And ſo *note* that the Reſidue of the ſaid 70 Years which had not incurred ſhall commence preſently upon the Death of the ſaid *Joan Perrot* Survivor to her Huſband.

But the other Matters upon which the Parties chiefly reſted were two. The firſt was, when Sir *George Griffith* had granted over his Term of 70 Years to *John Bracebridge* and to *Joice* the Wife of *Thomas Bracebridge* the Father, and afterwards *Thomas* the Father made a Feoffment in Fee of the Manor, if by ſuch Feoffment the Moiety of the Term of 70 Years, which he had in Right of *Joice* his Wife, ſhould paſs to the Feoffees included in the Land by way of Extinguiſhment, and if ſo, then the Jointenancy between *Joice* and *John Bracebridge* would be ſevered, and then the Leaſe made by *Thomas Bracebridge* the Son to *Buckingham* is good, and the Land is diſcharged of the former Leaſe of 70 Years for the other Moiety. The ſecond was, admitting that by the Feoffment and Livery of the Manor the Term or Intereſt for Years ſhall not paſs, yet if it ſhall paſs by the other Words in the Deed, *viz.* by the Grant of all his Lands and Tenements in *Kinſbury*.

For the Plaintiff.

A. leaſes 40 Acres Parcel of a Manor to B. for 40 Years, and afterwards leaſes the ſame to C. for 70 Years, C. grants over his Eſtate to the Wife of A. the Leſſor and to a Stranger, A. makes a Feoffment in Fee of the Manor to others, B. attorns, if by this Feoffment the Moiety of the Term of 70 Years, which A. had in Right of his Wife, ſhall paſs to the Feoffees included in the Land by Way of Extinguiſhment.

And as to the firſt Point, it was ſaid on Behalf of the Plaintiff, that although the 40 Acres were Parcel of the Manor, yet when the Leaſe was made of them to *Perrot* and his Wife for 40 Years, [f] by that Leaſe the Poſſeſſion was ſevered from the Manor, and was not Parcel of the Manor, although the [g] Reverſion continued Parcel of the Manor, ſo that the Term hath diſmembered the Land in Poſſeſſion from the Manor; for if *Perrot* and his Wife and *Thomas Bracebridge* would have joined in a Leaſe of the Manor and of all the Lands and Tenements Parcel of the Manor to another for 50 Years, nothing of the 40 Acres which *Perrot* and his Wife had ſhould paſs from *Perrot* during the Term of 40 Years, becauſe during his Leaſe the Land was not Parcel of the Manor. [h] So *Littleton* ſhews us that if one makes a Gift in Tail, or a Leaſe for Life of Parcel of a Manor, during thoſe Eſtates the Land is not Parcel of the Manor. And as the Land is ſevered from the Manor during the Leaſe to *Perrot* and his Wife, ſo likewiſe ſhall it be during the ſecond Leaſe for 70 Years made to Sir *George Griffith*: And when Sir *George* granted over his Eſtate to *Joice* and to *John Bracebridge*, the Eſtate remained ſevered from the Manor in their Hands, as it was in the Hands of Sir *George* himſelf, and eſpecially when the Freehold which *Thomas Bracebridge* had could not merge the Moiety of the Term, as it is before [i] adjudged; from whence it conſequently follows that the Feoffment of the Manor did not give nor convey to the Feoffees by Way of Extinguiſhment or otherwiſe the Term of 70 Years, becauſe it was not Parcel of the Manor. And from hence it alſo conſequently follows, that if it ſhall not paſs, then *John* the Survivor of *Joice* ſhall have the Term by the Death of *Joice*, and then his Grant to *Anticle* the Plaintiff is good, and ſo the Suit of *Ejectione firmæ* is maintainable.

[f] S. P. 5 Mod. 246 *Per Curiam.*

[g] Cro. E. 522. 324. b. 325. a. Ante 103 (f). Vide Dy. 350. pl. 18. 5 Mod. 246. Vin. Abr. tit. Manor C. pl. 5. Q. pl. 1. Q. 2. pl. 2.

[h] Littlet. § 591. Bro. Compriſe 27. 36 H. 6. 20. Bro. Ibid. 9. M. 7. H. 7, 8. a. Bro. Ibid. 19. Co. Litt.

[i] *Bracebridge v. Cook* Ante 417, 418, 419.

And

And as to the ſecond Point, it was ſaid by them that the Grant of *Thomas Bracebridge* the Father of all his Lands and Tenements ſhall not make the Term to paſs. [a] And to prove this the Caſe of 7 *Edw.* 6. was alledged, which is cited in the Abridgment of the Lord *Robert Brook* late Chief Juſtice of the Common-Bench *Tit. Grant pl.* 155. where it is thus written, "A Man grants "*omnia terras et tenementa ſua in D.* a Leaſe for Years ſhall not paſs, otherwiſe if he grants [b] *om-* "*nes firmas ſuas*, thereby a Leaſe for Years ſhall paſs, for an *Ejectione firmæ* lies thereof, by which "he may recover the Term, and therefore it is a good Word of Grant." Thus ſays the Book. Alſo the Grant here is to the Feoffees and their Heirs, [c] which Word (*Heirs*) implies that the Feoffor intended to paſs Things of Inheritance only. Wherefore if the Term of 70 Years ſhall not paſs by the Words in the Deed of Grant *of all his Lands and Tenements*, nor by the Feoffment of the Manor, then the Title of *Anticle* the Plaintiff, who claims from *John Bracebridge*, who had the Reſidue of the Term of 70 Years as Survivor to *Joice*, is good. And therefore they prayed Judgment for the Plaintiff for the ſaid other Moiety.

[a] S.P. *Per Brook* Bro. Grants 87. 37 H. 8. Bro. Done 41. B. N. C. § 301, 438. 1 Bulſt. 100. Godolph. Orph. Leg. 348. § 4. Sed Contra Poſt 424.

[b] Show.P.C.206

[c] S.P.Moor 832 *Edwards v. Denton.*

On the other Hand it was argued by the Counſel for the Defendant. And as to the firſt Point, it was admitted that when the Leaſe for Years was made to *Perrot* and his Wife, who entered, thereby the Land leaſed was become no Parcel of the Manor, but was diſmembered from it as to the Poſſeſſion, during the Leaſe, but the Reverſion thereof and the Freehold continued Parcel of the Manor, and the Reaſon thereof is, [d] becauſe the Leſſees have entered into the Land, whereby they have the Poſſeſſion, and ſo there is a Poſſeſſion and a Reverſion, which are diſtinct Things. And as the Eſtates are ſeveral, ſo are they in ſeveral Perſons, for he that has the Leaſe has nothing in the Reverſion, and he that has the Reverſion has nothing in the Leaſe. But if a Man ſeized of Land makes a Leaſe for Years to commence preſently or at a Day to come, there before the Leſſee has entered, or the Leſſor has waived the Poſſeſſion, the Leſſee has but an *Intereſſe termini*, which is an Agreement executory to have the Land, and he has not the Poſſeſſion of the Land, but that continues always in the Leſſor until Entry is made, ſo that the Entry makes the Poſſeſſion and Reverſion. [e] For *Littleton* in his Book *cap. Releaſes* ſays that if one leaſes Land to another for Term of Years, and the Leſſor releaſes to the Leſſee all his Right before the Leſſee has entered into the ſame Land by Force of the Leaſe, ſuch Releaſe is void, becauſe the Leſſee had no Poſſeſſion of the Land at the Time of the Releaſe made, but only a Right to have the ſame Land by Force of the ſame Leaſe. Such are the Words of *Littleton*. And, Sir, if the Leſſee has but a Right, *ergo* he has no Poſſeſſion, nevertheleſs it is ſuch a Contract and Right as may be [f] granted over to another, and be forfeited, but yet it is not executed, but only executory as to the Poſſeſſion. [g] For, it was ſaid, in the Time of the preſent Queen the Dean and Chapter of *Canterbury* brought in this Court a Bill of Debt againſt their Leſſee for Years for Rent in Arrear for divers Years, and counted that they made the Leaſe by Deed to commence at the Feaſt of *St. Michael* next after the Date of the Deed, and it was held here that the Suit was not maintainable, becauſe the Leſſee had not entered, nor the Leſſors * waived the Poſſeſſion, until which Entry or Waiver made they ſhall be adjudged Occupiers, in which Caſe they ſhall not have any Rent. Then here in the principal Caſe the Leſſee for 70 Years had not entered before the Feoffment, nor could he have any Entry, becauſe the former Leaſe made to *Perrot* and his Wife had then Continuance, in which Caſe *Thomas Bracebridge* the Leſſor had no [h] Reverſion depending upon the Leaſe for 70 Years, but only upon the Leaſe for 40 Years, for the Leſſees for 40 Years had entered, and ſo had an Eſtate diſtinct from the Reverſion, but the Leſſee for 70 Years had not entered, nor could enter, but his Leaſe was executory by Entry after the Determination of the Eſtate of *Perrot* and his Wife, and not before, in which Caſe when Sir *George Griffith* had before the Feoffment granted his Intereſt to *Joice* and to *John Bracebridge*, which Intereſt was executory by Entry, and the Huſband of *Joice* made a Feoffment of the Manor whereof the Reverſion of theſe 40 Acres then were Parcel, and *Perrot* and his Wife attorned, by that Feoffment the Moiety which *Joice* might have claimed ſhall paſs in the Reverſion, and *Thomas Bracebridge* and his Wife ſhall never claim it againſt the Feoffment. For if *Joice* before the Coverture had had a Rent-charge for Years granted out of the Land of *Thomas Bracebridge*, to commence at a Day to come, and after the Coverture *Thomas Bracebridge* had made a Feoffment of the Land, and had died, *Joice* ſhould never have had the Rent afterwards. And the principal Caſe is no other in Effect than if *Thomas Bracebridge*, being ſeized of the Manor, had made a Leaſe of Parcel of it to Sir *George Griffith* for 70 Years to commence at the Feaſt of *St. Michael* then next following, and before *Michaelmas* Sir *George Griffith* had granted over his Eſtate to *Joice* only, and before *Michaelmas* her Huſband the Leſſor had made a Feoffment of the Manor, and after *Michaelmas* had died, there *Joice* ſhould never have had her Leaſe, becauſe it paſſed drowned in the Feoffment; but if in this laſt Caſe Sir *George* had entered after *Michaelmas*, and had granted his Eſtate to the ſaid *Joice*, and afterwards the Huſband had made a Feoffment of the Manor, and Livery of Seizin in another Part of the Manor, then perhaps the Wife ſurviving her Huſband ſhould have had the Land during the Term leaſed, becauſe the Land was not Parcel of the Manor during the Leaſe, for that it was executed; but in the principal Caſe the Leaſe was not executed by Entry, for which Reaſon the Manor is given diſcharged of the Leaſe for *Joice*'s Moiety, and therefore as to that the Plaintiff ſhall be barred. And ſo was the Opinion of the whole Court.

E contra for the Defendant.

[d] 4 Bac. Abr. 277

[e] M. 22 Ed. 4. 37. a. *Per Neal* J. Bro. Releaſes 59. Litt. § 459. Co. Litt. 46. b. 270 a. 5 Co. 124. b. 2 Rol. R. 407. Perk. § 603. 4 Bac. Abr. 277. Vin. Abr. tit. Releaſe B. a. pl. 6. Plowd. Quær. § 311.

[f] Plowd. Quær. § 95, 311. Ante 142 (k), and the Books there cited.

[g] S. P. 2 Brownl. 159. 2 Rol. R. 174, 407. Palm. 117. Vin. Abr. tit. Reverſion B. pl. 3.

* But if the Leſſor waives the Poſſeſſion, tho' the Leſſee never enters into the Land, yet an Action of Debt for the Rent lies upon the Contract, Dy. 4. b. pl. 3. 1 Rol. Abr. 605. pl. 6.

[h] S. P. Dy. 111. pl. 44. Co. Litt. 46. b. Lutw. 444. Vin. Abr. tit. Reverſion A. pl. 2. B. pl. 3. in Margine.

And as to the ſecond Point it was ſaid, [i] that the Grant of all his Lands and Tenements ſhall make the Intereſt for Years to paſs, becauſe it is his Land for the Time, and that the Caſe cited

[i] Vide Moor 832. pl. 1119. Skin. 539, 540. Kitch. 63.

out of *Brook* was not Law, becauſe the Words of the Grant would be made void by ſuch Expoſition of them, inaſmuch as it is not ſhewn in that Caſe that the Words might be otherwiſe ſupplied, and ſuch Expoſition the Law will not ſuffer. And here when *Thomas Bracebridge* the Father gave and granted the Manor and all his other Lands and Tenements, if this ſhould not make the Land leaſed to paſs (admitting that the ſame was not Parcel of the Manor) the Words would be void, for it is not found that he had any other Land which was not Parcel of the Manor, and therefore the Words would be void and to no Purpoſe if ſo be they could not make the Intereſt of the Term to paſs. But they did not reſt ſo much upon this Point as upon the former, which made the Matter ſufficiently clear. Wherefore in *Eaſter* Term 18 *Elizabeth* Judgment was given that the Plaintiff ſhould be barred for the ſaid other Moiety, which Judgment here follows.

The Judgment. At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid. And becauſe the Court of the Lady the Queen here is not yet adviſed of giving their Judgment of and upon the Premiſſes, Day is given to the Parties aforeſaid before the Lady the Queen at *Weſtminſter* until *Wedneſday* next after 15 Days of *Eaſter* to hear their Judgment thereon, becauſe the Court of the Lady the Queen here thereof not yet, *&c.* At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid, whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the Lady the Queen here more fully underſtood, and mature Deliberation being had thereupon, for that it ſeems to the Court of the Lady the Queen here, upon the whole Matter aforeſaid in Form aforeſaid found, that the aforeſaid Entry of the aforeſaid *Henry Clowſe* into the aforeſaid 40 Acres of Paſture is a good and lawful Entry in Law of and for the aforeſaid Moiety of the ſame 40 Acres of Paſture, whereupon the aforeſaid Matter in Law by the Jurors aforeſaid is found, it is conſidered that the ſame *Anticle* take nothing by his Bill aforeſaid, as to the ſame Moiety of the aforeſaid 40 Acres of Paſture with the Appurtenances, but that he be in Mercy for his falſe Claim therein, and that the aforeſaid *Henry* go thereof without Day. And further it is conſidered that the aforeſaid *Anticle* recover againſt the aforeſaid *Henry Clowſe* his Term aforeſaid yet to come of and in the aforeſaid other Moiety of the ſame 40 Acres of Paſture with the Appurtenances, whereupon it is found by the Jurors aforeſaid in Form aforeſaid that the ſame *Henry* is guilty of the Treſpas and Ejectment aforeſaid thereof, and his Damages aforeſaid by the Jurors aforeſaid in Form aforeſaid aſſeſſed, and alſo 9 *l.* 10 *s.* for his Coſts and Charges aforeſaid to the ſame *Anticle* by the Court of the Lady the Queen here with his Aſſent of Increaſe adjudged: Which ſaid Damages in the whole amount to 10 *l.* and 20 *d.* And that the aforeſaid *Henry* be taken, *&c*

Nota. And after this Judgment was given, one who was of Counſel with the Defendant thought himſelf greatly blameable for that he had forgotten to ſpeak to another Point, which was, that the Plaintiff ought not to have had Judgment for the other Moiety, but the Judgment ought to have been that he ſhould take nothing by his Writ, [a] becauſe the Plaintiff had brought his Suit for the entire Thing, *viz.* for the 40 Acres, and now it is found that he had but Title to a Moiety thereof, in which Caſe he ought to have brought his Suit for the Moiety only. For there is a Difference in the *Regiſter* as to the Demand of Particulars in a Writ, for firſt the whole is put, and afterwards the Moiety, or third Part, or other Quantity which is not ſeveral. And if a Man demands the whole Portion by his Writ, he ſhall not thereby recover any Parcel which is not entire or ſeveral, becauſe he might have had another Form of Writ. For if he brings a Writ of Entry upon a Diſſeizin for one Acre, and the Tenant pleads *ne diſſeiſa pas*, and the Jury find that he had Right to the Moiety, and of that was diſſeized, and of no more, becauſe the Tenant had a good Title to the other Moiety, there he ſhall recover nothing, becauſe he might have had another Form of Writ for the Moiety; but if they find that he was diſſeized *de dimidio dictæ acræ*, and of no more, there he ſhall have Judgment for it, becauſe this is ſeveral, for there is a Diverſity between *medietatem acræ terræ*, and *dimidium acræ terræ*, for the one Portion is ſeveral and divided, and the other is in Common, or in Jointure, or in Parcenary, and undivided. And alſo he took it that the Suit ſhould have abated for the whole in this Caſe upon Bill, as it ſhould have done upon Writ original, if Exception had been taken to it. *Quære tamen inde.*

[a] S. P. 1 Rol. R. 385, 386. by the Reporter. SedContra 2 Rol. Abr. 719. pl. 19. Godb. 128. 3 Bulſt. 185. And ſee Hob. 282, 283.

A Re-

A Report of a Judgment given by the Juſtices of the Common-Bench *in* Michaelmas *Term in the* 14*th &* 15*th Years of the Reign of Queen* Elizabeth, *upon a Challenge taken by* Henry Vernon *Eſquire Demandant in a* Formedon *in Remainder brought againſt* William Madder *for a Houſe and Land in* Wirkſworth *in the County of* Derby, *wherein the Tenant vouched to Warranty* Thomas Stanley *Knight and* Margaret *his Wife and* John Manners *Eſquire and* Dorothy *his Wife, who appeared and traverſed the Point of the Writ, and thereupon they were at Iſſue. And the Jury appeared in the* Common-Bench *the ſaid Term of the Record, which is entered amongſt the Records of* Hillary *Term* 12 Elizabeth, Rot. 1509. *And the Challenge was taken as follows.*

AT which Day the Jury between the Parties aforeſaid touching the Plea aforeſaid was put between them in Reſpite here until this Day, *viz.* the Morrow of *All Souls* then next following. And now here at this Day came as well the aforeſaid *Henry Vernon* now Demandant, as the aforeſaid *Thomas Stanley* and *Margaret*, *John Manners* and *Dorothy*, by their Attornies aforeſaid, and the Jurors therein impannelled being called likewiſe came. And thereupon the ſame *Henry Vernon* challenges the Array of the Panel aforeſaid, becauſe he ſays that that Panel was arrayed by one *John Zouch* Knight, now, and at the Time of the Array aforeſaid made, Sheriff of the aforeſaid County of *Derby*, which ſaid Sheriff is Couſin of the aforeſaid *John Manners*, that is to ſay, Son of *George Zouch* Eſquire, Son of *John Zouch* Knight, Son of *John Zouch* Eſquire, Son of *John Zouch* Eſquire, Son of *William* Lord *Zouch*, Son of *Alan* Lord *Zouch*, Son of *William* Lord *Zouch*, Son of *Elizabeth* Daughter of *William* Lord *Roos*, Father of *William* Lord *Roos*, Father of *Thomas* Lord *Roos*, Father of *Thomas* Lord *Roos*, Father of *Elianor* Mother of *George Manners* Knight, Father of *Thomas* Earl of *Rutland*, Father of the aforeſaid *John Manners*.

And Exception was taken to this Challenge by the Counſel of the Vouchees, for that it was inſufficient in Matter, becauſe the Blood between the ſaid Sir *John Zouch* the Sheriff and the ſaid *John Manners* is ſo far diſtant. For Sir *John Zouch* is in the ninth Deſcent from *William* Lord *Roos* the Anceſtor Paramount from whom the Blood is derived, and *John Manners* is in the ſeventh Deſcent from the ſaid *William* Lord *Roos*, and ſo Sir *John Zouch* Knight, Grandfather to Sir *John Zouch* the Sheriff who has made the Return, and the ſaid *John Manners* were in the ſeventh Degree one to the other, and the ſaid *Zouch* the Sheriff is two Degrees further, ſo that the one is in the ſeventh Degree of Blood, and the other in the ninth, in which Degrees, by Reaſon of their great Diſtance, there can be no Preſumption of Partiality, for the further removed Blood is, the more cool it is, and the leſs Favour it bears to thoſe of the ſame Stock. And therefore the Law which follows Nature, and conſiders its Operations and Effects, judges that thoſe who are ſo remote in Blood are as remote in Affection alſo, for elſe there would be no Bounds put to Challenges, for the whole World is of one Blood, and all the Inhabitants of the Earth are deſcended from *Adam* and *Eve*, and ſo are Couſins to one another, but yet every ſuch Couſinage is no Cauſe of Challenge, unleſs it be in a reaſonable Proximity. And it was touched that the Degrees of Marriage are good Limits for Challenges of Blood.

If Huſband and Wife are vouched, (for the Warranty of the Lands of the Wife) and the Sheriff who returns the Jury is Couſin in the ninth Degree to the Huſband, this is a good principal Challenge to the Array, for Couſinage is a good Cauſe of Challenge, let it be ever ſo many Degrees diſtant, and the Law preſumes that the Sheriff being of the ſame Lineage will bear Affection to the other, and tho' in this Caſe the one cannot be Heir to the other of the Land in Diſpute, yet the one may be Heir to the other of other Land. S. C. Dy. 319. pl. 13. 2 Rol. Abr. 637. H. pl. 2. S. P. O Bendl. 96. 1 Finch 187. 2 Finch 401. Tri. per pais 144, 145.

Another Reaſon was alledged againſt the Challenge (by *Thomas Bromley* the Queen's Sollicitor, who was of Counſel for the Vouchees, and admitted to ſpeak within the Bar) becauſe the Land here, to which the Warranty was annexed, came from the Wives of the Vouchees, or from their Anceſtors, for they are here vouched with their Huſbands, which ſhall be intended in Reſpect of the Warranty made by the Wives or their Anceſtors, and the Land which ſhall be rendered in Value ſhall be the Land of the Wives, and no other, and Sir *John Zouch* the Sheriff is not of their Blood, nor is he inheritable to their Land, and the Reaſon why Challenges for Couſinage are allowed in Law, is, in Reſpect that the Sheriff who makes the Panel, or the Juror who is challenged, may inherit by Deſcent the Land of one of the Parties. And hereupon he cited the Caſe of * 40 *Aſſ. pl.* 20. which reaches to both the Cauſes here alledged, where it appears that *Bernard Brocas* ſued an Attaint upon a Verdict of an Aſſize which paſſed againſt him, where ſome were challenged becauſe they were of Affinity and Alliance to the Plaintiff, and foraſmuch as they were many Degrees diſtant, and alſo the Alliance was by Couſinage on the Part of the Mother of the Plaintiff, ſo that the Land could never come into the Blood of the Mother, the Challenge was diſallowed. The ſame Reaſon (he ſaid) was in the principal Caſe here, for the Land which ſhall be rendered in Value ſhall be the Land of the Wives, to which Land the Sheriff cannot be inheritable, inaſmuch as he is not alledged to be of the Blood of the Wives, for which Reaſon the Law cannot preſume that the Sheriff returned the Jury favourably to ſave the Land which ſhould be rendered in Value, to which he cannot by any Poſſibility be inheritable; and alſo the ſaid Caſe proves that Couſinage, which is a long Degree diſtant, is no Cauſe of Challenge.

* Dy. 319. pl. 13.

In Anſwer to theſe Objections it was ſaid, that, as to the firſt Point, Couſinage ſhall be a good Challenge, what Degree ſoever it be diſtant. † And hereupon the Caſe in 21 *Edw.* 4. was cited, where in an Aſſize brought by the Dean and Chapter of *Lincoln* againſt *Pratt*, *Choke* ſaid, if the Juror be Couſin to the Party in the ninth Degree, it is a good Challenge, if he can ſhew how, *quod omnes conceſſerunt*. From whence it appears that Proximity of Blood is not requiſite in a Challenge, but if he is of Blood it is ſufficient.

E contra, in Support of the Challenge.

† M. 21. Ed. 4. 63. b. Bro. Challenge 180. Dy. 319. pl. 13. Co. Litt. 157. a. 1 Finch 187. 2 Finch 401.

And as to the other Reaſon given by the Counſel of the other Side, it was ſaid that the Reaſon why Couſinage is a good Cauſe of Challenge is not becauſe the Land in Diſpute, or the Land which ſhall be rendered in Value, may deſcend to the Sheriff who made the Panel, or to the Juror who is challenged, but the Reaſon is, [a] becauſe the one may be Heir to the other of other Land which they have, if they have any, and alſo it is in Reſpect of the Affection which the Law preſumes one of the ſame Lineage bears to another; [b] and for this Cauſe it ſhall be a good Challenge in perſonal Suits. Wherefore the Counſel for the Demandant ſaid to the Counſel of the other Side, "if you take the Challenge to be ineffectual, demur in Law upon it if you will, for we will not "relinquiſh it." But the Counſel for the Vouchees thought it better to deny the Couſinage than to demur upon it, for by the Demurrer the Couſinage would be confeſſed, which they did not take to be true, and if it ſhould be tried againſt them, yet they might afterwards have Benefit of the Matter in Law, for although the Couſinage was tried and found to be true, yet if the Matter was not ſufficient in Law, the Juſtices ought not to quaſh the Array; wherefore they denied the Challenge. And thereupon Triers were aſſigned, to whom Evidence was given by the Heralds of Arms, and Teſtimony out of their Books was ſhewn to prove that the Couſinage was true; wherefore the Triers found the Couſinage. And after it was found, the Court took the Challenge to be good in Law, and quaſhed the Array. And it was entered of Record as follows.

[a] 1 Finch 187. 2 Finch 401.

[b] 1 Finch 187. 2 Finch 401.

Herald's Books admitted good Evidence to Triers of a Challenge to prove Couſinage in the Sheriff. Vide T. Jones 224. Comb. 63. Salk. 281. pl. 9. Vin. Abr. tit. Evidence A. b. 39. *per totum.*

Which ſaid Challenge by the aforeſaid *Thomas Stanley* and *Margaret*, *John Manners* and *Dorothy* denied, by *Nicholas Sturley* of *Beachiff* Eſquire and *Robert Fitzherbert* of *Tiſſington* Eſquire, Triers thereunto elected and ſworn, is found to be true. Therefore let the Panel aforeſaid be quaſhed and withdrawn, *&c.* And thereupon the aforeſaid *Henry Vernon* now Demandant prays the Writ of the Lady the Queen to make to come here a new 12, *&c.* to the Coroner of the County aforeſaid to be directed. And it is granted to him, *&c.* Therefore the Coroner is commanded that he cauſe to come here from the Day of *Eaſter* in 15 Days, 12, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.*

A Report of a Judgment given in the King's-Bench, *entered of Record in* Eaſter *Term in the 15th Year of the Reign of Queen* Elizabeth, *and of Part of the Arguments, upon a Demurrer in* Replevin *ſued by* Robert Smith *againſt* Thomas Stapleton *and* John Heycock. *And the Record was as follows.*

Eaſter Term 20 Eliz. Rot. 247. Rooper et Heywood. Eſſex.

Declaration.

Same Precedent Raſt. Entr. 563. b. pl. 3.

Thomas Stapleton and *John Heycock* were ſummoned to anſwer *Robert Smith* of a Plea, wherefore they took the Cattle of the ſaid *Robert*, and them unjuſtly detained againſt Gages and Pledges, *&c.* And whereupon the ſame *Robert* by *Francis Sandbach* his Attorney complains, that the aforeſaid *Thomas* and *John* the 27th Day of *November* in the 10th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, at *Goldhanger* in the County aforeſaid in a certain Place there called *Faity in the Land Ground* in *Goldhanger*, took the Cattle, *viz.* 6 Cows of the ſaid *Robert*, and them unjuſtly detained againſt Gages and Pledges, until, *&c.* and whereupon he ſays that he is damnified and has Damage to the Value of 10 *l.* And therefore he produces the Suit, *&c.*

Avowry.

And the aforeſaid *Thomas Stapleton* and *John Heycock* by *Richard Haywood* their Attorney come and defend the Force and Injury when, *&c.* all the taking and whatſoever, *&c.* And as Bailiffs of *John Reynolds* well acknowledge the taking of the Cattle aforeſaid in the aforeſaid Place in which, *&c.* and juſtly, *&c.* becauſe they ſay that the ſame Place, in which the taking of the Cattle aforeſaid is ſuppoſed to be done, is, and at the aforeſaid Time of the taking of the ſaid Cattle above ſuppoſed to be done, was, Acres with the Appurtenances in *Goldhanger* aforeſaid, whereof, long before the taking of the ſaid Cattle above ſuppoſed to be done, one *Charles* late Duke of *Suffolk* was ſeized in his Demeſn as of Fee. And being ſo ſeized thereof, the ſame late Duke of *Suffolk*, before the aforeſaid Time when, *&c. viz.* the 20th Day of *March* in the 30th Year of the Reign of Lord *Henry* the *Eighth* late King of *England*, at *Goldhanger* aforeſaid, gave, granted, and confirmed to one *Robert Trapps* of *London* Goldſmith and to *Joan* then his Wife the aforeſaid Place with the Appurtenances in which, *&c.* amongſt other Things, to have and to hold to the ſame *Robert* and *Joan* for Term of their Lives and of the longer Liver of them, without Impeachment of any Waſt, the Remainder thereof, after the Death of the aforeſaid *Robert Trapps* and *Joan*, to *Nicholas Trapps* one of the Sons of the ſaid *Robert Trapps*, and to the Heirs of his Body lawfully begotten, and for Default of

ſuch

ſuch Iſſue, the Remainder thereof to one *Francis Trapps* another of the Sons of the ſaid *Robert Trapps*, and to his Heirs and Aſſigns for ever. By virtue of which ſaid Gift, Grant, and Confirmation the aforeſaid *Robert Trapps* and *Joan* his Wife of the aforeſaid Place in which, &c. were ſeized in their Demeſn as of Freehold for Term of their Lives, the Remainder thereof to the aforeſaid *Nicholas Trapps* and to the Heirs of his Body lawfully begotten, the Remainder thereof in Form aforeſaid. And the aforeſaid *Robert* and *Joan* being ſo ſeized thereof, and the aforeſaid *Nicholas* being ſo ſeized of the Remainder thereof, the aforeſaid *Nicholas Trapps* afterwards, and before the aforeſaid Time when, &c. viz. the 7th Day of *May* in the 36th Year of the Reign of the ſaid late King *Henry* 8. at *London* aforeſaid of ſuch his Eſtate thereof died ſeized, after whoſe Death the aforeſaid Remainder of the aforeſaid Place in which, &c, amongſt other Things deſcended to one *Mary* Wife of one Lord *Giles Paulet*, and to *Alice* Wife of one *Henry Brown*, as Daughters and Heirs of the ſame *Nicholas* of his Body lawfully begotten, whereby the ſame Lord *Giles* and *Mary*, *Henry Brown* and *Alice* his Wife, in Right of the ſame *Mary* and *Alice*, were of the ſaid Remainder of the aforeſaid Place in which, &c. amongſt other Things ſeized as of Fee and Right, viz. to the aforeſaid *Mary* and *Alice*, and to the Heirs of their Bodies lawfully begotten, by the Form of the Gift aforeſaid. And afterwards the aforeſaid *Robert Trapps* and *Joan* being ſo ſeized, as is aforeſaid, of the aforeſaid Place in which, &c. the aforeſaid *Robert Trapps*, the 12th Day of *December* in the 3d Year of the Reign of the ſaid Lady the Queen now, at *London* in the Pariſh of *St. Vedaſt*, died: And the aforeſaid *Joan* ſurvived him, and held herſelf in the Tenements aforeſaid with the Appurtenances in which, &c. by Right of Survivorſhip, and was thereof ſole ſeized in her Demeſn as of Freehold. And ſhe being ſo thereof ſeized, at *London* aforeſaid the 16th Day of *January* in the 6th Year of the Reign of the Lady the Queen now, of ſuch Eſtate thereof died ſeized; after whoſe Death the aforeſaid Lord *Giles* and *Mary* his Wife, and the aforeſaid *Henry Brown* and *Alice* his Wife, in Right of the ſame *Mary* and *Alice*, into the aforeſaid Tenements with the Appurtenances in which, &c. amongſt other Things, as in the Remainder of the ſaid *Mary* and *Alice*, entered, and were thereof, amongſt other Things, ſeized in their Demeſn as of Fee-tail, by the Form of the Gift aforeſaid, in Right of the ſame *Mary* and *Alice*. And the ſaid Lord *Giles* and *Mary*, *Henry* and *Alice*, being ſo thereof ſeized, before the aforeſaid Time when, &c. viz. the 10th Day of *July* in the 7th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, at *Goldhanger* aforeſaid, Partition of the Place aforeſaid in which, &c. and of other Tenements which deſcended to the aforeſaid *Mary* and *Alice* as Daughters and Heirs of the aforeſaid *Nicholas* in the ſaid County of *Eſſex*, was made between the aforeſaid Lord *Giles Paulet* and *Mary*, and the aforeſaid *Henry Brown* and *Alice*, by which ſaid Partition the aforeſaid Place in which, &c. amongſt other Things was allotted and aſſigned to the aforeſaid Lord *Giles* and *Mary* in Recompence and Allowance of the whole Purparty of the aforeſaid *Mary* falling to the ſaid *Mary* out of all the Tenements aforeſaid with the Appurtenances which were the aforeſaid *Nicholas*'s her Father. By virtue of which ſaid Partition the ſame Lord *Giles Paulet* and *Mary*, as in Right of the ſame *Mary*, were of the aforeſaid Tenements with the Appurtenances in which, &c. amongſt other Things, ſeized in their Demeſn as of Fee-tail, viz. to the aforeſaid *Mary* and to the Heirs of her Body lawfully begotten, according to the Form of the Gift aforeſaid. And the ſame Lord *Giles* and *Mary* being ſo ſeized thereof, before the aforeſaid Time when, &c. viz. the 25th Day of *March* in the 9th Year of the Reign of the ſaid Lady the Queen now, at *Goldhanger* aforeſaid, demiſed the aforeſaid Place in which, &c. amongſt other Things, to the aforeſaid *John Reynolds*, to have and to hold to the aforeſaid *John Reynolds* from the ſame 25th Day of *March* unto the End of the Term of 21 Years from thence next following and fully to be compleat. By virtue of which ſaid Demiſe the ſame *John Reynolds*, the 26th Day of *March* in the 9th Year of the Reign of the Lady the Queen now, into the aforeſaid Place in which, &c. entered, and was thereof poſſeſſed. And becauſe the aforeſaid Cattle the aforeſaid Time when, &c. were in the aforeſaid Place in which, &c. eating up the Graſs then and there growing, and doing Damage there, the ſame *Thomas Stapleton* and *John Heycock* as Bailiffs of the ſame *John Reynolds* well acknowledge the taking of the Cattle aforeſaid in the aforeſaid Place in which, &c. and juſtly, &c. for the Damage then there ſo by them done. And this they are ready to verify, wherefore they pray Judgment and a Return of the Cattle aforeſaid, together with their Damages, Coſts, and Charges by them about their Suit in this Behalf expended, according to the Form of the Statute in ſuch Caſe lately made and provided, to be adjudged to them, &c.

And the aforeſaid *Robert Smith* ſays that by any Thing by the aforeſaid *Thomas Stapleton* and *John Heycock* above by pleading alledged, the ſame *Thomas* and *John* the taking of the Cattle aforeſaid in the aforeſaid Place in which, &c. juſt, ought not to acknowledge, becauſe he ſays that well and true it is that the aforeſaid *Charles* Duke of *Suffolk* was ſeized in his Demeſn as of Fee of Bar.

and in the aforeſaid Place in which, &c. And being ſo ſeized thereof, he the ſaid 20th Day of *March* in the 30th Year of the Reign of Lord *Henry* the *eighth* late King of *England*, at *Goldhanger* aforeſaid, gave, granted, and confirmed to the ſaid *Robert Trapps* and *Joan* his Wife the aforeſaid Place with the Appurtenances in which, &c. to have and to hold to the ſame *Robert* and *Joan* for Term of their Lives and of the longer Liver of them, without Impeachment of any Waſt, the Remainder thereof, after the Death of the aforeſaid *Robert* and *Joan*, to *Nicholas Trapps* one of the Sons of the ſaid *Robert Trapps*, and to the Heirs of his Body lawfully begotten, and for Default of ſuch Iſſue, the Remainder thereof to the aforeſaid *Francis Trapps* another of the Sons of the ſaid *Robert Trapps*, and to his Heirs and Aſſigns for ever; and that the aforeſaid *Robert Trapps* and *Joan* his Wife by virtue of the Gift, Grant, and Confirmation aforeſaid were ſeized in their Demeſn as of Freehold for Term of their Lives, the Remainder thereof to the aforeſaid *Nicholas Trapps* and to the Heirs of his Body lawfully begotten, the Remainder thereof in Form aforeſaid. But further the aforeſaid *Robert Smith* ſays, that the aforeſaid *Robert Trapps* and *Joan* his Wife being ſo ſeized of the aforeſaid Place in which, &c. the Remainder to the ſaid *Nicholas Trapps*, as is aforeſaid, on the Octave of *St. Hillary* in the 35th Year of the Reign of Lord *Henry* the *eighth* late King of *England*, in the Court of the ſame late King at *Weſtminſter* in the County of *Middleſex*, before *John Baldwin*, *William Shelley*, *Thomas Willoughby*, and *Humphry Brown* Juſtices, * a certain final Concord was made, and afterwards from the Day of *Eaſter* in 15 Days in the 36th Year of the Reign of the ſame King *Henry* the *eighth* there granted and recorded before the ſame Juſtices and other faithful Men of the ſaid late King *Henry* the *eighth* there preſent, between the ſaid *Nicholas Trapps* Complainant and one *Stephen Beckingham* Deforceant, of the Place aforeſaid in which, &c. amongſt other Things, by the Name of one Meſſuage, one Garden, 60 Acres of Land, 6 Acres of Meadow, 100 Acres of Paſture, 20 Acres of Wood, and 300 Acres of Marſh with the Appurtenances in *Goldhanger*, whereof a Plea of Covenant was ſummoned between them in the ſame Court: By which ſaid Fine the ſame *Stephen* acknowledged the ſaid Tenements with the Appurtenances to be the Right of the ſaid *Nicholas*, as them which the ſame *Nicholas* had of the Gift of the ſame *Stephen*, and them remitted and quit-claimed from himſelf and his Heirs to the ſame *Nicholas* and his Heirs for ever; for which ſaid Acknowledgment, Remiſe, and Quit-claim, Fine, and Agreement the ſame *Nicholas* granted to the ſame *Stephen* the ſaid Tenements with the Appurtenances, and them to him rendered in the ſame Court; To have and to hold to the ſame *Stephen* from the Feaſt of *St. Michael* the Archangel then next to come unto the End of the Term of 54 Years from thence next following, and fully to be compleat, yielding therefore yearly during the whole Term to the ſame *Nicholas* his Heirs and Aſſigns 6 *l.* 7 *s.* 8 *d.* payable at the Feaſts of the *Annunciation* of the bleſſed *Mary*, and of *St. Michael* the Archangel by equal Portions. Upon which ſaid Fine Proclamations were made according to the Form of the Statute in ſuch Caſe made and provided, that is to ſay, the firſt Proclamation thereupon was made the 17th Day of *May* in the Term of *Eaſter* in the 36th Year of the Reign of the ſaid late King *Henry* the *eighth*, the ſecond Proclamation was made the 20th Day of *May* in the ſame Term, the third Proclamation was made the 23d Day of *May* in the ſame Term, the fourth Proclamation was made the 26th Day of *May* in the ſame Term, the fifth Proclamation was made the 25th Day of *June* in the Term of the *Holy Trinity* in the 36th Year of the Reign of the aforeſaid late King, the ſixth Proclamation was made the 27th Day of *June* in the ſame Term, the ſeventh Proclamation was made the 30th Day of *June* in the ſame Term, the eighth Proclamation was made the 2d Day of *July* in the ſame Term, the ninth Proclamation was made the 21ſt Day of *November* in the Term of *St. Michael* in the ſaid 36th Year of the Reign of the aforeſaid late King, the tenth Proclamation was made the 24th Day of *November* in the ſame Term, the eleventh Proclamation was made the 26th Day of *November* in the ſame Term, the twelfth Proclamation was made the 28th Day of *November* in the ſame Term, the thirteenth Proclamation was made the 5th Day of *February* in the Term of *St. Hillary* in the 36th Year of the Reign of the aforeſaid late King *Henry* the *eighth*, the fourteenth Proclamation was made the 7th Day of *February* in the ſame Term, the fifteenth Proclamation was made the 10th Day of *February* in the ſame Term, the ſixteenth Proclamation was made the 12th Day of *February* in the ſame Term, by virtue of which Fine with Proclamations aforeſaid *Stephen Beckingham* was poſſeſſed of the Intereſt of the Term aforeſaid. And further the ſame *Robert Smith* ſays, that the 7th Day of *May* in the 36th Year of the Reign of the ſaid late King *Henry* the *eighth* the aforeſaid *Nicholas Trapps* at *Goldhanger* aforeſaid died, and afterwards the aforeſaid *Stephen Beckingham* being poſſeſſed of the ſaid Intereſt of and in the Tenements aforeſaid, as is aforeſaid, at *London* in the Pariſh of the bleſſed *Mary* of the Arches in the Ward of *Cheap* made his Teſtament and laſt Will, and therein conſtituted *Joan Beckingham* his Wife ſole Executrix, and afterwards, viz. the 9th Day of *December* in the 1ſt Year of the Reign of the Lady the Queen now at *London* in the Pariſh

and

* Vide 1 Leon. 76.

and Ward aforeſaid died. And the aforeſaid *Joan Beckingham* afterwards, viz. the 15th Day of *December* in the 1ſt Year aboveſaid took upon herſelf the Burthen of the Teſtament aforeſaid, and according to the eccleſiaſtical Law the ſame lawfully at the City of *London*, viz. in the Pariſh of the bleſſed *Mary* of the Arches in the Ward of *Cheap*, proved before *Nicholas Wotton* Doctor of both Laws, Dean of the Church of *Chriſt* in *Canterbury*, and the Chapter of the ſame Place, to whom all and all Manner of Juriſdiction ſpiritual and eccleſiaſtical, which to the Archbiſhop of *Canterbury* in full See appertained, that See being vacant, is notoriouſly known to belong. By virtue whereof the aforeſaid *Joan Beckingham*, as Executrix of the Teſtament aforeſaid, was of the Intereſt of the Term aforeſaid poſſeſſed. And the aforeſaid *Joan Beckingham* being ſo poſſeſſed, afterwards, viz. the 17th Day of *December* in the 1ſt Year of the Reign of the ſaid Lady the Queen now, at *London* in the Pariſh and Ward aforeſaid made her Teſtament and laſt Will, and therein made and conſtituted one *George Keynſham* and *Richard Buckland* Executors, and afterwards, viz. the 17th Day of *December* in the 1ſt Year aboveſaid, at *London* aforeſaid in the Pariſh and Ward aforeſaid, died. Which ſaid *George Keynſham* and *Richard Buckland* took upon themſelves the Burthen of the Teſtament of the aforeſaid *Joan Beckingham*, and the ſame Teſtament lawfully and according to the eccleſiaſtical Law proved at the City of *London* aforeſaid, viz. in the Pariſh and Ward aforeſaid, before the aforeſaid *Nicholas Wotton* Doctor of both Laws, Dean of the Church of *Chriſt* in *Canterbury*, and the Chapter of the ſame Place, to whom all and all Manner of Juriſdiction ſpiritual and eccleſiaſtical, which to the Archbiſhop of *Canterbury* in full See appertained, that See being vacant, is notoriouſly known to belong. By virtue whereof the aforeſaid *George Keynſham* and *Richard Buckland* as Executors of that Teſtament were poſſeſſed of the Intereſt of the Term aforeſaid, and afterwards the aforeſaid *Robert Trapps* and *Joan* his Wife died, after the Deaths of which *Robert* and *Joan*, the aforeſaid *George Keynſham* and *Richard Buckland*, before any Entry into the aforeſaid Place with the Appurtenances in which, &c. by the aforeſaid Lord *Giles* and Lady *Mary*, and by the aforeſaid *Henry Brown* and *Alice* his Wife, or any of them, the 20th Day of *January* in the 6th Year of the Reign of the ſaid Lady the Queen now, as Executors of the Teſtament of the aforeſaid *Joan Beckingham* Executrix of the Teſtament of the aforeſaid *Stephen Beckingham*, claiming their Term aforeſaid, into the aforeſaid Place with the Appurtenances in which, &c. entered, and were of the ſame as Executors of the Teſtament aforeſaid poſſeſſed for the Term aforeſaid, after that Partition of the Place aforeſaid in which, &c. was had, as the ſame *Thomas Stapleton* and *John Heycock* by Pleading have alledged. And the aforeſaid *George Keynſham* and *Richard Buckland* being ſo thereof poſſeſſed, as is aforeſaid, before the aforeſaid Time when, &c. viz. the 20th Day of *September* in the 6th Year of the Reign of the ſaid Lady the Queen now, at *Goldhanger* aforeſaid, demiſed the aforeſaid Place in which, &c. to the aforeſaid *Robert Smith*, to have and to hold to the ſame *Robert Smith* his Executors and Aſſigns from the Feaſt of *St. Michael* the Archangel then next following unto the End of the Term and for the Term of 7 Years from thence next following, and fully to be compleat. By virtue whereof the ſame *Robert Smith* into the aforeſaid Place in which, &c. entered, and was of the ſame poſſeſſed until the aforeſaid *Thomas* and *John* took his Cattle aforeſaid in the ſame, in Manner and Form as in his Declaration aforeſaid he hath alledged. And this he is ready to verify, wherefore for that the aforeſaid *Thomas Stapleton* and *John Heycock* the taking of the Cattle aforeſaid in the aforeſaid Place in which, &c. acknowledge, the ſame *Robert Smith* prays Judgment, and his Damages aforeſaid by Occaſion of the taking and unjuſt Detention of the Cattle aforeſaid to be adjudged to him, &c.

And the aforeſaid *Thomas Stapleton* and *John Heycock* ſay that the Plea aforeſaid by the ſaid *Robert Smith* in Manner and Form aforeſaid above by Pleading in Bar to the Cogniſance aforeſaid pleaded, and the Matter in the ſame contained, are inſufficient in Law to preclude them the ſaid *Thomas* and *John* from having their Cognizance aforeſaid, to which ſaid Plea they the ſame *Thomas* and *John* have no Neceſſity, nor are by the Law of the Land bound in anywiſe to anſwer; wherefore for Want of a ſufficient Anſwer in Bar to the Cognizance aforeſaid in this Behalf, the ſame *Thomas* and *John* as before pray Judgment, and a Return of the Cattle aforeſaid together with their Damages, Coſts, and Expences by them about their Suit in this Behalf expended, according to the Form of the Statute in ſuch Caſe made and provided, to be adjudged to them, &c. Defendants demur.

And the aforeſaid *Robert Smith* ſays that the Plea aforeſaid by him the ſaid *Robert Smith* in Manner and Form aforeſaid by Pleading in Bar to the Cognizance aforeſaid pleaded, and the Matter in the ſame contained, are good and ſufficient in Law to preclude the aforeſaid *Thomas Stapleton* and *John Heycock* from having their Cognizance aforeſaid, which ſaid Plea and the Matter in the ſame contained the ſame *Robert Smith* is ready to verify and prove as the Court, &c. And becauſe the aforeſaid *Thomas Stapleton* and *John Heycock* to that Plea do not anſwer, nor the ſame hitherto in any wiſe deny, the ſame *Robert Smith* as before prays Judgment, and his Damages aforeſaid by the Occaſion Joinder in Demurrer.

Occasion aforesaid to be adjudged to him, &c. And because the Court of the said Lady the Queen here is not yet advised of giving their Judgment of and upon the Premisses, Day therefore is given to the Parties aforesaid before the Lady the Queen at *Westminster* until next after to hear their Judgment of and upon the Premisses, &c. because the Court of the Lady the Queen here thereof not yet, &c.

THE CASE. A Stranger levies a Fine to Tenant in Tail in Remainder expectant on two Estates for Life, *sur Conusance de droit come ceo que il ad de son done*, and the Conusee by the same Fine renders to the Conusor for 54 Years to commence at *Michaelmas* ensuing, and dies, and all the Proclamations are made after his Death: The Tenants for Life, (after the Time in which the Lease is limited to commence) die: Adjudged, that the Term was good against the Issue in Tail, for the Fine was not avoided by the Descent of the Remainder. S.C. cited Moor 630. Sav. 106. 2 Bulst. 43. 1 Show. 378. West's Symb. pt. 2. fo. 10. b. Shep. Pract. Couns. 27, 65, 68. 2 Bac. Abr. 530. Vin. Abr. tit. Fine O. 4. pl. 5. S. 2. pl. 1.

THE Case was recited in this Manner. *Charles* Duke of *Suffolk* was seized in his Demesn as of Fee of and in Acres in *Goldhanger* in the County of *Essex*, and being so seized, the 20th Day of *March* in the 30th Year of the Reign of King *Henry* 8. he gave the said Lands to *Robert Trapps* and to *Joan* his Wife for their Lives, the Remainder to *Nicholas Trapps* one of their Sons, and to the Heirs of his Body begotten, the Remainder to *Francis Trapps* another of their Sons, and to his Heirs for ever; by Force whereof the Husband and Wife were seized accordingly, the Remainders over in Form aforesaid. And they being so seized, on the Octave of *St. Hillary* in the 35th Year of the Reign of King *Henry* 8. in the Common Bench a final Concord was made, and afterwards on the *Quinzime* of *Easter* in the 36th Year of the Reign of the same King granted and recorded before the Justices of the same Bench, between the said *Nicholas Trapps* Complainant, and one *Stephen Beckingham* Deforceant, of the said Tenements; by which Fine the said *Stephen* acknowledged the Tenements to be the Right of the said *Nicholas*, as them which the said *Nicholas* had of his Gift, for which Fine the said *Nicholas Trapps* granted and rendered the same Tenements to the same *Stephen Beckingham*, to have and to hold to the same *Stephen* from the Feast of *St. Michael* then next following unto the End and Term of 54 Years from thence next ensuing, and fully to be compleat: Yielding therefore yearly during the said Term to the said *Nicholas* his Heirs and Assigns 6 *l.* 7 *s.* 8 *d.* at the Feasts of the *Annunciation* of our Lady and of *St. Michael* the Archangel by equal Portions. And afterwards, viz. the 7th Day of *May* in the 36th Year of the Reign of King *Henry* 8. the said *Nicholas* died, leaving Issue two Daughters, viz. *Mary* the Wife of Lord *Giles Paulet*, and *Alice* the Wife of *Henry Brown*, after whose Death Proclamations were made upon the said Fine, that is to say, the first Proclamation was made the 17th Day of *May* in the 36th Year of the Reign of King *Henry* 8. and three other Proclamations were made the same Term, and four Proclamations in each of the three Terms following. And afterwards, viz. in the 1st Year of the Reign of Queen *Elizabeth* the said *Stephen Beckingham* made *Joan* his Wife his Executrix, and died, who proved the Testament, and made *George Keynsham* and *Richard Buckland* her Executors, and died in the said 1st Year of the Reign of Queen *Elizabeth*. And afterwards, viz. in the 3d Year of the Reign of Queen *Elizabeth* the said *Robert Trapps* died, and afterwards in the 6th Year of the Reign of Queen *Elizabeth* the said *Joan* Wife of the said *Robert Trapps* died. After whose Death, and before any Entry made by the Daughters of the said *Nicholas Trapps*, or their Husbands, the said *Keynsham* and *Buckland* Executors of the said *Joan Beckingham* entered into the said Tenements, claiming their said Term of 54 Years. And afterwards, viz. the 20th Day of *September* in the said 6th Year of the Reign of Queen *Elizabeth* they leased the said Tenements to the said *Robert Smith* the Plaintiff for 7 Years next following the Feast of *St. Michael* the Archangel then next ensuing, by Force whereof *Smith* entered and was possessed. And afterwards the said two Husbands and their Wives entered, and the 10th Day of *July* in the 7th Year of the Reign of Queen *Elizabeth* made Partition of the Hereditaments descended to them from the said *Nicholas Trapps*, by which Partition the said Tenements in *Goldhanger* were allotted to the said Lord *Giles Paulet* and to *Mary* his Wife, as Part of their Purparty. Whereupon they the 25th Day of *March* in the 9th Year of the Reign of Queen *Elizabeth* made a Lease of the said Tenements to one *John Reynolds* for 21 Years next ensuing the said 25th Day of *March*, by Force whereof on the Morrow afterwards the said *Reynolds* entered, and the said *Robert Smith* the Plaintiff put in his Cattle, viz. six Cows, and the said *Thomas Stapleton* and *John Heycock* as Bailiffs of the said *John Reynolds*, the 27th Day of *November* in the 10th Year of the Reign of Queen *Elizabeth*, distrained them, whereupon he sued a Replevin against them, which was removed into the King's Bench. And they as Bailiffs of the said *John Reynolds* make Cognizance for Damage-feasant, and shew the said Conveyance made by the Duke, and the Descent and the Partition, and the Lease to *Reynolds*. And the Plaintiff by Way of Bar to the Cognizance shews the Fine and the Proclamations, and the rest of the said Matter, and so the whole Matter before shewn was disclosed. And thereupon *Stapleton* and *Heycock* have demurred in Law.

And the Matter was argued at the Bar in the King's Bench in *October* in the 10th Year of the Reign of Queen *Elizabeth* by *Thornton* and *Manwood* on the Part of the Defendants, and by *Thomas Bromley* and an Apprentice of the Middle-Temple on the Part of the Plaintiff. And

Exceptions taken to the Pleadings.

Bromley took Exception to the Plea of Cognizance made by the Defendants, for that they have made Cognizance for Damage-feasant in the Land of their Master, and his Title is shewn to be by Force

Force of a Leaſe made by the Lord *Giles Paulet* and his Wife for 21 Years, which Leaſe is not ſhewn to be by Deed, in which Caſe it is not the Leaſe of the Wife, but of the Huſband only, and therefore they ought to have ſhewn that the Huſband and Wife were in full Life at the Time of the Diſtreſs taken, for if the Huſband is dead, the Leaſe is abſolutely determined, as againſt the Wife, becauſe it was made without Deed, and if the Wife is dead, then the Eſtate of the Huſband who made the Leaſe is ended, if it be not ſhewn that he was Tenant by the Curteſy, and then the Leaſe for Years is alſo ended. Wherefore the Defendants, in order to enable themſelves to puniſh the Plaintiff by Diſtreſs for his Wrong to *Reynolds*, ought to aver the Lives of the Huſband and Wife, which they have not done, and for this Reaſon their Plea is bad.

Exception 1. Whether it be neceſſary for him that derives Title to Land by a Leaſe for Years made by Huſband and Wife Tenants in Tail in Right of the Wife, to alledge the ſame to be made by Deed, or to aver the Lives of the Huſband and Wife, S. P. Sav. 111. Vide Dy. 91. pl. 13. 146. pl. 70. 2 Co. 61. a. b. 1 Leon. 192, 204. Cro. E. 438, 481, 656, 708. Cro. C. 527. Hutt. 55. 102. Winch 34. 1 Rol. R. 402. 3 Bac. Abr. 306.

In Anſwer to which it was ſaid, that it is ſhewn that the Wife had an Eſtate of Inheritance in the Land, *viz.* a Fee-tail, and ſo had the Huſband in her Right, and when a Leaſe is derived from one who has an Inheritance, whether he be an Abbot, Biſhop, Dean, Tenant in Tail, or the like, the Inheritance ſhall be intended to [a] continue in him, and he in the Inheritance, until the contrary is ſhewn; otherwiſe it is of a particular Eſtate, as for Life. [b] And alſo the Poſſeſſion continuing in the Leſſee ſhall enable him to diſtrain Damage-feaſant the Cattle of a Stranger that has no Title, although his Eſtate in Right is ended. But if the Huſband had granted a Rent-charge to a Stranger, and he had diſtrained for it, there would have been greater Reaſon to aver the Life of the Huſband, but here this Diſtreſs for Damage-feaſant is in Reſpect of the Poſſeſſion rather than of a good Title, which Poſſeſſion is not ſhewn to be removed. [c] And alſo it is pleaded by Way of Bar, for although he that makes Cognizance makes Title to have a Return, yet it is alſo a Bar to the Plaintiff, for it excuſes the Defendants of the Wrong, [d] and a Bar ſhall be good to a common Intent. And at the End this Exception was diſallowed by the Rule of the Court.

[a] See Ante 193 (c). and the Books there cited.

[b] S. P. 2 Rol. Sav. 111.

[c] S. P. Litt. R. 71. Palm. 483.

[d] See Ante 26 (b); and the Books there cited.

Abr. 676. pl. 19. Sav. 111. Vide 5 Co. 85. a. Vin. Abr. tit. Poſſeſſion G. per totum. See poſt 546 (c).

Another Exception was taken to the Pleading of the Partition in the Defendant's Plea of Cognizance, for that it is pleaded that the Place where, *&c.* amongſt other Things, was allotted and aſſigned to Lord *Giles* and his Wife in Recompence of her Purparty, and they have not ſhewn in particular all that was allotted to them, but have only ſaid that the Place where, *&c. amongſt other Things*, was allotted to them, and have not ſhewn the Certainty of the Land allotted to the other Coparcener.

Exception 2. Whether Partition pleaded *inter alia* be good.

To which it was ſaid, that the Pleading is good enough, and in the uſual Form, and the Plaintiff in his Bar to the Cognizance has in preciſe Words confeſſed the ſaid Partition according as it was alledged, wherefore this Exception was diſallowed by the Court.

Another Exception was taken by *Thornton* and *Manwood* to the Pleading of the Fine in the Plaintiff's Bar to the Cognizance, for that he has pleaded "that a final Concord was made," and has not pleaded "that a Fine was levied," as the uſual Form is, and although the Fine here was not engroſſed until *Eaſter* Term, yet it may be ſaid that the Fine was levied in *Hillary* Term, for in that Term the Writ of Covenant was returned, with the *Dedimus poteſtatem*, and the Concord and the King's Silver was entered the ſame Term, and the Note is made that Term in which the Writ is returned, which makes it a Fine, ſo that it might well be ſaid that the Fine was levied in *Hillary* Term, although it was not engroſſed until *Eaſter* Term. [e] And upon this the Caſe in 22 *H.* 6. was cited, where *Bremingham* brought a *Scire facias* upon a Fine levied in *Eaſter* Term *anno* 18. *Edw.* 3. and it was recorded and engroſſed in *Trinity* Term the ſame Year, and Exception was taken becauſe the *Mittimus* did not make Mention that the Fine was engroſſed, but *cum quidam finis levavit* only: But it is there ſaid that although a Fine is levied and not engroſſed, yet it is a Fine, and remains of Record, to the Intent to be executed afterwards, as ſtrongly as if it had been engroſſed, and there are divers Fines executed in this Place which never were engroſſed; [f] and before the engroſſing of it a Man ſhall have a *Quid juris clamat* to compel the Tenant to attorn, [g] for without Attornment the Waſt would be diſpuniſhable, which was there affirmed by the whole Court, but after the Fine is engroſſed he ſhall not ſue a *Quid juris clamat*, nor make Avowry, nor puniſh the Waſt without Attornment, and neither in the *Certiorare*, which iſſues out of the Chancery to the Chamberlains to remove a Fine levied in one Term, and engroſſed in another Term, nor in the *Mittimus*, is there any Mention made of the engroſſing: Wherefore the Tenant was there driven to anſwer over. From whence (it was ſaid) it appears in our Caſe that the Plaintiff might have ſaid that the Fine was levied in *Hillary* Term, although it was not engroſſed until *Eaſter* Term, and therefore inaſmuch as he has not purſued the uſual Form of Pleading, the Bar to the Cognizance is not good. And alſo it is not ſhewn that it was levied in the Common-Bench.

Exception 3. Whether it be a good Form of pleading a Fine to ſay that *a final Concord was made, &c.* And if it be neceſſary to ſhew that it was levied in the Common Bench. Vide 2 Mod. Entr. 325. b. pl. 5.

[e] M. 22. H. 6. 13. b. Fitz. Scire facias 31. Bro. 115. Shep. Pract. Counſ. 41.

[f] F. N. B. 147. a. 5 Co. 39. b. Poph. 63. Strange 109. Curſon 131, 142. Manby 158. Booth 249, 250. Weſt Symb. Pt. 2. fo. 47.

[g] Curſon 131. Manby 158. Booth 249. Weſt's Symb. pt. 2. fo. 47. a.

In anſwer to which it was ſaid, that the Matter and the Subſtance of the Fine is here ſhewn by this Form of Pleading as fully as by the other, ſo that there is no Variance in Subſtance, and in ſuch Caſe a Man is not tied up to one particular Form of Pleading, but if he ſhews the Matter effectually it is ſufficient. And as to its not being ſaid that it was levied in the Common-Bench, to this it was anſwered that the uſual Form is to ſay that the Fine was levied *in the Court of the Lady*

* Raſt. Entr. laſt Edition fo. 374. a.

the Queen at Weſtminſter, as it is before pleaded, and not to ſay that it was levied in the Common Bench. And Precedents hereof were cited in the * *Book of Entries Tit. Formedon fo.* 350. and in divers other Places. Wherefore theſe Exceptions were diſallowed by the Rule of the Court.

The Matter in Law,

As to the Matter in Law, the main Point of it was, whether or no the Leaſe for Years made by the Fine be defeated. And in order to underſtand this (it was ſaid) it is firſt to be conſidered how and in what Degree the Leaſe at firſt paſſed by the Fine; and then whether or no by the Death of *Nicholas Trapps*, and the Deſcent of the Remainder in Tail to his Daughters, thoſe Daughters were remitted to the Remainder in Tail in ſuch Manner that the Leaſe ſhall be adjudged in Law to be utterly defeated by the Deſcent of the Remainder; and laſtly, what was the Force of the Proclamations upon the Fine made after the Death of the ſaid *Nicholas Trapps*.

And as to the firſt Point, *viz.* in what Degree the Leaſe at firſt paſſed from *Nicholas Trapps*, it was ſaid, it is to be obſerved that *Robert Trapps* and his Wife were Tenants for Life of the Land, the Remainder to *Nicholas* in Tail, in which Caſe when *Beckingham* acknowledged the Tenements to be the Right of *Nicholas*, as them which he had of his Gift, his Eſtate *in rei veritate* was not altered, for *Beckingham* had no Right nor Eſtate in the Land, ſo that in Fact nothing paſſed from *Beckingham* to *Nicholas*, although during the Life of *Nicholas* he ſhould be concluded by Eſtoppel to ſay otherwiſe but that he received a Fee-ſimple from *Beckingham*.

Foraſmuch then as nothing is in Fact done by the Acknowledgment of *Beckingham* to *Nicholas*, the Render of *Nicholas* to *Beckingham* is to be conſidered, which was for 54 Years to commence at the Feaſt of *St. Michael* the Archangel then next coming, at which Time *Nicholas* had but a Remainder in Tail depending upon an Eſtate for the Lives of Huſband and Wife, and the Huſband and Wife were alive at the Time when the Leaſe for Years took its Commencement. And for the better underſtanding this Matter, it was ſaid, it is to be divided into divers Parts. Firſt, it is to be conſidered what would have been the Operation of the Law if the Leaſe had been made by Parol without Deed, and then what would have been its Operation if it had been made by Deed Poll without Eſtoppel, and laſtly, what ſhall be the Operation of the Law if it is made by Deed indented or by Fine, which are Eſtoppels in themſelves.

[a] S. P. Dy. 35. pl. 29 in margine. Moor 344. Litt. R. 281. Hutt. 105. Hardr. 411. Shep. Pract. Counſ. 71. 3 Bac. Abr. 438, 439. Ante 422 (e). Poſt 521 (b).

And as to theſe the Apprentice ſaid, [a] if a Man is ſeized of Land in Fee-ſimple, and makes a Leaſe for 21 Years to commence preſently, rendering Rent, and afterwards the ſame Day makes a new Leaſe by * Parol to another for the ſame Term, or for a leſſer Term, this ſecond Leaſe is utterly void to all Intents and Purpoſes, ſo that although the firſt Leſſee ſurrenders his Term to the Leſſor, or loſes his Term by Reaſon of a Condition broken, or forfeits it by a Feoffment made, and by Entry of the Leſſor, yet the ſecond Leſſee ſhall never have his Term, becauſe his Leaſe was void at the Beginning. For when the Leſſor had made the firſt Leaſe, he had then nothing in him but the Reverſion, and the Leſſee had the Land and the Poſſeſſion of it during the 21 Years, ſo that for that Time the Leſſor had no Intereſt in him to meddle with the Poſſeſſion, nor Authority to contract for it, for it was the Leſſee's Land for that Time, and he only had the Poſſeſſion of it during his Term, and therefore the Leſſor had no Power to contract for that which was not his own, but another's; [b] for it is requiſite that he, who by his Contract makes another the Poſſeſſor of any Thing, be the Proprietor of the ſame Thing, or elſe it is reaſonable that his Contract ſhould be void. [c] For if I am poſſeſſed of a Horſe, and I ſell the Horſe to another upon Condition that he pay me 40 *s.* for him at *Chriſtmas*, and before *Chriſtmas* I ſell the Horſe to another, and afterwards the firſt Vendee fails of Payment at *Chriſtmas*, ſo that I re-ſeize the Horſe, the ſecond Vendee ſhall never have him, for at the Time of the ſecond Contract I had no Intereſt in, nor Property, nor Poſſeſſion of the Horſe, nor any Thing but a Condition, which is not ſufficient to enable me to contract for the Property and Poſſeſſion, and therefore the ſecond Contract is meerly void. So ſhall the ſecond Leaſe be in the ſaid Caſe. But if the Leſſor after the Leaſe made for 21 Years grants the Reverſion by Deed for 21 Years immediately, there this Grant is good with Attornment, and the Grantee, if he obtains Attornment, ſhall have the Reverſion for 21 Years, which is as long as the firſt Leaſe continues, and he ſhall have the Rent reſerved upon the firſt Leaſe as incident to it; for there the Grant is not of the ſame Thing which the firſt Leſſee hath, for he hath the Land in Poſſeſſion, and the ſecond Grantee has but the Reverſion of it, which is quite a different Thing, and of a different Nature, for Poſſeſſion and Reverſion are ſeveral Things, and meerly contrary to each other. * And ſo the Leſſor, who has made a Leaſe for 21 Years, may by Parol make a Leaſe for Years to commence after the Determination of the firſt Leaſe, for this ſecond Leaſe is of another Thing, for the ſecond Leſſee is to have the Poſſeſſion after the firſt Poſſeſſion and Intereſt is expired, ſo that it is of another Thing than that which the firſt Leſſee has. [d] But if the Leſſor, who has made a Leaſe for 21 Years to commence preſently, makes another Leaſe by Parol for 31 Years to commence preſently alſo, there this ſecond Leaſe is good for the laſt 10 Years only, and for no Part of the firſt 21 Years of the ſecond Term, although the firſt Leaſe ends within the Time by Forfeiture or otherwiſe. For as to thoſe 21 Years the Leſſor had no Power to contract, becauſe the firſt Term of 21 Years ſtood in the Way, as it is ſaid before, but as to the laſt 10 Years the Caſe is juſt the ſame as if he had made a Leaſe for 10 Years to commence

* *Note*, at this Day by the Statute of 29 *Car.* 2. *cap.* 3. *of Frauds and Perjuries*, no Parol Leaſe for above three Years is to have any other Effect than only as a Leaſe at Will, ſo that ſuch Parol Leaſes now for 10 or 20 Years are out of Doors.

[b] Dy. 26. pl. 168.

[c] Vin. Abr. tit. Contract C. pl. 10.

* S. P. Plowd. Quær. § 122. 157, admitted,

[d] S. P. 26. H. 8. Bro. Leaſe 48. Cro. E. 160 *Per Gawdy*. 3 Bac. Abr. 439. Plowd. Quær. § 122. Wentw. Off. of Exec. 231.

mence from ſuch a Day which is the firſt Day after the Determination of the firſt Term of 21 Years by Effluxion of Time; for if it be ended by Surrender or other Abbreviation, yet the 10 Years ſhall not commence until the Time of 21 Years is expired and paſt, for the Leaſe for 31 Years made by Parol, as to the firſt 21 Years of it, was void as well againſt the Leſſor, for the Rent and all other Purpoſes, as againſt the Leſſee, and then the laſt 10 Years ſhall commence not after the Surrender of the firſt Leaſe, but after the Number of 21 Years are expired, at which Time they ſhall commence. For although the Contract for 31 Years is void in Part, *viz.* for the firſt 21 Years, yet it ſhall be good for the Reſidue, for in the Demiſe or Contract for 31 Years the Term is executory for every Year, and as to the Matter of the Execution it is the ſame as if there had been ſeveral [a] Contracts, one for one Year, and another for another Year, and ſo for every Year and every Day ſeverally, and then although it is void for the firſt 21 Years, yet it is good for the other 10 Years remaining, as if ſeveral Contracts had been made for them; [b] ſo that one and the ſame Contract may be void in Part and good in Part. [c] As if a Man who is ſeized in Fee makes a Leaſe for 21 Years to commence 10 Years afterwards, and the ſame Day makes a ſecond Leaſe by Parol to a Stranger for 31 Years to commence preſently, rendering Rent, there the ſecond Leaſe is good only for the firſt 10 Years, and void for the laſt 21 Years, as well againſt the Leſſor as againſt the Leſſee, ſo that the Leſſor ſhall not have any Rent for the laſt 21 Years, nor ſhall the ſecond Leſſee have the Land after the firſt 10 Years ended, although the firſt Leſſee, before the Commencement of his Term, re-grants his Term to the firſt Leſſor, becauſe the ſecond Leaſe for the laſt 21 Years was void to all Intents and Purpoſes, for the Leſſor had no Authority nor Power to contract with the ſecond Leſſee for ſuch Time, inaſmuch as he had before leaſed the Land to the firſt Leſſee for that Time, whereby he had diſcharged himſelf of the Land, and of all Power to contract for it, as to that Time. [d] But if a Man who is ſeized in Fee makes a Leaſe for Life, and afterwards makes a Leaſe to another by Parol for 40 Years to commence preſently, and within a Year afterwards the Leſſee for Life dies, there the Leſſee for 40 Years may enter, and ſhall have the Land for as many of the 40 Years as are then to come, for the firſt Eſtate for Life had no Certainty of Continuance, becauſe nothing is more incertain than the Life of Man, and although it was ſo far certain that the Leſſee for Life ſhould have the Land as long as he ſhould live, yet how long he ſhould live was utterly incertain; and therefore this cannot be reſembled to the ſaid Caſe of a Leaſe for 21 Years where the ſecond Leaſe is for 31 Years, for there it is certain that the firſt Leaſe will continue for 21 Years, and neither more nor leſs, ſo that upon ſuch Certainty the Law can ſay that the ſecond Leaſe is void for the firſt 21 Years, becauſe another has the Land for that Time, in which Caſe the Leſſor had no Power nor Intereſt to contract for the Land with another for that Time, but yet the ſecond Leaſe is good for the Reſidue of the 31 Years, *viz.* for the laſt 10 Years. So here the Leſſor had no Power to contract for the Poſſeſſion during the Life of the Tenant for Life, and therefore if the Leſſee for Life [e] ſurrenders, yet the Leſſee for 40 Years ſhall not have the Land during his Life, though after his Life he ſhall have it for as many of the 40 Years as are then to come, becauſe in a Contract for a Leaſe for Years, which is but an Agreement for the Land for the Time, every Year and Day and other Part of the Time which is to come is executory as to the Leſſee, and he ſhall have it if there be no Impediment to the contrary, and when the Eſtate for Life is ended, then the Contract which is executory for the Time to come ſhall be executed, and the Impediment, *viz.* the Eſtate for Life, which made the Contract void as long as the Life continued, is now removed, ſo that nothing ſtands in the Way of the Contract from thenceforwards, and ſo the Leſſee ſhall have the Reſidue of the 40 Years which are to come after the Death of the firſt Leſſee for Life. And thus he took the Law to be touching a preſent Contract for Land by Parol.

[f] But if a Man makes a Leaſe for 21 Years to commence preſently, and the Leſſee enters, and afterwards the ſame Day the Leſſor makes a new Leaſe by Deed-poll to a Stranger for the ſame Years, or for a leſſer Time, there if the firſt Leſſee attorns, the ſecond Leſſee ſhall have the Reverſion, and the Rent reſerved upon the firſt Leaſe, [g] for in the Demiſe of the Land the Reverſion ſhall paſs with Attornment, if the Poſſeſſion cannot. For if a Man by Deed inrolled bargains and ſells an Acre of Land, and he has but a Reverſion in it depending upon an Eſtate for Life, the Reverſion ſhall paſs; and every Man may uſe his Deed as he himſelf pleaſes. And therefore although the Deed-poll ſpeaks of a preſent Leaſe for Years of the Land, yet the Party may uſe it as a Grant of the Reverſion, but ſo he cannot uſe a Demiſe which is by Parol without Deed, [h] for a Reverſion for Years cannot be granted by Parol without Writing. But if the Leſſee will uſe the Leaſe by Deed-poll as a preſent Leaſe for Years, or if he does not obtain Attornment of the firſt Leſſee, then ſuch Leaſe by Deed-poll is abſolutely void, as much as if it was without Deed, ſo that if the firſt Leaſe is forfeited or defeated by Condition broken, the ſecond Leſſee by Deed-poll cannot enter, although the Time of his Years is not elapſed, nor can the Leſſor have an Action of Debt for the Rent reſerved, [i] becauſe a Contract by Deed-poll cannot make that to paſs which another then enjoyed, but it is void.

But

[a] See Litt. R. 280.

[b] Vin. Abr. tit. Contra&E. pl. 12.

[c] Vin. Abr. tit. Eſtate B. b. 10. pl. 6.

[d] P. 37. H. 8. Bro. Leaſe 48. 1 Co. 155. a. Moor 341. 3 Bac. Abr. 400. Cro. E. 160 *Per Gawdy*. Ante 422 (c). Vin. Abr. tit. Eſtate B. b. 10. pl. 7. Wentw. Off. of Exec. 230, 231. Contra Plowd. Quær. § 122, 161.

[e] S. P. 3 Bac. Abr. 440. Sed Ante 422 (d).

[f] Hutt. 105. 3 Bac. Abr. 439. Vin. Abr. tit. Eſtate B. b. 10. pl. 8. Ante 422 (a).

[g] See Ante 155 (b). and the Books there cited.

[h] Cro. C. 143. pl. 20. 3 Lev. 155.

[i] Vin. Abr. tit. Faits G. a. pl. 7.

[a] 1 Co. 155. a. Dy. 112. pl. 49. Skin. 261. 3 Bac. Abr. 440. Shep. Pract. Counſ. 71.

[b] Co. Litt. 47. b. 1 Finch 89, 162. 2 Finch 109. 3 Bac. Abr. 441. W. Jones 459. See Ante 421(b).

[c] See the Books next before cited. Clayt. 32. Plowd. Quær. § 124.

[d] Litt. § 58.

[a] But if the ſecond Leaſe was by Deed indented, or by Fine, (as our Caſe is) then if the firſt Leaſe is ſurrendered, or defeated by Forfeiture or Condition broken, or otherwiſe ended, the ſecond Leſſee may enter and hold it againſt the Leſſor, [b] for inaſmuch as the Leaſe is by Indenture or by Fine, both Parties are concluded to ſay the contrary but that the Leſſor had the Land in Poſſeſſion to paſs, and that it paſſed in Poſſeſſion according to the Tenor of the Leaſe; [c] for if the Leſſor had nothing in the Land, but purchaſed it after ſuch Leaſe, or if the Land deſcended to him afterwards, the Leſſee might enter upon him by Reaſon of the Concluſion, and alſo the Leſſee by Eſtoppel ſhould be compelled to pay the Rent. [d] For *Littleton* in his Chapter of *Tenant for Years* ſays, "if a Man brings an Action of Debt for Rent reſerved "upon a Leaſe for Years, it is a good Plea for the Leſſee to ſay that the Leſſor had nothing in "the Tenements at the Time of the Leaſe made, except the Leaſe be by Deed indented, in "which Caſe ſuch Plea does not lie for the Leſſee to plead." And thus, he ſaid, ſtands the Law with Regard to a preſent Leaſe for Years made by Parol, by Deed-poll, and by Indenture or other Matter of Eſtoppel, where the Land is as long in Leaſe before.

In our Caſe then *Nicholas Trapps*, who made the Leaſe by Fine to commence immediately after the Feaſt of *St. Michael* then next following, had nothing in the Land but a Remainder in Tail, and both at that Time, and at the Day when the Leaſe ought to commence, his Father and Mother held the Land for Term of their Lives, in which Caſe the Leaſe is not meerly void, for if it had been made by Parol, and the Leſſees for Life had died during the Life of *Nicholas Trapps*, *Beckingham* the Leſſee might have entered and have held the Land againſt *Nicholas*. And inaſmuch as the Leaſe is made by Fine, which carries an Eſtoppel to every Party, the Leaſe ſhall be ſtronger thereby, and ſo the Leaſe in the Life of *Nicholas Trapps* ſhall not be ſaid to be void, but ſhall be good in Eſtate to have the Reſidue of the Years which are not incurred in the Life of the Tenants for Life, and by Eſtoppel the Leaſe is a good Leaſe in Poſſeſſion for all the 54 Years.

But the great Matter is, when *Nicholas Trapps* died before the Commencement of the Leaſe, and the Remainder in Tail deſcended to his two Daughters, and the Proclamations upon the Fine were all made after the Death of the Tenant in Tail, whether or no they ſhall bind the Tail, and make the Leaſe for 54 Years good againſt the Iſſues in Tail. And hereupon the Statutes of 4 *H.* 7. *cap.* 24. and of 32 *H.* 8. *cap.* 36. and the Branches and the Meanings of them, were conſidered. And whereas the ſaid Statute of 32 *H.* 8. ordains *that all Fines levied with Proclamations of any Lands entailed to the Perſon levying the Fine, or to any of his Anceſtors, ſhall, after the Fine engroſſed and Proclamations made, be adjudged and accepted a ſufficient Bar and Diſcharge for ever againſt the ſaid Perſon and Perſons, and their Heirs claiming only by Force of any ſuch Entail*, it was objected by the Counſel for the Defendants, and alſo affirmed by the ſaid Apprentice, [e] that if the Eſtate given, upon which the Fine was levied by the Tenant in Tail, be abſolutely defeated before the laſt Proclamation made, then notwithſtanding all the Proclamations afterwards paſs and are made, the Eſtate-tail ſhall not be barred. [f] As if Tenant in Tail is diſſeized, and afterwards he levies a Fine to the Diſſeizor *ſur conuſance de droit*, or upon Releaſe, and dies, and the Iſſue in Tail enters before all the Proclamations made, and afterwards all the Proclamations are made, the Tail is not barred, but the Iſſue is remitted, and is in as Tenant in Tail; for although the Statute of 32 *H.* 8. ſays, *that the Fine after the Proclamations made ſhall be a Bar to the Tail*, yet theſe Words are ſo to be underſtood that if the Fine remains in Force until the Proclamations are made, then after the Proclamations are made, it ſhall be a Bar to the Tail, but when the Iſſue in Tail, before all the Proclamations made, enters, where his Entry is lawful, there by ſuch Entry he has annulled the Eſtate which the Parties to the Fine had, and thereby he has annulled the Fine, and is remitted to the Eſtate-tail, and then the Proclamations, which proceed afterwards and are conſummated, are of no Force, inaſmuch as the Fine is of no Force, for the Fine which is the Principal being annulled, the Proclamations which are only acceſſary to the Fine muſt alſo be annulled: And ſo the general Words of the Statute, which are *that the Fine after the Proclamations made ſhall be a Bar to the Tail*, are to be conſtrued in this reaſonable Senſe, for elſe it is idle to ſay that it ſhall be a Bar after the Proclamations, if nothing can be done before the Proclamations. And the Proclamations were ordained to the Intent that thoſe who have Right or Title ſhould have Notice of the Fine, which Notice is to give them who have Right or Title an Opportunity of defeating the Fine before the laſt Proclamation by Entry, Claim, or Action, and to no other Purpoſe is it, by which it is to be underſtood that the Entry or other lawful deveſting of the Poſſeſſion by him that has Right, before the laſt Proclamation made, ſhall aid him that has Right, or elſe the Proclamations would but be ſuperfluous, for to give Notice by the Proclamations to thoſe that have Right, and when they have Notice, not to permit them to take the proper Methods of preventing and oppoſing the Force of the Proclamations, would be to a very idle and frivolous Purpoſe. Wherefore it appears to be the Intent of the Makers of the Act that thoſe who have Right may avoid the Fine and the Force of the Proclamations by Entry or other lawful deveſting of the Eſtate and Poſſeſſion of the Land before the laſt Proclamation.

[e] 1 Co. 96. b. 2 And. 177. Kelw. 205. b.

[f] 1 Co. 96. b. Shep. Pract. Counſ. 65. See 3 Co. 90. a.

Alſo

[a] Alſo it was ſaid that if Tenant in Tail of a Rent, or of an Advowſon, or of Tithes, or ſuch like, levies a Fine thereof to a Stranger *come ceo que il ad de ſon done*, and dies before all the Proclamations are paſt, if the Iſſue ſuffers the Poſſeſſion to continue according to the Fine until the Proclamations are paſt, the Tail is barred for ever, but if he gets Seizin of the Rent, or of the Tithes, or of the Preſentment to the Advowſon before the Proclamations, the whole Force of the Fine and of the Proclamations are defeated, *cauſâ qua ſupra*. And it was ſaid, if ſo be the Iſſue cannot get Seizin of the Rent, or of the Tithes, or of the Preſentment to the Advowſon before the laſt Proclamation is paſt, (as perhaps he cannot, becauſe it may happen that no Day of Payment is incurred, and that no Tithes, or Avoidance of the Advowſon has fallen after the Acknowledgment of the Fine and before the laſt Proclamation) yet if the Iſſue comes to the Land before the laſt Proclamation is made, and claims the Rent or the Tithes, or to the Church, and claims the Advowſon, this is ſufficient to defeat the Fine and the Proclamations, and to ſave the Tail; [b] for as ſuch Claim is ſufficient for the Lord of a Villain to remove out of the Villain ſuch Things purchaſed by him, and to veſt them in the Lord, as *Littleton* ſays, ſo by the ſame Reaſon in this Caſe ſuch Claim ſhall be ſufficient for the Iſſue in Tail to deveſt ſuch Things out of the Conuſee, and to reveſt them in the Iſſue in Tail, which the Law of itſelf would not otherwiſe do, altho' the Things are in Tail, and altho' the Fine makes no [c] Diſcontinuance. [d] But if Tenant in Tail of Land levies a Fine of it to a Stranger *ſur conuſance de droit come ceo que il ad de ſon done*, and dies, and before all the Proclamations are paſt the Iſſue brings a *Formedon* in Deſcender againſt the Conuſee, and pending the Action all the Proclamations paſs, there (it was ſaid) the Iſſue ſhall be barred, and the Diſcontinuee may plead in Bar of the Tail for ever this Fine with Proclamations made pending the Writ which was well brought, and the Reaſon is, becauſe the Fine is not annulled before the Proclamations are conſummate, and the Statute of 32. *H.* 8. ſays that *the Fine after the Proclamations made ſhall be accepted to all Intents and Purpoſes a ſufficient Bar to the Heirs in Tail*, and ſo this Bar made pending the Writ is ſtrong and ſufficient enough to bar the Heir by the Letrer of the Act and by the Intent of the Makers of it, for their Intent was moſt ſtrong againſt Eſtates Tail, and this Act does not allow to the Heir in Tail, who is Privy, any Benefit by bringing of Action before the Proclamations incurred, as the Statute of 4 *H.* 7. does to Strangers within five Years. [e] And *Thornton* ſaid that if a Stranger levies a Fine to the Tenant in Tail *come ceo que il ad de ſon done*, and he renders to him a Rent in Fee, and the Proclamations upon the Fine incur, and the Tenant in Tail dies, the Iſſue ſhall avoid the Rent, for he is remitted to the Land, and the Fine ſhall not bind him for the Rent, becauſe his Anceſtor was not Tenant in Tail of the Rent, but of the Land, ſo that the Rent is another Thing than that which was entailed, and therefore the Fine is not levied of any Thing entailed, and conſequently the Rent is out of the Proviſion of the Act of 32 *H.* 8. [f] So is it (he ſaid) where Tenant in Tail of an Advowſon renders or grants to one by Fine the Nomination of a Clerk to the Advowſon. [g] And (he ſaid) if Tenant in Tail of a Rent diſſeizes the Tenant of the Land, and levies a Fine with Proclamations of the Land to a Stranger, and the Proclamations paſs, the Heir in Tail ſhall not be bound for the Rent, becauſe the Fine was not levied of it, but of the Land, which is another Thing, *quod fuit conceſſum*. But it was ſaid that in the principal Caſe the Render of the Tenant in Tail was of the Land which was entailed, ſo that it was of the Thing itſelf entailed, and therefore if the Leaſe was not defeated before the laſt Proclamation made, the Proclamations ſhall bind the Tail here, as to the Leaſe, as much as they ſhould do in a Freehold or Inheritance. And therefore whether or no the Leaſe was defeated before the Proclamations paſt, was made the principal Point of the Caſe.

[a] Poph. 63. Shep. Pract. Counſ. 65.

[b] Litt. § 177.

[c] Litt. § 618. Co. Litt. 327. b. Shep. Pract. Counſ. 65.

[d] 3 Co. 90. b. 2 Bac. Abr. 530. Shep. Pract. Counſ. 65.

[e] S. P. accord, Dy. 213. pl. 41. 3 Co. 90. a. 1 And. 6. pl. 11. Cro. J. 699. 2 Rol. R. 500. Shep. Pract. Counſ. 62, 63, 65. Winch 110. Jenk. 275. pl. 96. 2 Bac. Abr. 531. Weſt's Symb. pt. 2. fo. 66. a.

[f] Weſt's Symb. pt. 2. fo. 66. b. Shep. Pract. Counſ. 62. Sed Contra Watſ. Compl. Incumb. 79, becauſe the Preſentation and Nomination is in Effect the ſame Thing, and the Fruit and full Profit of the Patronage, the Thing entailed, Poſt 529 (b). But if Tenant in Tail of an Advowſon grants by Fine the Nomination of a Clerk to one and to his Heirs, ſo that when the Church becomes void, the Grantee and his Heirs may nominate a Clerk to the Tenant in Tail and his Heirs, and that he or they ſhall preſent the Clerk ſo nominated to the Ordinary, and the Tenant in Tail dies, ſuch Fine ſhall not bind the Iſſue in Tail, becauſe there the Nomination and the Preſentation are diſtinguiſhed, ſo that the Fine is not levied of the Thing entailed. Dodder. Compl. Parſ. 36. Watſ. Compl. Incumb. 79, 85.

[g] The Authority of the Caſe here put is greatly impeached by the Opinions of *Hobart* and *Harvey* J. in the Caſe of *Heliot v. Saunders*, where they held that if Tenant in Tail of a Rent-charge iſſuing out of a Manor levies a Fine of the Manor, this is a Bar of the Rent, becauſe the Fine being levied of the Land incluſively gives the Rent, and they ſtrongly denied this Caſe put by *Thornton* to be Law. Cro. J. 700. 2 Rol. R. 500. Winch 110, 121, 123. Jenk. 275. pl. 96. *Tamen quære* that Caſe, for there appears to be no Fine levied of the Rent, which being the Thing entailed, and not the Land, ſhould, it ſeems, deſcend to the Iſſue till the Intail thereof be barred by a Fine. And with the Opinion of *Thornton* here agrees that of *Winch* J. 2 Brownl. 155. Shep. Pract. Counſ. 62, 63, 65. Weſt's Symb. pt. 2. fo. 66. b. S. P. Dy. 213. pl. 41.

For the Defendants.

And as to this, it was ſaid on the Part of the Defendants, that it is to be conſidered that *Nicholas Trapps* who made the Leaſe was but Tenant in Tail in Remainder depending upon an Eſtate for two Lives, and the Leaſe made to commence immediately after the Feaſt of *St. Michael* then next following after the Fine levied could not take Effect nor be executed until after the Death of the Tenants for Life, and it might ſo happen that it never could be executed, for if either of the Tenants for Life ſhould outlive the Term of 54 Years, then the Leaſe for Years could never commence or take Effect in Deed. And the Iſſue in Tail, who does not come in by the Donee in Tail only, but by the Donor, ſhall not be eſtopped to ſhew the Eſtates of the Tenants for Life which diſturbed the Commencement of the Leaſe at the Day limited in the Fine, but he may ſhew the Truth of the Matter well enough. And it is confeſſed on all Sides that the Survivor of the Tenants for Life died in the 6th Year of the Reign of the preſent Queen, ſo that the Truth being confeſſed, all Eſtoppel is taken away. [h] And altho' by the Statute the Iſſue in Tail ſhall not aver Continuance

[h] Same Diverſity 3 Co. 89. b. Weſt's Symb. pt. 2. fo. 70. b. See Sav. 106, it is ſaid that this Difference is not clear. See Dy. 334. a.

ance of the Poſſeſſion againſt the Fine of his Anceſtor *come ceo que il ad de ſon done*, yet upon other Fines as this is here he ſhall not be eſtopped. And inaſmuch as the Tenants for Life were alive at the Time of the Leaſe made, they might poſſibly have outlived the Term of 54 Years, and if they had done ſo, then the Leaſe would never have taken Effect, and if they died within the 54 Years, the Leaſe might take Effect, ſo that it reſted upon a Contingency whether it ſhould ever be a Leaſe or not, which Contingency being incertain made it alſo incertain whether the Leaſe ſhould ever take Effect or not, and therefore it could not be preciſely called a Leaſe, but a Title to or Poſſibility of a Leaſe. And then when *Nicholas* the Leſſor died before the Time limited for the Commencement of the Leaſe, the Remainder in Tail by his Death deſcended to his two Daughters and Heirs, which Remainder was in them without any Entry or Claim as fully as it was in his Father, for the Continuance of the Eſtate of the Tenants for Life made the Remainder to be in the Daughters of *Nicholas* as actually and fully as a Remainder can be in any one, and the Deſcent of the Remainder to them and their Seizin of it wrought in them a Remitter to the Remainder, which Remitter purged and diſcharged the Remainder from the ſaid Title to or Poſ-
[a] Poſt 437 (c). ſibility of the Leaſe. [a] For if *Nicholas* who had the Remainder in Tail had granted a Rent-charge out of it to a Stranger, and had died, and the Remainder had deſcended to his Daughters, they ſhould have held it diſcharged of the Rent. And if they had granted the Remainder by Fine to a Stranger, and afterwards the Tenants for Life had died, the Stranger ſhould have held the Land diſcharged of the Rent, becauſe the Deſcent of the Remainder remitted the Daughters, and purged the Remainder of all Incumbrances as fully as the Deſcent of the Poſſeſſion in Tail purges the Poſſeſſion of all Incumbrances. And if *Nicholas* had made a Leaſe for 40 Years, to commence after the Death of the Tenants for Life, the Deſcent to the Daughters ſhould have avoided ſuch Leaſe which has a certain Commencement and a certain End, *a fortiore* then it ſhall avoid this Leaſe, which cannot well be called a Leaſe, but rather a Poſſibility of or Title to a Leaſe, for the Daughters cannot make Claim to avoid the Leaſe, becauſe they themſelves have the Remainder of the Land, and they cannot make Claim in their own Land, as they may to have a Thing out of the Land of another, as in the Caſe put of a Rent, and ſuch like, but the Operation of Law without Claim gives to them by the Deſcent and Remitter the like Advantage by Way of Diſcharge as they ſhould have by Claim in the Land of another: And then if the Deſcent and Remitter hath avoided the Leaſe, thereby it hath defeated the Fine as fully as the Entry of the Iſſue in Tail ſhould do in the Caſes before ſpecified where the Iſſue in Tail after the Diſſeizin of his Father enters upon the Conuſee, or obtains Seizin of the Rent before the Proclamations paſt. And then the Proclamations which were all made after the Deſcent and Remitter are of no Force, but are as abſolutely void as the Fine itſelf is. And ſo the Leaſe for 54 Years, and alſo the Eſtate of the ſaid *Robert Smith* the Plaintiff, are void, and therefore he ſhall be barred.

E Contra for the Plaintiff. On the other Side it was argued that the Leaſe for 54 Years was good againſt *Nicholas Trapps* himſelf upon this Contingency that the Tenants for Life had died before him, for the Cauſes before ſhewn, and that too altho' the Leaſe had not been by Fine, but by Parol or Deed Poll, in which there is no Eſtoppel. And when *Nicholas* died, and the Remainder in Tail deſcended to his Daughters, the Leaſe ſhall not be adjudged in Law to be preſently void as to the Daughters, becauſe there is a Rent reſerved upon it, ſo that there is a Recompence for the Land, which may be as advantageous to the Iſſue as it would be to have the Leaſe void, at leaſt it will be of no Damage to him, [b] and the Iſſue in Tail ſhall never avoid Things done by his Anceſtor but where they are or may be to his Diſadvantage. [c] For in the Caſe of *Octavian Lumbard* in 44 *Ed.* 3. where Tenant in Tail upon defeaſible Title granted a Rent-charge of 20 *l.* to him that had Right for a Releaſe of his Right, the Court was of Opinion that the Rent-charge ſhould be levied upon the Iſſue of the Tenant in Tail, becauſe the Grant of the Rent was for the Releaſe of the Right, ſo that the Iſſue had Benefit thereby, for which Reaſon he ſhould not avoid the Grant. [d] So it ſeems by 46 *Ed.* 3. that if Land is given in Tail, ſo that the Donee may alien for the Profit of his Iſſues, this is a good Condition or Power limited to him. [e] And if the Tenant in Tail ſuffers a common Recovery in which he vouches and has Recompence, the Iſſue ſhall be bound, becauſe he is not damnified thereby; [f] and ſo if he aliens with Warranty, and leaves Aſſets to his Iſſue, the Iſſue ſhall not avoid the Alienation, becauſe it is not to his Diſadvantage. [g] So here inaſmuch as a Rent is reſerved upon the Leaſe, it may be that this Rent is equivalent to or more than the Value of the Land, and alſo it may be that the Land lies at a great Diſtance from the Daughters, ſo that it may be more advantageous for them to have it in Leaſe and to receive the Value of it in Rent, than to manure and cultivate it themſelves; and therefore it does not appear that this Leaſe is to their Diſadvantage. And put the Caſe that the Tenants for Life happen to die, and that the Leſſee enters, and at the Day of Payment pays the Rent to the Daughters, and they accept it, by that Acceptance they have affirmed the Leaſe, and they ſhall not avoid it afterwards during their Lives, which could not be ſo if the Law was to adjudge the Leaſe void upon the Deſcent of the

[b] 1 Lev. 168. Poſt *Manxel's* Caſe 14. Pig. on Recov. 24.
[c] T. 44 Ed. 3. 21. pl. 24. Fitz. Charge 7. Bro. 4. Tail 6. Co. Litt. 343. b. 1 Co. 94. b. 96. b. 10 Co. 37. b. 1 Rol. Abr. 842. G. pl. 1. 2 Bulſt. 43. 2 Brownl. 67. Hardr. 209, 384. 3 Keb. 287. 1 And. 288. T. Raym. 349. 1 Show. 374. 1 Chan. Caſ. 171. Kitch. 312. 2 Bac. Abr. 266. Poſt 466. *Manxel's* Caſe 15. Pig. on Recov. 11 Curſon 241.
[d] H. 46. Ed. 3. 4. pl. 11. 2 Bulſt. 43.
[e] See Poſt *Manxel's* Caſe 14 (g). and the Books there cited.
[f] 10 Co. 37. b. Curſon 241. See Ante 127 (b).
[g] See 1 Show. 373.

the Remainder in Tail. And here the Daughters might have had an Action of Debt for all the Arrears incurred after the Death of their Father, and in the Life of the Tenants for Life or of the Survivor of them, for on this Part there is an Eſtoppel, that is to ſay, *Beckingham* the Leſſee and his Executors and their Executors are eſtopped by the Fine to ſay otherwiſe but that the Leaſe took Effect immediately after the Feaſt of *St. Michael* next after the Fine, and that they ought to pay the Arrears, unleſs they could alledge an Entry in Fact and an Expulſion by the Tenants for Life claiming by Title paramount the Leaſe for Life; and this Benefit would be loſt to them if the Law ſhould adjudge the Leaſe void by the Deſcent. [a] And if Tenant in Tail makes a Leaſe for 40 Years to commence 10 Years after, rendering Rent, and dies the Day after, the Iſſue in Tail enters, and makes a Feoffment before the ten Years are elapſed, here it cannot be preſently affirmed that the Entry of the Iſſue has avoided the Leaſe which was executory and not executed, for if the Feoffee waives the Poſſeſſion of the Land at the End of 10 Years, and the Leſſee enters, and occupies the Land, and at the next Day of Payment pays the Rent to the Feoffee, who accepts it, the Leaſe is thereby made good, and the Election for the Allowance of the Leaſe remains to the Feoffee as well as to the Iſſue, and ſo peradventure for the [b] Diſallowance of it, for perhaps he might have had an Action of Treſpaſs againſt the Leſſee for entering. And then if the Law be ſo that the Entry of the Iſſue into the Land before the Leaſe commenced ſhall not be adjudged an Avoidance of the Leaſe for Years executory, *a fortiore* in our Caſe the Deſcent of the Remainder, where there is no Entry, ſhall not avoid the Leaſe which is executory. [c] But in the Caſe put of the Grant of a Rent-charge out of the Remainder by *Nicholas Trapps*, this, if he had made any, ſhould have been diſcharged by the Deſcent of the Remainder to the Daughters, for it cannot be preſumed to be for the Benefit of them who are his Iſſues, but to their Diſadvantage, becauſe there is not *quid pro quo*, but it is a meer Charge and nothing elſe, for which Reaſon the Law does not ſuſpend his Gift of it as a Thing indifferent, but ſays that it is a Charge to the Iſſue, and cannot be for his Benefit, and therefore it adjudges it to be void. [d] And hereupon the Apprentice ſaid that he well allowed the Judgment in *Cauxton*'s Caſe in 14 *Aſs.* where Tenant in Tail granted a Rent-charge, and died, the Iſſue entered, and made a Feoffment, and took back an Eſtate, and an Aſſize was brought for the Rent, and there it was adjudged that the Land was diſcharged, foraſmuch as the Iſſue in Tail had entered after the Death of his Anceſtor who charged it. But both he and *Bromley* diſallowed the Judgment in the Caſe of 19 *Ed.* 3. [e] where it is adjudged that if Tenant in Tail is bound in a Statute-merchant, and dies, and the Iſſue enters into the Land entailed, and aliens, the Land ſhall be bound, which, they ſaid, is not ſo, for the Remitter diſcharges the Execution here, as well as it does the Rent-charge in the Caſe before. [f] And ſo, it was ſaid, if Tenant in Tail aliens the Trees, and dies before they are cut, and the Iſſue enters, the Vendee ſhall not have the Trees, as it is put in 18 *Ed.* 4. ſo that, they ſaid, there is a Diverſity when the Thing may be to the Benefit of the Iſſue in Tail, and when to his Charge. Wherefore the Demiſe and the Contract by Fine in our Caſe is not defeated by the Deſcent of the Remainder, but ſhall be ſaid to continue, and then the Proclamations coming afterwards fortify the Leaſe, and take from the Heirs all Election of Diſallowance of it, for inaſmuch as the Leaſe had Continuance when the Proclamations were made (whether it be a Leaſe upon a Contingency or otherwiſe) the Words of the Act make the Fine to be for ever a ſufficient Bar for the Term againſt the Tail. [g] But the Apprentice ſaid that if there be Tenant in Tail, and a Stranger by Fine acknowledges the Tenements to be the Right of the Tenant in Tail *come ceo que il ad de ſon done*, and the Tenant in Tail grants and renders the Land to him again for Life, in Tail, or in Fee, and dies before all the Proclamations are made, and before the Conuſee has entered, and the Iſſue enters, and afterwards all the Proclamations paſs, in this Caſe the Conuſee, to whom the Land was rendered, ſhall never have a *Scire facias* to execute the Fine, nor can he enter, [h] for when the Tenant in Tail had rendered the Land, yet the Land was not out of him until the Conuſee had executed the Fine by Entry or Writ of Execution, and therefore when the Tenant in Tail died before Execution, the Land deſcended to his Iſſue, and when he entered he was remitted, and thereby he utterly avoided the Fine and the Eſtate rendered by it, and then every Proclamation made afterwards was void, and if the Conuſee brings a *Scire facias* againſt the Iſſue to have Execution, he ſhall plead in Bar his Remitter, and ſo ſhall exclude him of Execution and Entry alſo. But in our Caſe there was no ſuch Avoidance of the Fine, for inaſmuch as the Leaſe for 54 Years might be to the Benefit of the Iſſues in Tail, the Law will not ſay that the Deſcent hath avoided it, but that it continued until the Proclamations were paſſed, and when they were paſſed, the Leaſe became indefeaſible. Whereupon they prayed Judgment for the Plaintiff. And many other Things were ſaid on both Sides, which I have here omitted, it being my Deſign to make a brief Report of this Caſe, and therefore I have only given conciſely the Reaſons and Caſes above written, which were the moſt weighty and material in my Apprehenſion.

And after theſe Arguments the Juſtices took Advice, and in *Hillary* Term in the 11th Year of the Reign of Queen *Elizabeth* they commanded the Prothonotary to enter Judgment for the Plaintiff,

[a] Co. Litt. 46. b. 1 Rol. Abr. 831. pl. 2. 842. H. pl. 4. Dy. 51. pl. 17. in Margine. 3 Bac. Abr. 312. 12 Mod. 361. Carth. 260. *per Holt* C. J. but the other three doubted. See 1 Sid. 261, *Opee v. Thomaſius* L. P. held by all the Judges except *Twiſden*.

[b] See 1 Show. 38.

[c] See Dy. 51. pl. 17. 1 Keb. 910. T. Raym. 133. 1 Co. 48. b. Cro. E. 593.

[d] 14 Aſs. pl. 3. Bro. Charge 20. Execution 76. H. 14 Ed. 3. Fitz. Charge 10. Bridgm. 65, 99.

[e] H. 19 Ed. 3. Fitz. Reſceit 112. 14 Aſs. pl. 3. Sed Contra 17 Aſs. pl. 21. Bro. Statute Merchant 20. P. 11. H. 6. 26. b. *per Paſton*. Bro. Execution 76. Statute-merchant 19. Bridgm. 99.

[f] P. 18 Ed. 4. 6. a. *per Litt.* Ante 259 (c) and the other Books there cited.

[g] 1 Co. 96. b. 3 Co. 89. b.

[h] 3 Co. 89. b.

Plaintiff, becauſe they took the Law to be that the Leaſe was good, and that the Fine with Proclamations was a ſufficient Bar for the Term againſt the Eſtate-tail. But the Judgment was not then entered, becauſe the Plaintiff neglected to come to the Prothonotary to require it, and to pay for it And the Judgment remained unentered until *Eaſter* Term in the 15th Year of the Reign of Queen *Elizabeth*, and then the Plaintiff came to the Bar by his Counſel, and ſhewed how that the Judgment was not entered thro' his Default, and prayed that it might be now entered. And the Court adviſed thereupon until another Day, at which Day upon the Plaintiff's Prayer they ordered the Judgment to be entered, which was done accordingly, and was as follows.

The reſt of the Record.

Whereupon all and ſingular the Premiſſes being ſeen and by the Court of the Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, for that it ſeems to the Court of the ſaid Lady the Queen here that the Plea aforeſaid by the aforeſaid *John Smith* in Manner and Form aforeſaid above pleaded in Bar to the Cognizance aforeſaid, and the Matter in th eſame contained, are good and ſufficient in Law to preclude the ſaid *Thomas Stapleton* and *John Heycock* from having their Cognizance aforeſaid: Therefore it is conſidered that the aforeſaid *Robert Smith* his Damages as well by Occaſion of the taking aforeſaid, &c. as for his Coſts and Charges by him about his Suit in this Behalf expended, ought to recover, &c. But becauſe it is not known to the Court of the ſaid Lady the Queen now here what Damages the aforeſaid *Robert Smith* has ſuſtained as well by Occaſion of the taking aforeſaid, &c. as for his Coſts and Charges by him about his Suit in this Behalf expended, therefore the Sheriff is commanded that by the Oath of good and lawful Men of his Bailiwick he diligently enquire what Damages the aforeſaid *Robert Smith* has ſuſtained as well by the Occaſion aforeſaid as for his Coſts and Charges aforeſaid, and the Inquiſition which he ſhall take thereupon he ſend to the Lady the Queen on the Octave of the *Holy Trinity*, whereſoever, &c. under the Seal, &c. and the Seals, &c. together with the Royal Writ to him thereof directed, &c. The ſame Day is given to the aforeſaid *Robert Smith*, &c.

Judgment.

A Report of a Judgment given in the Common Bench *in* Eaſter *Term in the* 15*th Year of the Reign of Queen* Elizabeth, *and of Execution thereupon, in an Action of* Debt *brought by* John Davy *againſt* Fermer Pepys *Son and Heir of* Thomas Pepys *upon an Obligation of* 80 *l. made by the ſaid* Thomas Pepys *to the ſaid* John Davy. *And the Record was as follows.*

LONE.

Eaſter Term 15 *Eliz. Rot.* 1254. *London.*
Declaration.
Same Precedent Raſt. Entr. 172. b. pl. 5.
If in Debt againſt an Heir upon the Obligation of his Anceſtor, the Defendant confeſſes the Action, and ſhews the Certainty of Aſſets which he has by Deſcent, Judgment ſhall be ſpecially to recover the Debt of the Lands deſcended, S. C. cited Dy. 149. pl. 80. S. P. Dy. 373. pl. 14.

Fermer Pepys late of *South-Creak* in the County of *Norfolk* Gentleman, Son and Heir of *Thomas Pepys* Gentleman late called *Thomas Pepys* of *South-Creak* in the County aforeſaid Gentleman, was ſummoned to anſwer *John Davy* Gentleman, otherwiſe called *John Davy* of *Monge* otherwiſe called *Mountjoy* in the County aforeſaid Gentleman, of a Plea that he render to him 80 *l.* which he owes him, and unjuſtly detains, &c. And whereupon the ſame *John* by *Chriſtopher Crow* his Attorney ſays, that whereas the aforeſaid *Thomas* in his Lifetime, whoſe Son and Heir the aforeſaid *Fermer* is, the 11th Day of *January* in the 10th Year of the Reign of the Lady the Queen now, at *London* in the Pariſh of the bleſſed *Mary* of the Arches in the Ward of *Cheap*, by his certain Writing obligatory granted himſelf to be bound to the ſame *John* in the aforeſaid 80 *l.* to be paid to the ſame *John* at the Feaſt of *St. Michael* the Archangel which ſhould then be in the Year of our Lord 1571. and to the ſame Payment well and faithfully to be made the aforeſaid *Thomas* bound himſelf and his Heirs by the ſame Writing: Nevertheleſs the aforeſaid *Thomas* in his Life time, and the aforeſaid *Fermer*, Son and Heir of the ſaid *Thomas*, after the Death of the ſame *Thomas*, altho' often requeſted, the aforeſaid 80 *l.* to the ſame *John* have not yet rendered, but the ſame to him hitherto to render have refuſed, and the aforeſaid *Fermer* the ſame to the ſame *John* to render yet doth refuſe; Wherefore he ſays that he is damnified and has Damage to the Value of 10 *l.* and therefore he brings the Suit, &c. And he produces here in Court the Writing aforeſaid, which teſtifies the Debt aforeſaid in Form aforeſaid, the Date whereof is the Day and Year aboveſaid, &c.

Defendant confeſſes the Action.

And the aforeſaid *Fermer* by *Thomas Might* his Attorney comes and defends the Force and Injury when, &c. And ſays that he cannot deny the Action aforeſaid of the aforeſaid *John*, nor but that the Writing aforeſaid is the Deed of the aforeſaid *Thomas* his Father, nor but that he owes to the aforeſaid *John* the aforeſaid 80 *l.* in Form as the ſame *John* above againſt him has declared. Yet the ſame *Fermer* ſays that he has not any Lands or Tenements in Fee ſimple by hereditary Deſcent from the aforeſaid *Thomas* his Father, nor had the Day of obtaining the Writ Original of the aforeſaid *John*, nor ever afterwards, beſides the Rectory of *South-Creak* with the Appurtenances, and 16 Acres of Land with the Appurtenances in *South Creak*, *Sidiſtern*, and *Scoulthorp* in the aforeſaid County of *Norfolk*, of the yearly

Shews the Certainty of Aſſets by Deſcent.

yearly Value of . And this he is ready to verify, wherefore he prays Judgment if he, as Son and Heir of the aforeſaid *Thomas*, of the Debt aforeſaid, except in the aforeſaid Rectory and 16 Acres of Land with the Appurtenances in *South-Creak*, *Sidiſtern*, and *Scoulthorp* aforeſaid, by Virtue of the Writing aforeſaid, ought to be charged, *&c.* Therefore it is conſidered that the aforeſaid *John* do recover againſt the aforeſaid *Fermer* his Debt aforeſaid to be levied of the aforeſaid Rectory and 16 Acres of Land with the Appurtenances in *South-Creak*, *Sidiſtern*, and *Scoulthorp* aforeſaid, and his Damages by Occaſion of the Detention of that Debt to 60*s.* to the ſame *John* with his Aſſent by the Court here adjudged: And the aforeſaid *Fermer* in Mercy, *&c.* But becauſe it is not known how much that Rectory and thoſe 16 Acres of Land are worth by the Year in all Iſſues beſides Repriſes, the Sheriff is commanded that by the Oath of good and lawful Men of his Bailiwick he diligently enquire how much the Rectory and 16 Acres of Land aforeſaid with the Appurtenances are worth by the Year in all Iſſues beſides Repriſes, and that Inquiſition by him thereupon being diligently made, that he deliver the ſame Rectory and 16 Acres of Land with the Appurtenances, according to the true Value of the ſame, to the ſame *John* without Delay, to hold to the ſame *John* until the Debt and Damages aforeſaid thereof he ſhall have levied. And how, *&c.* the Sheriff make appear here from the Day of the *Holy Trinity* in 15 Days, *&c.* Judgment.

Upon this Judgment given the Plaintiff prayed a Writ to have Execution according to the Judgment, whereupon he had a Writ which was not ſerved, and afterwards he prayed another, and had it as follows.

" *Elizabeth* by the Grace of God of *England*, *France*, and *Ireland* Queen, Defender of the " Faith, *&c.* To the Sheriff of *Norfolk* Greeting. Whereas *John Davy* Gentleman,' otherwiſe " called *John Davy* of *Monge* otherwiſe called *Mountjoy* in the County aforeſaid Gentleman, in our " Court before our Juſtices at *Weſtminſter* by the Conſideration of the ſame Court hath recovered " againſt *Fermer Pepys* late of *South-Creak* in your County Gentleman, Son and Heir of *Thomas* " *Pepys* Gentleman late called *Thomas Pepys* of *South-Creak* in the County aforeſaid Gentleman, " as well a certain Debt of 80 *l.* as 60*s.* which to the ſame *John* in our ſame Court were adjudged " for his Damages which he had by Occaſion of the Detention of that Debt, whereof he is con- " victed, to be levied of the Rectory of *South-Creak* with the Appurtenances, and of 16 Acres " of Land with the Appurtenances in *South-Creak*, *Sidiſtern*, and *Scoulthorp* in your County, which " to the aforeſaid *Fermer* deſcended in Fee-ſimple from the aforeſaid *Thomas* his Father, as by the " Record reſident in our Court before our Juſtices at *Weſtminſter* manifeſtly appears. But becauſe it " is not known how much the aforeſaid Rectory and 16 Acres of Land with the Appurtenances are " worth by the Year in all Iſſues beſides Repriſes, we command you, as we have otherwiſe com- " manded you, that by the Oath of good and lawful Men of your Bailiwick you diligently enquire " how much that Rectory and thoſe 16 Acres of Land with the Appurtenances are worth by the " Year in all Iſſues beſides Repriſes, and that Inquiſition by you being diligently made, that you " deliver the ſame Rectory and 16 Acres of Land with the Appurtenances, according to the true " Value of the ſame, to the ſame *John* without Delay, to hold to the ſame *John* until the Debt and " Damages aforeſaid thereof he ſhall have levied. And how you ſhall have executed this our Pre- " cept do you make appear to our Juſtices at *Weſtminſter* from the Day of *St. Michael* in one Month. " And have you there the Names of them by whoſe Oath you ſhall make that Inquiſition, and this " Writ. Witneſs *James Dyer* at *Weſtminſter* the 3d Day of *June* in the 15th Year of our Reign." *Alias* Writ of Execution upon the foregoing Judgment.

UPON this Record divers Things are obſervable. Firſt, [a] that when a Man binds himſelf and his Heirs by Obligation to pay a certain Sum at a Day, and dies, it is at the Election of the Obligee to ſue the Heir or the Executors or [b] Adminiſtrators of the Obligor, [c] and if ſo be that the Executors have Aſſets in their Hands, yet the Obligee may ſue the Heir, if he will, becauſe the Obligor has bound as well his Heir as himſelf; and ſo if the Executors have Aſſets, and the Heir alſo has Aſſets, it is at the Election of the Obligee to have his Debt of either the one or the other, as he pleaſes, [d] but he ſhall not charge them both, for if he is ſatisfied by the one, the other ſhall be diſcharged by *Audita Querela*. [e] And in the Suit againſt the Heir the Plaintiff ſhall not ſurmiſe that the Executors have not Aſſets in their Hands, [f] but if the Heir would take Benefit thereof, formerly he ought to have pleaded it, as we find it done in ſome ancient Books, but at this Day it is no [g] Plea, for in *M.* 10. *H.* 7, 8. *b.* in Debt againſt the Heir, he pleaded *Aſſets in the Hands of the Executors* the Day of the Writ purchaſed, and there *Vaviſor* ſaid that ſuch Plea was not good, wherefore the Defendant pleaded *nothing by Deſcent*. [h] But until the Statute of 33 *H.* 8. the King could not touch the Land or the Heir of his Debtor for his Debt, if the Goods of the Debtor had been ſufficient to ſatisfy the Debt, and this was by Reaſon of the Statute of * *Magna Charta cap* 8. the Words whereof are, *we or our Bailiffs ſhall not ſeize any Land or Rent for any Debt,*

The following ſeem to be the Obſervations of the Reporter upon the foregoing Record.

1 Point. The Election which the Obligee has to ſue the Heir or Executor or Adminiſtrator of the Obligor, but not both.

[a] M. 4. Ed. 4. 25. a. *Per Pigot et Danby*. M. 22 H. 6. 4. a. b. *Per Aſhton*. 1 And. 7. pl. 13. 3 Lev. 304. 3 Bac. Abr. 25.

Vide Dy. 208. pl. 15. [b] S. P. 3 Lev. 189 *Davies v. Churchman* adjudged. [c] S. P. 1 And. 7. pl. 13. 3 Lev. 304. Contra Plowd. Quær. § 186. But anciently from the 18 *Ed.* 2. till 7 *H.* 4. if an Executor had Aſſets, the Heir was not chargeable, but in 7 *H.* 4. the Law changed in this Point, for now it is accounted his own Debt, Poph. 155. *Per Dodderidge* J. O. Bendl. 162. [d] S. P. 3 Lev. 304. 1 Mod. Entr. 83. pl. 3. [e] S. P. Ante 193 (h). [f] See what is ſaid above at (c). See H. 5 H. 5, 8. pl. 18. Bro. Debt 76. M. 18 Ed. 4. 20. a. where in Debt againſt an Abbot and Commoigne upon the Contract of the Commoigne before his Entry into Religion, the Abbot pleaded that the Commoigne had made his Executors, who had Aſſets, and held a good Plea. [g] Bro. Debt 238. And herewith agrees T. 27 Ed. 3. 6. pl. 23. T. 7 Ed. 4. 13. a. *Per Bryan*. Dy. 204. pl. 2. 3 Lev. 189. *Davies v. Churchman* adjudged. Ibid. 304, 305. [h] 2 Bac. Abr. 39. * But *note*, before this Statute it ſeems that the King's Prerogative extended to the Lands of the Debtor, and that this was an Act of Grace and Reſtraint, 2 Inſt. 19. 3 Co. 12. b. 7 Co. 21. b. Hob. 60. Godb. 290. *Per Dodder*. J. Cro. J. 450. Comyns 437.

as long as the preſent Goods and Chattles of the Debtor do ſuffice to pay the Debt, and the Debtor himſelf be ready to ſatisfy therefore. But other Perſons were left at large.

2 Point. Where the Judgment to recover the Debt againſt the Heir ſhall be generally of all his Lands, and where ſpecially of the Lands deſcended only, according as he behaves himſelf in Pleading.

Another Thing obſervable upon the Record is, [b] that if the Heir confeſſes the Action, and ſhews the Certainty of Aſſets which he has by Deſcent, neither his Body, nor any of his Goods, nor any of his other Lands ſhall be chargeable with the Debt, but only the Land which he has by Deſcent. For the Judgment above is, *therefore it is conſidered that the aforeſaid* John *do recover againſt the aforeſaid* Fermer *his Debt aforeſaid, to be levied of the aforeſaid Rectory and* 16 *Acres of Land with the Appurtenances.* So that the Judgment is, that the Debt ſhall be levied of the Land, wherein it is contained that no other ſhall be ſubject to the Execution. [c] But if the Heir does not confeſs the Action, and ſhew the Certainty *ut ſupra*, but pleads [d] *nothing by Deſcent*, or Judgment is given by [e] Default, or by *nient dedire*, or by [f] Confeſſion, or upon any other Matter or Ground whatſoever, without confeſſing and ſhewing the Certainty of Aſſets, there the Plaintiff ſhall have Execution of his other Land, or of his Goods, or of his Body by *Capias ad ſatisfaciendum*, as he ſhould have for the Debt of the Heir himſelf, if he had made the Obligation. [g] And hereupon the Caſe in *H.* 21 *Ed.* 3. 9. *b.* is to be conſidered, where in Debt againſt the Heir an Obligation of his Anceſtor was put forth, and the Defendant ſaid that nothing deſcended to him from the ſame Anceſtor, and it was found by Verdict that Lands deſcended to him after the Death of his Anceſtor, whereby the Plaintiff recovered, and prayed Execution of all the Lands of the Defendant, as well of his own Purchaſe as of the Tenements deſcended to him: And there *Green* ſaid, "He ſhall not have it, "for in a *Formedon* in Deſcender [h] if the Tenant pleads in Bar Warranty with Aſſets, and the "Demandant ſays that he has nothing by Deſcent, and it is found that he has Tenements by De- "ſcent, yet he ſhall not be barred of any more than of that Value which deſcended to him, ſo "here we ſhall not be charged but of that which deſcended to us." *Wilby*, "In the Caſe of a "*Formedon* which you have put, he ſhall be barred of [i] all that he has demanded by his Writ, "becauſe the Iſſue which he offered is found to be falſe; but if ſo be that the Demandant has Land "by Deſcent, but not to the Value of that which is pleaded in Bar againſt him, there if he pleads, "he ought to confeſs that which is deſcended to him, and demand Judgment if he ought to be "barred of more than of the Value thereof, ſo that he ought to plead in Law, and not join a "falſe Iſſue, and ſo ſhould the Defendant have pleaded in this Caſe." To which *Hill* and *Shard* there agreed, and afterwards it was awarded that the Plaintiff ſhould have an *Elegit* of the Moiety of all the Lands of the Defendant, as well of the Lands purchaſed as of thoſe deſcended to him. [k] And in *M.* 2 & 3 *Eliz. Roll.* 106 in *C. B. John Killigrew* ſued an Action of Debt in *London* againſt *Martin Trewiniard* Son and Heir of *William Trewiniard*, and declared upon an Obligation of 250 *l.* made by the ſaid *William:* And the Record ſays, *the aforeſaid* Martin *by* John Garnhouſe *his Attorney comes and defends the Force and Injury when*, &c. *and ſays nothing in Bar or Preclusion of the Action aforeſaid of the aforeſaid* John, *whereby the ſame* John *remains againſt the aforeſaid* Martin *therein undefended. Therefore it is conſidered that the aforeſaid* John *do recover againſt the aforeſaid* Martin *his Debt aforeſaid, and his Damages by Occaſion of the Detention of that Debt to* 33 s. 4 d. *to the ſame* John *with his Aſſent by the Court here adjudged.* And afterwards the Plaintiff had a *Capias ad ſatisfaciendum* againſt the ſaid *Martin Trewiniard*, and his Body was taken by it, and detained in Execution. And I was lately of Counſel in the King's-Bench with *David Greenſmith* againſt one *Thomas Brockhole* Son and Heir of *Thomas Brockhole*, in an Action upon an Obligation of 100 *l.* made by his Father, where upon Demurrer Judgment was given againſt the Defendant, and the Plaintiff had a *Capias ad ſatisfaciendum*, and the Defendant's Body was taken in Execution, whereupon he paid the Debt; and the Record of the *Capias* is in *Mich.* 15 & 16 *Eliz.* the Form whereof I have ſet down at the End of this Caſe. [l] So that if the Heir is condemned upon any Plea whatſoever, or by Default, or without Plea upon any Cauſe whatſoever, it is the Practice for the Plaintiff to have Execution of the Body of the Heir or of his Goods, or to have an *Elegit* of his Lands whatſoever, unleſs he confeſſes the Debt, and ſhews the Certainty of the Land deſcended, as in the foregoing Caſe of *Fermer Pepys*.

[m] And there ſeems to be a Diverſity between the Caſe of the Executor and of the Heir. For in Debt againſt the Executor, if he pleads [n] *nothing in his Hands*, or [o] *not the Deed of the Teſtator*, or the like, and it is found againſt him, there nothing ſhall be put in Execution but the Goods of the deceaſed. And the Reaſon is, becauſe the Debt is not the Debt of the Executor, but of the Teſtator, ſo that he is charged in another's Right, and has the Goods in another's Right. But when the Heir denies Aſſets, and it is found againſt him, or when he does not deny Aſſets, but pleads other Matter which implies that he has Aſſets, the Debt of his Anceſtor is become his own Debt, in reſpect of the Aſſets which he has in his own Right, and ſo the Property of the Land which he

b 2 Rol. Abr. 70. C. pl. 1. Dy. 373. pl. 14. Poph. 154 *Per Jones* J. 3 Bac. Abr. 30.

c Cro. E. 692 *Per Gawdy* J. Ld. Raym. 786 *Per Holt* C. J. and the Books next before cited.

d 3 M. 1. Bro. Aſſets per deſcent 5. 2 Rol. Abr. 70. C. pl. 2. N. Bendl. 46. pl. 82. 6 Co 47. a. W. Jones 87. 3 Bulſt. 320. 1 Keb. 157. Sty. 288. *Per Roll* C. J. 1 Vent. 95. Ld. Raym. 786 *Per Holt* C. J. 3 Bac. Abr. 30. 1 Finch 235, 236 But now ſee the Statute of 3 *W. & M. cap.* 14. that upon this Plea found for the Plaintiff, the Jury ſhall inquire of the Value of the Aſſets deſcended; by which Statute, it ſeems, the Plaintiff ſhall only recover *pro tanto* with reſpect to the Value of ſuch Aſſets, and ſhall not have a general Judgment againſt the Heir as at common Law upon this falſe Plea, Carth. 354.

e Ld. Raym. 786 *Per Holt* C. J. 3 Bac. Abr. 30.

f Dy. 344. b. pl. 1. 2 Rol. Abr. 70. C. pl. 3. Cro. E. 692 *Per Gawdy* J. 1 Vent. 95. Ld. Raym. 786 *Per Holt* C. J. 3 Bac. Abr. 30. Sed Contra 1 Finch 236. 2 Finch 384. Dy. 81. pl. 63.

g Bro. Aſſets per deſcent 15.

h Herewith agrees M. 22 Ed. 3. 16. pl. 55. Fitz. Judgment 186. 8 Co. 52. b. Vin. Abr. tit. Heir. C. pl. 10.

i Bro. Bar 19. With this Opinion agrees 1 Finch 236. 2 Finch. 384, 385.

k S. C. cited Dy. 225. pl. 34. And that the Law is agreeable with this Reſolution upon a *Nihil dicit*, See Dy. 344. pl. 1. 2 Rol. Abr. 70. C. pl. 5. Cro. E. 263, *Per Periam* J. 692. pl. 1. Moor 522. pl. 688. 1 Vent. 95. 1 Keb. 157, in Margine. 1 Show. 79. Ld. Raym. 786. 3 Bac. Abr. 30. But ſee the contrary Dy. 81. pl. 62. Poph. 155, *Per Jones* J. *et Crew* C. J. W. Jones 88. 1 Finch 236. 2 Finch 384.

l Vin. Abr. tit. Heir C. pl. 11.

m S. P. Vin. Abr. tit. Heir C. pl. 12.

n 1 Finch 236. 2 Finch 384.

o M. 6 Ed. 4. 1. pl. 1. Fitz. Judgment 48. Bro. Executors 109. M. 34 H. 6. 22. pl. 42. Bro. Executors 22. 1 Show. 78 *Per Dolben* J. 1 Finch 236. 2 Finch 384. Sed Contra P. 7 Ed. 4. 9. 2. b. *Per Choke.* Vide Kelw. 61. pl. 5.

has in his own Right makes the Debt to be his own proper Debt, for which Reaſon the Writ ſhall be in the [p] *debet et detinet*. So that there is a Diverſity between the Caſe of the Executor and the Caſe of the Heir.

[p] M. 10 H. 7. 8. pl. 17. Bro. Debt 238. 5 Co. 36. a. 3 Bac. Abr. 25.

Cro. E. 350, 712. W. Jones 87. 2 Leon. 11. Poph. 155. 1 Sid. 342. 1 Vent. 95. O. Bendl. 162. 1 Lev. 130. 1 Finch 100, 320. 2 Finch 119, 296.

Another Matter obſervable upon the foregoing Record is the Manner of the Execution here given. For the Writ to deliver all the Lands deſcended to the Heir in Execution to the Debtee, who has recovered, is grounded upon the Common Law, and not upon any Statute. But by the Statute of *Weſtminſter* 2 *cap.* 18. he that recovers Debt or Damages may have an *Elegit*, whereby he ſhall have the Moiety of the Defendant's Land delivered to him, but not the whole. [q] And at the Common Law the Writ of *Levari facias* might be ſued directed to the Sheriff, commanding that *the aforeſaid Money of the Lands and Chattles of the aforeſaid* (Defendant) *you cauſe to be levied, ſo that you may have it in*, &c. *ſuch a Day, to the aforeſaid* (Plaintiff) *to be delivered.* By which Writ, expreſſing that the Sheriff ſhould levy the Money of the Lands and Chattles, it ſeems that he might take the [r] Rents payable by the Tenants in Execution for the Debt, and bring them into Court, but he could not ſeize the Land and deliver it to the Party by this or any other Writ at the Common Law, unleſs in this ſpecial Caſe of Debt recovered againſt the Heir. And ſuch Writ as this is here in the Caſe of *Fermer Pepys* is rarely to be found, and yet ſometimes it is touched in our Books that upon Recovery in Debt againſt the Heir nothing ſhall be put in Execution but the Land deſcended, for ſo ſays *Wichingham* in 40 *Ed.* 3.

3 Point. If in Debt againſt the Heir upon the Obligation of his Anceſtor the Defendant confeſſes the Action, and ſhews the Certainty of Aſſets which he has by Deſcent, and Judgment is given to recover the Debt to be levied of the Lands deſcended, the Plaintiff may have a Writ of Execution to have all the Lands deſcended to the Heir delivered to him, which Writ is grounded upon the common Law, and not only to have a Moiety of the Lands of the Heir upon an *Elegit*, according to the Statute of *Weſtm.* 2. *cap.* 18. S. P. Dy. 149. pl. 80. 373. pl. 14. 2 Rol. Abr. 71. D. pl. 2. 3 Bac. Abr. 31. But until that Statute, Land was not liable at the common Law to the Execution of a private Perſon for Debt, in any other Suit but this againſt the Heir, S. P. 3 Co. 11. b. 12. a. 2 Inſt. 394. Cro. J. 450. Godb. 290, *Per Dodder.* J. 2 Bac. Abr. 328, 329. 3 Bac. Abr. 25.

[q] F. N. B. 265. f. 2 Inſt. 394, 395. 3 Co. 12. a. 2 Bulſt. 63. Godb. 290.

[r] 1 Finch 302. 2 Finch 471, 472.

[s] P. 40 Ed. 3. 15. a. Bro. Aſſets per Deſcent 13. Dy. 149. pl. 80.

See the *Book of Entries* [t] Tit. *Debt, fol.* 171. where an Action of Debt was brought againſt the Executors of the Heir upon an Obligation made by the Father of the Heir, by which it ſeems that the Heir of the Heir [w] ſhall not be charged, although the Land continues in Deſcent, becauſe he is not immediate Heir to the Obligor, for the laſt Heir is in as Heir to him only who was laſt ſeized, and not as Heir to the Obligor, and therefore the Action of Debt lies againſt the Executors of the firſt Heir, becauſe the Aſſets which deſcended to him make the Debt to be as a Duty due by the Heir. *Tamen quære de hoc.*

[u] Whether an Action of Debt lies againſt the Heir of the Heir upon an Obligation made by the Father of the Heir.

[t] Raſt. Entr. laſt Edit. fo. 172. b. pl. 4. Dy. 344. b, 151 *Jenk's* Caſe.

pl. 1. [u] 2 Leon. 11 *Per Dyer.* Vide 3 Bac. Abr. 28. [w] Contra Hale on F. N. B. 120. b. Poph. 155. Dy. 368. pl. 46. Cro. C. 1 Vern. 400. 2 Chan. Caſ. 175. Hill. 2 Car. C. B. Roll. 2445, *Den v. Bell.*

Here follows the Form of the *Capias ad ſatisfaciendum* againſt *Brockhole* before-mentioned, *fo.* 440.

Midd. The Sheriff is commanded that he take *Thomas Brockhole* Son and Heir of *Thomas Brockhole* of the Pariſh of *Cobham* in the County of *Surry* Yeoman deceaſed, if, *&c.* and ſafely, *&c.* ſo that he may have his Body before the Lady the Queen at *Weſtminſter* on *Thurſday* next after the Morrow of St. *Martin*, to ſatisfy *David Greenſmith* Gentleman, natural and lawful Son of *Gilbert Greenſmith* late of the Pariſh of *Hampton upon Thames* in the County aforeſaid, of 100*l.* of Debt, and alſo 6*l.* 13*s.* 4*d.* for his Damages which he has ſuſtained as well by Occaſion of the Detention of the ſame Debt, as for his Coſts and Charges by him about his Suit in this Behalf expended, whereof he is convicted. And have you then there this Precept, *&c.* *Rooper* and *Rooper.*

The Return of the ſame Precept thereon indorſed,

By Virtue of this Writ to me directed, I have taken the Body of the within-named *Thomas Brockhole*, whoſe Body at the Day and Place within contained I have ready.

The Anſwer of { James Harvey and Thomas Pulliſon } Sheriffs.

The Words following are alſo noted under the Writ, by the Secondary's own Hand.

Pence paid to the Party.

By *R. Beſt*, with his own Hand.

A Report

A Report of a Judgment given in the Common Bench *the laſt Day of* Eaſter *Term in the* 15*th Year of the Reign of Queen* Elizabeth, *in an Action of* Waſt *brought by* Edward Clere *Eſquire againſt* Henry Brook *otherwiſe* Cobham *Eſquire and* Anne *his Wife late the Wife of* Walter Hadden. *And the Record is entered amongſt the Records of* Michaelmas *Term* 14 & 15 Elizabeth, Rot. 2015. *and was as follows.*

WHITELEY.

Norf. Declaration.

HENRY *BROOK* otherwiſe *Cobham* Eſquire and *Anne* his Wife were ſummoned to anſwer *Edward Clere* Eſquire of a Plea, wherefore whereas by the common Council of the Realm of the Lady the Queen of *England* it is provided that it ſhall not be lawful for any one to make Waſt, Sale, or Deſtruction in any Lands, Houſes, Woods, or Gardens, to them demiſed for Term of Life or Years, the ſame *Anne*, while ſhe was ſingle, in Lands, Houſes, Woods, and Gardens in *Wimondham*, which the ſame *Henry* and *Anne* hold for the Life of the ſaid *Anne*, of which *Walter Hadden* Eſquire was ſeized in his Demeſn as of Fee, and being ſo ſeized thereof, the 20th Day of *January* in the 13th Year of the Reign of the Lady the Queen now, in Conſideration of a Marriage ſolemnized between the aforeſaid *Walter* and the aforeſaid *Anne*, and in Conſideration of the paternal Affection which the aforeſaid *Walter* bore towards *Clere Hadden* Son and Heir apparent of the aforeſaid *Walter*, he granted and agreed for himſelf and his Heirs with one *Thomas Wilbraham* Eſquire and *Peter Oſborn* Eſquire and their Heirs, that he the aforeſaid *Walter Hadden* and his Heirs ſhould ſtand and be ſeized from thenceforth for ever of and in the aforeſaid Lands, Houſes, Woods, and Gardens to the Uſe of the aforeſaid *Walter* and of the aforeſaid *Anne* for Term of their Lives and of the longer Liver of them, and after the Death of them the ſaid *Walter* and *Anne*, to the Uſe of the aforeſaid *Clere Hadden* his Heirs and Aſſigns for ever. By Virtue whereof, and by Force of a certain Statute for the transferring of Uſes into Poſſeſſion held, made, and provided in a Seſſion of Parliament of Lord *Henry* the *eighth* late King of *England*, Father of the Lady the Queen now, begun the 4th Day of *February* in the 27th Year of his Reign, at *Weſtminſter* in the County of *Middleſex*, and continued to and until the 14th Day of *April* then next following, the ſame *Walter* and *Anne* were thereof ſeized in their Demeſn as of Freehold for Term of their Lives, and for Term of Life of the longer Liver of them, Remainder thereof to the aforeſaid *Clere Hadden* his Heirs and Aſſigns in Form aforeſaid. And they being ſo ſeized thereof, the aforeſaid *Walter* died, and the aforeſaid *Anne* ſurvived him, and kept herſelf in, and was thereof ſole ſeized in her Demeſn as of Freehold for Term of her Life. And ſhe being ſo ſeized thereof, the aforeſaid *Clere Hadden* died without Heirs of his Body iſſuing, after whoſe Death the Remainder thereof deſcended to the aforeſaid *Edward* as Couſin and Heir of the ſaid *Clere Hadden*, whereby the ſame *Edward* was and yet is thereof ſeized as of Fee. And he being ſo ſeized thereof, the aforeſaid *Anne*, while ſhe was ſingle, made Waſt, Sale, and Deſtruction to the diſinheriting of him the ſaid *Edward Clere*, and againſt the Form of the Proviſion aforeſaid, *&c.* And whereupon the ſame *Edward* by *Auguſtin Sotherton* his Attorney ſays that whereas the aforeſaid *Walter Hadden* was ſeized of and in the Houſe or Scite of the late diſſolved Priory and *Monaſtery* of *Wimondham* in the County aforeſaid, and of 40 Acres of Land called *Bellaminis*, 30 Acres of Meadow, 20 Acres of Paſture, and 30 Acres of Wood called *Bixland-Wood*, with the Appurtenances in *Wimondham* aforeſaid, in his Demeſn as of Fee. And being ſo ſeized thereof, the ſame *Walter* after the aforeſaid 4th Day of *February* in the 27th Year aboveſaid, *viz.* the 20th Day of *January* in the 13th Year of the Reign of the ſaid Lady the Queen now, in Conſideration of the Marriage aforeſaid ſolemnized between the aforeſaid *Walter* and the aforeſaid *Anne*, and in Conſideration of the paternal Affection which the aforeſaid *Walter* bore towards the aforeſaid *Clere Hadden* Son and Heir apparent of the ſame *Walter*, by a certain Indenture made at *London* in the Pariſh of *Chriſt* in the Ward of *Farringdon within*, between the aforeſaid *Walter* in his Life-time of the one Part, and the aforeſaid *Thomas Wilbraham* and *Peter Oſborn* of the other Part, (which other Part ſealed with the Seals of the aforeſaid *Thomas* and *Peter* the ſame *Edward* brings here into Court, the Date whereof is the ſame Day and Year) amongſt other Things granted and agreed for himſelf and his Heirs with the aforeſaid *Thomas Wilbraham* and *Peter Oſborn* and their Heirs, that he the aforeſaid *Walter Hadden* and his Heirs ſhould ſtand and be ſeized from thenceforth for ever of and in the Tenements aforeſaid with the Appurtenances to the Uſe of the ſaid *Walter* and the aforeſaid *Anne* then his Wife for Term of their Lives, and for Term of Life of the longer Liver of them, and after the Death of the ſaid *Walter* and *Anne*, to the Uſe of the aforeſaid *Clere Hadden* and his Heirs for ever. By Virtue whereof, and by Force of the aforeſaid Statute for the transferring of Uſes into Poſſeſſion in a Seſſion of the Parliament of the aforeſaid late King *Henry* the *eighth* thereupon, the aforeſaid 4th Day of *February* in the 27th Year of his Reign aboveſaid, held, made, and provided, the aforeſaid *Walter* and *Anne* were ſeized of the Tenements aforeſaid with the Appurtenances in their Demeſn as of Freehold for Term of their Lives, and for Term of Life of the longer Liver of them, the Remainder thereof, after the Death of the aforeſaid *Walter* and *Anne*, to the aforeſaid

Clere Hadden his Heirs and Aſſigns in Form aforeſaid belonging. And they being ſo ſeized thereof, the aforeſaid *Walter* at *London* in the Pariſh and Ward aforeſaid afterwards died, and the aforeſaid *Anne* ſurvived him, and held herſelf in the Tenements aforeſaid with the Appurtenances, and was thereof ſole ſeized in her Demeſn as of Freehold for Term of her Life by Right of Survivorſhip, the Remainder thereof to the aforeſaid *Clere Hadden* and his Heirs belonging. And ſhe being ſo ſeized thereof, the aforeſaid *Clere Hadden* at the Town of *Cambridge* in the County of *Cambridge* afterwards died thereof ſeized, without Heirs of his Body iſſuing, after whoſe Death the Remainder aforeſaid deſcended to the ſame *Edward* as Couſin and Heir of the aforeſaid *Clere Hadden*, *viz.* as Son and Heir of *John Clere* Knight, Father of *Margaret*, Mother of the aforeſaid *Clere Hadden*, whereby the ſame *Edward* was and yet is ſeized of that Remainder as of Fee. And he being ſo ſeized thereof, and the aforeſaid *Anne* being ſeized of the Tenements aforeſaid with the Appurtenances in Form aforeſaid, the ſame *Anne*, while ſhe was ſingle, made Waſt, Sale, and Deſtruction in the Tenements aforeſaid, in Lands, *viz.* by digging in 18 Acres of Land thereof, and by taking and ſelling 100 Cart-loads of Clay, every Cart-load thereof of the Price of 4 *d.* and in Houſes, *viz.* by throwing down one Hall or great Chamber lying near to the Church of *Wimondham* aforeſaid, of the Price of 10 *l.* one Chamber called a *Vault*, of the Price of 100 *s.* and two Chambers in the Gate-houſe there, both of them of the Price of 60 *s.* by ſuffering alſo two other Chambers, both of them of the Price of 60 *s.* one Granary of the Price of 80 *s.* and one Houſe called a *Whiting-houſe* of the Price of 60 *s.* Parcel of the Premiſſes, to ſtand and be uncovered for Want of Tiles and Thatch, whereby the Timber of the Chambers, Granary, and Houſe called the *Whiting houſe* by the Rains falling upon them became rotten and corrupt, ſo that the Chambers, Granary, and the Houſe called the *Whiting-houſe* by reaſon of that Rottenneſs entirely fell down, and came to the Ground; and in Woods, *viz.* by cutting down and ſelling 200 Oaks, every of them of the Price of 10 *s.* 20 Aſhes, every of them of the Price of 10 *s.* and 4 Elms, every of them of the Price of 10 *s.* in a certain Wood called *Bixland*, likewiſe Parcel of the Premiſſes, in the ſame Wood lately diſperſedly growing, by cutting down alſo and ſelling 40 Oaks, every of them of the Price of 10 *s.* 14 Aſhes, every of them of the Price of 10 *s.* and two Elms, each of them of the Price of 10 *s.* in four Cloſes in the aforeſaid Wood called *Bixland* near adjoining, containing 40 Acres of Land, likewiſe Parcel of the Premiſſes, lately diſperſedly growing in the ſame four Cloſes; and by ſuffering one Stone Wall about the Scite and Precinct of the ſame late Priory to the Value of 40 *l.* to ſtand uncovered, whereby the Wall for Want of Covering decays and threatens Ruin; and in Gardens aforeſaid, *viz.* by cutting down and burning three Pear-trees, every of them of the Price of 6 *s.* 8 *d.* and five Apple-trees, every of them of the Price of 6 *s.* 8 *d.* in thoſe Gardens lately diſperſedly growing; and in Meadows, *viz.* by ſuffering an Inundation of Waters to continue in and upon the Meadows aforeſaid, whereby the ſame are the worſe, and the Banks of them are deſtroyed, to the diſinheriting of him the ſaid *Edward*, and againſt the Form of the Proviſion aforeſaid. Wherefore he ſays that he is damnified and has Damage to the Value of 200 *l.* and therefore he brings the Suit, *&c.*

And the aforeſaid *Henry* and *Anne* by *John Philips* their Attorney come and defend the Force and Injury, when, *&c.* And ſay that the aforeſaid *Edward* his Action aforeſaid againſt them ought not to have, becauſe * by proteſting not acknowledging any Waſt to be done in the Tenements aforeſaid with the Appurtenances, for Plea they ſay that after the Death of the aforeſaid *Clere Hadden* without Heirs of his Body iſſuing, the Remainder aforeſaid deſcended to one *Edward Young* as Couſin and Heir of the aforeſaid *Clere Hadden*, *viz.* as Son and Heir of *Humphry Young*, Son and Heir of *John Young*, Father of *Dorothy*, Mother of the aforeſaid *Walter Hadden*, Father of the aforeſaid *Clere Hadden*, whereby the ſame *Edward* was of that Remainder ſeized as of Fee; with this, that the ſame *Henry* and *Anne* will aver that the aforeſaid *Edward Young* is yet ſurviving and alive, *viz.* at *London* in the Pariſh and Ward aforeſaid. And this they are ready to verify, wherefore they pray Judgment if the aforeſaid *Edward Clere* his Action aforeſaid againſt them ought to have, *&c.*

* See Heath's Max. 26.

And the aforeſaid *Edward Clere* ſays that the aforeſaid Plea of the aforeſaid *Henry* and *Anne* in Manner and Form aforeſaid above in Bar of his Action aforeſaid pleaded, and the Matter in the ſame Plea contained, are inſufficient in Law to preclude him the ſaid *Edward Clere* from having his Action aforeſaid againſt the ſame *Henry* and *Anne*, and that he to that Plea in Manner and Form aforeſaid pleaded has no Neceſſity, nor is by the Law of the Land bound to anſwer. Wherefore for Want of a ſufficient Anſwer in this Behalf he prays Judgment, and the Places waſted together with his Damages according to the Form of the Statute aforeſaid to be adjudged to him, *&c.* Demurrer.

And the aforeſaid *Henry* and *Anne*, for that they have above alledged ſufficient Matter in Law to preclude the aforeſaid *Clere* from having his Action aforeſaid, which they are ready to verify, which ſaid Matter the aforeſaid *Edward Clere* does not deny, nor thereunto in any wiſe anſwer, but that Averment wholly refuſes to admit, pray Judgment, and that the aforeſaid *Edward Clere* may be precluded from having his Action againſt the ſame *Henry* and *Anne*, *&c.* And becauſe the Juſtices here will adviſe of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until the Octave of *St. Hillary* to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.* Joinder.

The CASE.

A purchaſer of Land in Fee dies without Iſſue, his Mother has a Brother, and alſo his Grandmother, viz. his Father's Mother, has a Brother, in this Caſe his Grandmother's Brother and his Iſſue ſhall be his Heir, and not his Mother's Brother: For tho' the Blood which was between the Purchaſer and either of theſe Brothers originally accrued and came by a Female, yet the Blood of the Grandmother's Brother was derived to the Purchaſer by a Male, viz. by his Father, whereas the Blood of the other came immediately to the Purchaſer by his Mother, without any intermediate Conveyance thro' a Male, and therefore by as much as the Blood of a Male is more worthy than that of a Female, by ſo much the Blood of the Grandmother's Brother is more precious with reſpect to the Purchaſer, having male Blood in it, than that of the Mother's Brother, in the Conveyance whereof to the Purchaſer there is no male Blood: And alſo in Caſe of a Purchaſe, both the Bloods of the Purchaſer's Father, viz. the Blood of his Father and the Blood of his Mother, ſhall always be ſpent before ever the Blood of the Purchaſer's own Mother (which has nothing of the Blood of the Purchaſer's Father in it) ſhall inherit. And tho' here the Mother's Brother is nearer in Blood to the Purchaſer than the Grandmother's Brother is, yet the latter is more worthy, and Proximity of Blood is never regarded but where the Parties are equally worthy in Blood. S. C. Dy. 314. pl. 95. Vin. Abr. tit. Deſcent. F. 2. pl. 1. tit. Heir E. 4. pl. 2. S. P. Hale's Hiſt. Com. Law 241, 243. And ſee S. P. in Effect. Dr. & Stud. lib. 1. cap. 7. fo. 22, 23. 2 Bac. Abr. 29.

UPON this Record the Caſe appears to be thus. *Edward Clere* has brought an Action of Waſt againſt *Henry Brook* otherwiſe *Cobham* and *Anne* his Wife for Waſt done by the ſaid *Anne*, when ſhe was ſingle, in Lands, Houſes, Woods, and Gardens, in *Wimondham*, which they hold for Term of Life of the ſame *Anne*, whereof he has declared that *Walter Hadden* was ſeized in Fee, and being ſo ſeized, the 20th Day of *January* in the 13th Year of the Reign of the preſent Queen, by an Indenture bearing the ſame Date, in conſideration of a Marriage ſolemnized between the ſaid *Walter* and the ſaid *Anne*, and in Conſideration of the paternal Affection which the ſaid *Walter* bore towards *Clere Hadden* his Son and Heir apparent, the ſame *Walter Hadden* granted and agreed for himſelf and his Heirs with *Thomas Wilbraham* and *Peter Oſborn* and their Heirs, that he the ſaid *Walter Hadden* and his Heirs ſhould ſtand and be ſeized from thenceforth for ever of the ſaid Tenements to the Uſe of the ſaid *Walter* and *Anne* for Term of their Lives, and after their Deaths, to the Uſe of the ſaid *Clere Hadden* and his Heirs for ever. By virtue whereof, and by Force of the Statute *of Uſes* made the 4th Day of *February* in the 27th Year of the Reign of King *Henry* 8. the ſaid Walter and *Anne* were ſeized of the ſaid Tenements for Term of their Lives, the Remainder thereof to the ſaid *Clere Hadden* and his Heirs. And afterwards the ſaid *Walter* died, and the ſaid *Anne* ſurvived him, and kept herſelf in, and was ſole ſeized in her Demeſn as of Freehold, the Remainder to the ſaid *Clere* in Fee. And afterwards the ſaid *Clere Hadden* died without Iſſue of his Body, after whoſe Death the ſaid Remainder deſcended to the ſaid *Edward* as Couſin and Heir of the ſaid *Clere*, that is to ſay, as Son and Heir of *John Clere* Knight, Father of *Margaret*, Mother of the ſaid *Clere Hadden*, whereby the ſaid *Edward* was and yet is ſeized of the ſaid Remainder. And he being ſo ſeized, and the ſaid *Anne* being ſeized as before, ſhe, when ſhe was ſingle, made Waſt, Sale, and Deſtruction in the ſaid Tenements, *viz.* in digging, *&c.* and ſo he ſhews the whole in certain, to the diſinheriting of the ſaid *Edward*, and againſt the Form of the Statute, whereby he has Damage to the Value of 200 *l.* And the ſaid *Henry* and *Anne*, by proteſting that no Waſt was done, for Plea ſay that after the Death of the ſaid *Clere Hadden* without Heir of his Body, the ſaid Remainder deſcended to one *Edward Young* as Couſin and Heir of the ſaid *Clere Hadden*, that is to ſay, as Son and Heir of *Humphry Young*, Son and Heir of *John Young*, Father of *Dorothy*, Mother of the ſaid *Walter Hadden*, Father of the ſaid *Clere Hadden*, whereby the ſaid *Edward Young* was ſeized of the ſaid Remainder as of Fee; with this, that the ſaid *Henry* and *Anne* will aver that the ſaid *Edward Young* is yet alive, *viz.* at *London* in *Chriſt*'s Pariſh in the Ward of *Farringdon within*: And ſo they demand Judgment *ſi actio, &c.* And upon this the Plaintiff demurs.

And the Matter was argued in the ſaid *Eaſter* Term 15 *Elizabeth* by *Gawdy* and *Bendloe* Serjeants on the Part of the Plaintiff, and by *Loveleſs* and *Barham* Serjeants on the Part of the Defendants. And I only heard Part of *Gawdy*'s Argument, and the whole of *Loveleſs*'s, and therefore what I here report of the Arguments of the ſaid other Serjeants is upon credible Information; and I heard the Juſtices ſpeak to the Matter. And the Point argued was but one, and that was, if, upon the Death of *Clere Hadden* without Iſſue, the Remainder which he had by Purchaſe ſhould deſcend to the Heir of the Grandmother of *Clere Hadden* on the Part of his Father, (inaſmuch as he had no other Heir on the Part of his Father, nor on the Part of his Grandfather on his Father's Side) or if it ſhould deſcend to the Heir on the Part of his Mother, for the Plaintiff was his Uncle and next Heir on the Part of his Mother.

1 Point.

If for Default of Iſſue of the Body of the Purchaſer, the Land deſcends to the collateral Heirs on the Part of the Father, the Heirs of the Blood of the male Line on the Part of the Father aſcending ſhall be preferred in the Succeſſion before the Heirs of the Blood of the female Line on the Part of the Father aſcending: As the Brother or Siſter of the Grandfather of the Purchaſer on the Part of the Father, and their Iſſues, ſhall be there. Blackſtone Contra Bac. Max. reg. 1.

And divers Things were agreed by the Counſel on both Sides, and by the Court alſo. One was, that in the collateral Deſcent from any one who purchaſes Lands, and dies without Iſſue, the Heirs on the Part of the Father, who are of the Blood of the male Anceſtors in the lineal Aſcent by the Father, ſhall be preferred in the Deſcent before the Heirs who are of the Blood of the Females in the lineal Aſcent by the Father, in one and the ſame Degree. As for Example, the Brother of the Grandfather on the Part of the Father, and his Iſſues, be they Males or Females, ſhall be preferred before the Brother of the Grandmother on the Part of the Father, and his Iſſues: And ſo the Brother of the Great-grandfather on the Part of the Father, that is to ſay, the Brother of the Purchaſer's Father's Father's Father, and his Iſſues, be they Males or Females, ſhall be preferred before the Brother of the Great-grandmother on the Part of the Father, that is to ſay, before the Brother of the Purchaſer's Father's Father's Mother, and his Iſſues. For the Males are more worthy than the Females, Man being the moſt precious Creature that God made upon Earth, and far exceeding Woman. For *Adam* was firſt made as the Superior, and afterwards *Eve* as the Inferior, and *Adam* being the Head was her Protector and Governor, and *Eve*, as a weaker Creature, was given to him as a Companion in an inferior Degree, and to be protected and governed by him, and in them was the firſt Marriage, as *Loveleſs* ſaid, and from them it was derived to all others, ſo that there never was any People in the World amongſt whom there was not Mar-

preferred before the Brother of the Grandmother of the Purchaſer on the Part of the Father. S. P. Hale's Hiſt. Com. Law 243, 244, the 3d Rule of Deſcents 58, the 7th Rule there. Co. Litt. 12. b. in the Caſe of *Fairfield* there put. 2 Bac. Abr. 29. Vin. Abr. tit. Heir E. 4. pl. 2. in margine.

riage.

riage. For which Reaſon, he ſaid, Marriage may be ſaid to proceed *de jure gentium*. [a] And to this Purpoſe he cited *Bracton* in his firſt Book *de rerum diviſione, cap.* 5. wherein he ſays, *a jure enim gentium deſcendit maris et fœminæ conjunctio, et fit per mutuam utriuſque voluntatem, quæ matrimonium appellatur, nec proprie dici poterit jus, cum ipſum ſit corporale et videatur, jura autem omnia ſunt incorporalia, et videri non poſſunt, quæ deſcendunt et introducta ſunt ex jure gentium, ab eo tamen jure deſcendit liberorum procreatio et educatio, id eſt, nutrimentum.* And it is not only *ex jure gentium*, but it is alſo approved by the ſacred Laws of God, [b] ſo that without Matrimony no lawful and laudable Iſſue can be begotten amongſt Men. And then inaſmuch as Man proceeds from Matrimony, which is between a Man and a Woman, ſo that every Man has a Father and Mother, and is deſcended from two [c] Branches, *viz.* from Male and Female, and one of them is more worthy than the other, it is conſonant to Nature that if he purchaſes Land, and dies without Iſſue to inherit it, it ſhall go to that Line from whence he deſcended, and foraſmuch as he deſcended from two Lines, *viz.* from Male and Female, and the one is more worthy than the other, it ſhall go to the more worthy, for the more worthy the Line is to which a Man's Land goes, the greater Pleaſure it gives to him that purchaſed it, for every Man naturally deſires that all his Poſſeſſions in general, and his Inheritance particularly, ſhould after his Death go to the moſt worthy Perſon. And therefore the Law, which in all its Operations ſtudies the Diſpoſitions of Mankind, has ordained that Inheritances ſhall deſcend to the Race that is more worthy, rather than to that which is leſs worthy, and to the Line which is more precious, rather than to that which is more baſe. For which Reaſon the Brother of the Grandfather on the Part of the Father ſhall have the Land, rather than the Brother of the Grandmother on the Part of the Father, for the Brother of the Grandfather is Son to the Great-grandfather, and ſo comes from the more worthy Race. And if the Grandfather has no Brother, but a Siſter, it ſhall deſcend to that Siſter, and to her Line, rather than to the Brother of the Purchaſer's Father's Mother; for the Siſter of the Grandfather is Daughter to the Great-grandfather, and ſo comes from the Race of Males, from whom the Purchaſer came, and conſequently from the Race more worthy. And what is here ſaid touching the Brother of the Grandfather on the Part of the Father, and the Brother of the Grandmother on the Part of the Father, and their Iſſues, holds alſo with Regard to the Brother of the Great-grandfather or Great-Great-grandfather on the Part of the Father and their Iſſues, and the Brother of the Great-grandmother or Great-Great-grandmother on the Part of the Father, and their Iſſues; and ſo of every other in the Lines aſcending *. And ſo was it reſolved and agreed by the Counſel on both Sides, and by the Court alſo.

Further they agreed, that if the Purchaſer dies without Iſſue, and has no Heir on the Part of the Father, the Land ſhall deſcend to the next Heir on the Part of the Mother, which is to be intended to the Heirs of the Race of Males from whom the Mother is deſcended, rather than to others. As, for Example, the Grandfather of the Mother of the Purchaſer, that is to ſay, the Father of the Purchaſer's Mother's Father, has a Brother, and the Grandmother of the Mother of the Purchaſer, that is to ſay, the Mother of the Purchaſer's Mother's Father, has another Brother, there if the Purchaſer dies without Iſſue, having no Heir on the Part of his Father, the Brother of the Grandfather of the Purchaſer's Mother, *viz.* the Brother of the Father of the Purchaſer's Mother's Father, ſhall have the Land by Deſcent, and not the Brother of the Grandmother of the Purchaſer's Mother, *viz.* the Brother of the Mother of the Purchaſer's Mother's Father, for ſuch Brother of the Grandfather of the Purchaſer's Mother is of the more worthy Race, for he is Son to the Great-Grandfather of the Purchaſer's Mother, who ſhall be preferred before the Brother of the Grandmother of the Purchaſer's Mother, for he is Son to the Great-Grandfather of the Purchaſer's Mother in another Race, *viz.* in the Race which was conjoined with the Race of the Males, from which the Purchaſer's Mother deſcended, by the Marriage of the Woman *viz.* by the Marriage of the Grandmother of the Purchaſer's Mother to the Grandfather of the Purchaſer's Mother; and therefore the Brother of the Grandfather of the Purchaſer's Mother on the Part of her Father, and his Iſſues, ſhall be Heirs to the Purchaſer, and not the Brother of the Grandmother of the Purchaſer's Mother, nor his Iſſues, for the Brother of the Grandmother of the Purchaſer's Mother cannot be Heir to the Purchaſer as long as the Grandfather of the Purchaſer's Mother on the Part of the Father has a Brother, *cauſa qua ſupra*. [d] And to prove that the Heir of the Part of the Mother ſhall inherit where the Purchaſer dies without Heir of the Part of the Father, *Littleton cap.* 1. was cited, where he ſays that if a Man purchaſes Land, and dies without Iſſue, and has no Heir on the Part of his Father, then the Land ſhall deſcend to the Heirs on the Part of the Mother. [e] And to the ſame Purpoſe *Loveleſs* cited the Caſe in 49 *Ed.* 3. in Aſſize, where the Caſe was, that the Purchaſer of Land died without Iſſue, having no Heir on the Part of the Father, and the Heir on the Part of the Mother entered, and the Lord entered claiming it by Eſcheat, and the Heir on the Part of the Mother brought an Aſſize, and upon the general Iſſue pleaded all this Matter was found by Verdict, and it was there adjudged that the Plaintiff ſhould recover, becauſe when the Inheritance never came in Deſcent, nor in the Degrees, but the Purchaſer was the firſt that had it, there although there is a Failure of one Branch of Heirs, *viz.* of thoſe on the Part of the Father, it is reaſonable that the Heirs on the Part of the Mother ſhould have it, rather than that it ſhould eſcheat to the Lord. [f] And if he has no Heir on the Part of the Father, the Heir on the Part of the Mother ſhall be vouched, and ſhall be barred of his Action by ſuch Warranty. And if the King grants to a Man a Franchiſe-royal, *viz.* that he and his Heirs ſhall be quit of Toll, or the like, and he dies without Heir on the Part of the Father, the Heir on the Part of the Mother ſhall have Benefit of this Dif-

[a] Bract. 4. a. 37. a. Cowel's Inſt. 3.
[b] Ante 303 (b).
[c] S. P. Co. Litt. 12. a.
* *Note*, the Male Line of the Part of the Father aſcending ſhall *in infinitum* exclude the Female Line of the Part of the Father aſcending, ſo that the Brother or Siſter of the Purchaſer's Great-Grandfather or Great-Great-Grandfather on the Part of the Father, and ſo on *in infinitum*, ſhall be preferred before the Brother of the Purchaſer's Grandmother on the Part of the Father, notwithſtanding the former is more remote, which goes a Step further than the Point here agreed, which only touches the Heirs of the Male and Female Line on the Part of the Father ſo far as they are in one ſame Degree. See Co. Litt. 12. b. Hale's Hiſt. Com. Law 243, 244. Poſt 452 (c) *Per Manwood* J.

2 Point.

If for Default of Heirs of the Purchaſer on the Part of the Father, the Land deſcends to the Line of the Mother (as it may do) the Heirs of the Blood of the Male Line on the Part of the Mother aſcending ſhall be preferred in the Succeſſion before the Heirs of the Blood of the Female Line on the Part of the Mother aſcending: As the Brother of her Grandfather on the Part of her Father ſhall be preferred before the Brother of her Grandmother on the Part of her Father.

[d] Litt. § 4. See S. P. admitted Dr. & Stud. lib. 1. cap. 7. fo. 22, 23. Hale's Hiſt. Com. Law 239, 243. 2 Finch 116. Cowel's Inſt. 159 2 Bac. Abr. 29.
[e] P. 49 Ed. 3. 11. pl. 5. Fitz. Diſcent 7. Bro. 7. 49 Aſſ. pl. 4. 2 Finch 116. Vin. Abr. tit. Heir W. pl. 3.
[f] S. P. 2 Rol. Abr. 746. pl. 11. Hob. 25. Co. Litt. 376. b.

Discharge; all which Matters are put in the said Case of 49 *Ed.* 3. [a] And he also cited the Case in 12 *Ed.* 4. where it was held by all the Justices of the Common-Bench, that if a Man purchases Lands, and dies without Issue, and without Heir on the Part of the Father, his next Heir on the Part of the Mother shall have the Land. And so in the principal Case if *Clere Hadden* had not had any Heir on the Part of his Father, they held clearly that *Edward Clere* his Uncle and Heir on the Part of his Mother should have been inheritable to the said *Clere Hadden*, and should not have been excluded by Law from being his Heir.

[a] M. 12 Ed. 4. 14. pl. 12. Fitz. Discent 2. Bro. 38.

3 Point.

If the Father purchases Land, and it descends to the Son, who enters and dies without Issue, and without Heirs of the Male or Female Line of the Part of the Father, viz. of the Father's Father or Mother, it shall never go at all to the Line of the Son's Mother, but shall rather escheat to the Lord: For when once Land comes in Descent, it shall go only to the Heirs on that Part from whence it descends, and shall always taste of the Blood of the first Purchaser: And tho' here the Heir of the Part of the Son's Mother is of the Blood of the Son who was last seized, yet such Heir is an entire Stranger to the Blood of the Father, who was the first Purchaser; and, if after the Purchaser's Death the Son does not enter, then the Heir of the Part of the Son's Mother cannot have the Land, because he is not of the Blood of him that was last seized. S. P. Litt. § 4. Co. Litt. 12. a. in the Case of *Knightly* there put. Dr. & Stud. lib. 1. cap. 7. fo. 22. 2 Finch 117. Hale's Hist. Com. Law 239, 240. Noy 159. Blackstone of Descents 34, 38, 39, 2 Bac. Abr. 33. Vin. Abr. tit. Heir E. 4. pl. 1. W. pl. 3.

Also it was agreed by them, that if a Purchaser of Land has Issue a Son, and dies, and the Son enters, and dies without Issue, and without any Heir on the Part of his Father's Father, the Heir on the Part of his Father's Mother shall have the Land by Descent: And so *Loveless* said it was held in the said Book of 12 *Ed.* 4. but in such Case the Heir on the Part of the Mother of such Issue shall never inherit. [b] And to this Purpose he cited the Case in 39. *Ed.* 3. in Assize brought by *John Osborn*, and the Saying of Justice *Finchden* there at large: And the Case was in Effect thus, *viz.* a Bastard purchased Land in Fee, and died having Issue one *Cicily*, who entered, and died without Issue, and whether or no the Land should escheat, or the Heir on the Part of the Mother of *Cicily* should have it, was the Question; and there Justice *Finchden* said as follows, "I hold that there is a great Diversity where one purchases Land, and dies without Heir on the "Part of his Father, and where he has the Land by Descent on the Part of his Father. For where "he has Land by Descent, the Purchase first commenced in his Ancestor, and the Land ought "to descend lawfully in the Blood of the first Purchaser, for if Land descends to the Heir on "the Part of the Father, and he dies without Heir, the Land cannot descend to the Blood of the "Mother, because it first commenced in the Father, and the Heir on the Part of the Mother is "not of the Blood of the Father who was the first Purchaser. But when he himself purchases "the Land, and dies without Heir on the Part of the Father, and has an Heir on the Part of the "Mother, this Heir is inheritable to the Land for Default of Heir on the Part of the Father, for "the Heir on the Part of the Mother is his Heir as well as the Heir on the Part of the Father; "but if he has an Heir on the Part of the Father, and also an Heir on the Part of the Mother, there "forasmuch as the Blood on the Part of the Father is more worthy, as well the Land of his own "Purchase as that which he has by Descent on the Part of the Father shall descend to such Blood; "but if he has no Heir on the Part of the Father, seeing that the Land is his own Purchase, "which first commenced in himself, and also seeing that the Heir on the Part of the Mother may "be Heir to him, and is of his Blood, the Inheritance shall descend to such Heir rather than it "shall escheat. But in this Case the Title of the Purchase first commenced in the Father of *Ci-*"*cily*, and he that is Heir on the Part of the Mother of *Cicily* is not of the Blood of her Father, "for which Reason he is not inheritable to this Tenancy, but it shall revert to the Lord as his "Escheat." Wherefore (as it appears in the *Book of Assizes* where the same Case is reported *pla.* 7.) the Assize was adjourned into the Common-Bench, where the Opinion went against the Plaintiff who brought the Assize against the Lord by Escheat; and therefore he was nonsuited. Which Opinion, *Loveless* said, was agreeable to that in 12 *Ed.* 4. in all Points. And to this Purpose he also cited the Case of [c] *John Carell v. Richard Cuddington* and *Elizabeth* his Wife, in the Commentaries of Mr. *Plowden* lately printed, where the Case was, that *Thomas Buckenham* and the said *Elizabeth* then his Wife had Issue a Son and one *Dorothy* their Daughter, and the said *Thomas Buckenham* died seized of Lands holden in Socage, and the Son died without Issue, and the said *Dorothy* entered, and took to Husband *Thomas Carel*, and she and the said *Thomas Carell* levied a Fine of the Land to one *Noy* in Fee, *sur conusance de droit come ceo que il ad de lour done*, and took back an Estate by Grant and Render to them and to the Heirs Males of the Body of the said *Thomas Carell* by him upon the Body of the said *Dorothy* begotten, the Remainder to the right Heirs of the said *Dorothy* in Fee, and afterwards they had Issue *John Carell*, and the said *Thomas* and *Dorothy* died, the said *John* being within the Age of 14 Years, and there the Point of the Case was, whether *John Carell* Attorney of the Dutchy Court of *Lancaster*, who was Father of the said *Thomas*, and Grandfather of the Infant on the Part of his Father, or the said *Elizabeth* Grandmother of the said Infant on the Part of his Mother, and *Richard Cuddington* her second Husband, should be Guardian in Socage to the Infant. And it was there clearly agreed that if the Infant should die without Issue, none of the Blood of *Carell* the Grandfather could have the Land by Descent from the Infant, because the Land moved from the Mother of the Infant, and whosoever should have had it from the Mother, if she had died without Issue, shall have it by Descent from the Son, if he should die without Issue, and forasmuch as the Blood of *Carell* is a Stranger to the Purchaser of the Fee-simple, *viz.* to *Dorothy*, from thence it follows that the Land could never descend to the Brother of *Carell* the Grandfather, nor to any other on that Side, nor from them to the said *Carell* the Grandfather, and therefore *Carell* the Grandfather could by no Possibility have the Land, if the Infant should die without Issue: But if the Blood of the Father of *Dorothy*, *viz.* of *Thomas Buckenham*, should fail, then it was held that the Land might descend to the Blood of the said *Elizabeth*, who was the Mother of the Purchaser, and from them possibly to *Elizabeth* herself, so that she is nearer to the Possibility of having the Land, if the Infant should die without Issue, than the Grandfather on the Part of the Father is, and therefore it was adjudged that the said *John Carell* the Grandfather should be Guardian in Socage, and not the Grandmother on the Part of the Mother of the Infant. From whence, he said, it appears that if *Clere Hadden* had taken a Wife, and had had Issue, and had died, and the Issue had entered, and died without Issue, the Heir of the Father of *Clere Hadden*, if he had had any such Heir, should have had the Land by Descent, and if he had had no such Heir, then the Heir of the Mother of

[b] M. 39. Ed. 3. 29. Bro. Discent 15. Vin. Abr. tit. Heir W. pl. 1.

[c] Ante 295.

Clere Hadden ſhould have had the Land by Deſcent, if he had had any ſuch Heir, and if he had had no ſuch Heir, the Heir of the Mother of ſuch Iſſue ſhould never have had the Land by Deſcent, for the Mother of the Iſſue is an entire Stranger in Blood to the firſt Purchaſer, viz. to *Clere Hadden*, and as long as the Land continues in Deſcent, it ſhall always taſte * of the firſt Purchaſer, and to his Blood only it ſhall have Reſpect, and not to any new Blood. For if *Clere* had had Iſſue, who had had the Land from him by Deſcent, and the Land had deſcended from that Iſſue to his Iſſue, and ſo on from Iſſue to Iſſue until four or five Deſcents, and the laſt Iſſue had died without Iſſue, there upon Failure of Heirs on the Part of the Father of *Clere* and of the Mother of *Clere*, no Heir on the Part of any Wife that any of the Iſſues had taken ſhould have had the Land by Deſcent, but it ſhould rather have eſcheated, for all Wives taken by any Iſſue after the Purchaſe of *Clere Hadden* are Strangers to the Blood of the Purchaſer, and therefore their Lineage ſhall be Strangers to the Land; for when the Land is in Deſcent it ſhall taſte of the firſt Purchaſer, and of the Blood of him in whom it firſt attached, and it ſhall always deſcend to the Blood of the firſt Purchaſer only, and not to the Blood of any Women who are afterwards married into that Race, for they are but allied to the firſt Purchaſer, and are not of his Blood, and the Land ſhall deſcend to the Blood, and not to the Alliance without Blood; † ſo that in Point of Deſcent no Marriage is to be reſpected but the Marriage of the Father and Mother of the Purchaſer, which precedes the Purchaſer, for no Marriage afterwards ſhall enable any to inherit the Land ſo purchaſed. And foraſmuch as the Marriage of the Father and Mother of *Clere Hadden* preceded the Exiſtence of *Clere Hadden*, the Blood of the Male accoupled in this Marriage, if there is any of that Blood, and if not, the Blood of the Female accoupled in this Marriage, if there is any of that Blood, are only inheritable. And ſo the Plaintiff here being Uncle on the Part of the Mother of *Clere Hadden* ſhall inherit, if there is no Heir on the Part of the Father of *Clere Hadden*, whom the Law prefers. And all this was agreed on both Sides, and by the Court alſo.

* This a Maxim in Law, Co. Litt. 12. a. And therefore to go one Step further than the Point here agreed, upon the ſame Ground it is, that if the Grandfather purchaſes Land in Fee, and it deſcends from him to the Father, and from him to the Son, if the Son enters, and dies without Iſſue, his Father's Brothers or Siſters, or their Deſcendants, or for Want of them, his Grandfather's Brothers or Siſters, or their Deſcendants, or for Want of them, his Great-grandfather's Brothers or Siſters, or their Siſters, or their the Mother, or the Grandfather.

Deſcendants, or for Want of them, any of the Conſanguinity of the Great-grandfather, or for Want of them, his Great-grandmother's Brothers or Deſcendants, ſhall inherit, for the Conſanguinity of the Great-grandmother was the Conſanguinity of the Grandfather; but none of the Line of of the Grandmother, viz. the Grandfather's Wife, ſhall inherit, becauſe not of the Blood, either by Father or Mother, of the firſt Purchaſer, viz. Hale's Hiſt. Com. Law, 240. 2 Bac. Abr. 34. † Vin. Abr. tit. Heir E. 4. pl. 5.

For the Plaintiff, upon the principal Matter.

But as to this Matter, whether or no there is any ſuch Heir on the Part of the Father of *Clere Hadden*, viz. on the Part of *Walter Hadden*, whom the Law prefers in the Deſcent, was the great Doubt, and the only Point of the Caſe. And it was ſaid on Behalf of the Plaintiff, (to prove that the Land ſhould not deſcend to *Edward Young*, as the Defendants ſuppoſed) that the ſaid *Edward Young* was not as near in Blood to *Clere Hadden* as the Plaintiff was. For the Plaintiff is his Uncle on the Part of his Mother, and the ſaid *Edward Young* is Couſin german to *Walter Hadden* Father of the ſaid *Clere Hadden*, and ſo they are Couſins in the ſecond Degree, and *Clere Hadden* is one Degree further on his Part, ſo that *Edward Young* is in the ſecond Degree to *Clere Hadden*, and *Clere Hadden* is in the third Degree with reſpect to *John Young* the Anceſtor paramount, which Degree is more remote than the Degree between *Clere Hadden* and the Plaintiff. ‡ And *Littleton* ſays in his Book that if the Purchaſer dies without Iſſue, every one who is his next Couſin collateral of the whole Blood, how far ſoever he be from him in Degree, may inherit and have the Land as Heir to him. So that Proximity of Blood is conſiderable in every Deſcent, and this Proximity is in the Plaintiff here, and *Edward Young* is more remote in Blood.

‡ Lit. § 2.

And as to the other Point which is made the principal Matter, viz. whether or no *Edward Young* is deſcended from the Blood on the Part of the Father of *Clere Hadden* the Purchaſer, viz. on the Part of *Walter Hadden*, ſo as to be preferred in the Deſcent of the Land, as the Defendants ſuppoſed, the Counſel for the Plaintiff ſaid that true it is that he is deſcended from the Blood on the Part of the Father of the Purchaſer, but this is on the Part of a Female, viz. from *Dorothy*, who was Grandmother to the Purchaſer, which Female was a Stranger to the Blood of the *Haddens* at the Time when ſhe married with *Hadden* who was Grandfather to the Purchaſer, and equally as great a Stranger as *Margaret Clere*, who married with *Walter Hadden*, was to the Blood of the *Haddens* before her Marriage with the ſaid *Walter*. And then foraſmuch as the Blood of the one Female and of the other was a Stranger to the Blood of the *Haddens* until their Marriages, and after their Marriages their Blood was a Stranger to the Anceſtors of their Huſbands paramount their Huſbands, but not to their Iſſues begotten by the *Haddens*, (for the Iſſues of every Woman are alike deſcended from the Blood of the Woman as from the Blood of the Huſband, and the Blood of the Branch of the Mother is equally and in like Degree united to the Iſſues, and to the Race which deſcends from them, as the Blood of the Branch of the Father is) it ſeemed to them to be highly reaſonable that the Uncle here on the Part of the Mother of the Purchaſer ſhould be preferred in the Deſcent, becauſe he is neareſt. So that altho' the Caſe was equal in other Reſpects, it is not ſo as to the Point of Proximity. But if any one had come and claimed the Land as Couſin to the Purchaſer, for that he was deſcended from the Male Line of the *Haddens* aſcending, as if he had been deſcended from the Brother or Siſter of the Grandfather, Great-grandfather, or Great-great-grandfather of the Purchaſer on the Part of the Males from whom the Purchaſer was deſcended, there ſuch Perſon ſhould be preferred as Heir on the Part of the

Father, for he is of the Branch more worthy, viz. of the ſame Race of Males from whom the Purchaſer iſſued, and he and the Purchaſer had one common Anceſtor paramount, from whoſe Loins they are equally ſprung, and therefore it is reaſonable that ſuch Perſon ſhould be Heir to the Purchaſer, whether he be Male or Female. But here there is no ſuch Perſon, for *Edward Young*, whom the Defendants would make to inherit the Land, is of the Blood of the Mother of the Purchaſer's Father, and might indeed be Heir to the Purchaſer, if he was nearer than the Plaintiff is, but the Plaintiff is nearer than him, and altho' they are in like Degree as to the Point of Deſcent from the Branch of a Female, yet inaſmuch as they differ in Point of Proximity, *Edward Clere* the Plaintiff, being the neareſt, ſhall be adjudged Heir.

And further they ſaid, that if the neareſt ſhould not be preferred, it would create great Confuſion, and ſet up many Competitors for one and the ſame Inheritance, for perhaps one would lay Claim to the Land as Heir to the Purchaſer, viz. as Heir to the Brother of the Purchaſer's Grandfather in the male Line aſcending, and another as Heir to the Brother of the Purchaſer's Great-grandfather in the like male Line aſcending, and a third as Brother of the Purchaſer's Great-great-grandfather in the like lineal Aſcent of male Anceſtors, to avoid which Plurality of Claims the Law gives the Preference to Proximity of Blood. And ſo the Plaintiff here being neareſt ſhall be preferred.

E contra for the Defendants; upon the principal Matter.

On the other Hand *Loveleſs* and *Barham* Serjeants argued for the Defendants, and ſaid that the Plaintiff, who is Uncle to *Clere Hadden* the Purchaſer on the Part of his Mother, and *Edward Young*, who is Heir to the Great-uncle of the Purchaſer by his Grandmother, who was his Father's Mother, are not in one Degree of Blood to the Purchaſer, and therefore the Proximity of Blood in the Plaintiff is not to be regarded here. For the Blood which was between the Plaintiff and *Clere Hadden* came to *Clere Hadden* by a Female only, viz. by his Mother immediately, but the Blood which was between *Clere Hadden* and *Edward Young*, altho' it originally came from a Female, yet it was derived to the ſaid *Clere Hadden* by a Male, viz. by *Walter Hadden* his Father, (which Male is a Creature more worthy than a Female) and not by a Female immediately, as it was between him and the Plaintiff. For no Man can be born without a Father and Mother, and ſo *Clere Hadden* had a Father and Mother, who were the Cauſe of his Being, and the Father (as it is confeſſed) is more worthy than the Mother, and alſo the Father of *Clere Hadden*, viz. *Walter Hadden*, had a Father and Mother, of whoſe Seed the ſaid *Walter* was begotten, and inaſmuch as *Walter* the Father of *Clere* was a Male, and ſuch Male could not be without the Seed of Male and Female, and the Male, viz. *Walter*, was more worthy than *Margaret* his Wife, from thence it follows that the Blood of *Dorothy*, who was the Cauſe of the Being of *Walter*, who is the principal and more worthy Branch of *Clere Hadden*, is more worthy than the Blood of *Margaret*; and as ſhe was leſs worthy than *Walter*, ſo is her Blood leſs worthy than the Blood of *Walter*, with Reſpect to *Clere Hadden*, and ſo the Blood of *Dorothy*, by the Deſcent by a Male to the ſaid *Clere Hadden*, is more precious than the Blood of a Woman, viz of his Mother, which is not derived to *Clere Hadden* by any Male, but came to him immediately by a Female. And therefore *Edward Young* is, for the Dignity of his Blood, to be preferred in the Deſcent, and ſhall be adjudged Heir to *Clere Hadden* on the Part of the Father, and the Blood of *Margaret* the Mother of *Clere Hadden*, by whom the Blood between *Clere* and the Plaintiff immediately came, without any Deſcent by a Male, ſhall, for the Baſeneſs of the Degree of the Female, be rejected. [a] And this, they ſaid, is warranted by *Littleton*, who ſays that if the Son purchaſes Land in Fee-ſimple, and dies without Iſſue, thoſe of the Blood on the Part of his Father ſhall inherit as Heirs to him before any of the Blood on the Part of his Mother, but if he has no Heir on the Part of his Father, then the Land ſhall deſcend to the Heirs on the Part of his Mother. In which Sentence theſe Words are obſervable, viz. *thoſe of the Blood on the Part of his Father ſhall inherit as Heirs to him before any of the Blood on the Part of his Mother*, for here *Edward Young* is one of the Blood of the Father of *Clere Hadden* the Purchaſer, *ergo* he ſhall inherit before any of the Blood of the Mother, ſo that the Letter and Senſe of *Littleton* excludes *Edward Clere* from inheriting in this Caſe. And *Loveleſs* further cited diverſe Things in *Bracton* in the ſecond Book *de acquirendo rerum dominio*, *cap.* 29, 30, 31. touching Deſcents, and the Quality, Proximity, Pedigrees, Degrees, and Dignities of Heirs, and the Order of Succeſſion, and at the End he cited the Opinion of *Bracton* in the principal Point, where he ſays, [b] *Deſcendit jus quaſi ponderoſum quid cadens deorſum rectâ lineâ vel tranſverſali, et nunquam reaſcendit eâ viâ quâ deſcendit poſt mortem anteceſſorum, a latere tamen aſcendit alicui propter defectum heredum inferius provenientium.* Alſo *Bracton* ſays, [c] *Item eorum qui ſunt naturales legitimi et hæredes, quidam ſunt propinqui, quidam propinquiores, quidam remoti, et quidam remotiores, et omnes, quotquot ſunt, ſunt hæredes recti et juſti, quotquot deſcendunt gradatim a communi ſtipite, primò per lineam directam deſcendentem in infinitum, et poſtea per lineam tranſverſalem deſcendendo in infinitum, illis deficientibus qui ſunt in linea recta. Et ultimò cùm illi defecerint qui ſunt in linea tranſverſali deſcendendo, vocantur illi qui ſunt in linea tranſverſali aſcendendo tantum, quià per lineam rectam aſcendendo, per quam jus deſcendit propter mortem anteceſſorum, jus illud nunquam per eandem lineam reaſcendit. Et quamvis omnes ſic in infinitum aſcendendo et deſcendendo recti ſunt hæredes et juſti, tamen non omnes ſimul vocantur ad ſucceſſionem, quia propinquior excludit propinquum, propinquus remotum, remotus remotiorem.*

[a] Litt. § 4.

[b] Bract. 62. b. See Blackſtone of Deſcents, 18, 19.

[c] Bract. 64. a.

rem. And further *Bracton* ſays, * *Et ſciendum quod cognationum ſive parentelarum aliæ ſunt ſupra, aliæ infra, aliæ a tranſverſo ſive a latere. Parentes, qui ſunt ſupra, dici poterunt anteceſſores et parentes: Illi verò, qui ſunt infra rectam lineam vel tranſverſalem, dici poterunt rectè cognati et hæredes: Illi verò, qui ſunt ſupra in linea tranſverſali, dici poterunt rectè parentes, et hæredes, deficientibus illis qui ſunt inferius.* And afterwards *Bracton* ſays, *Superior autem cognatio parentum ſive anteceſſorum qui mortui ſunt in linea recta aſcendente, eſt et incipit a primo gradu, viz. a patre vel matre aſcendente uſque ad avum, a ſecundo gradu, ſcilicet ab avo uſque ad proavum, a tertio gradu, ſcilicet a proavo uſque ad abavum, et ſic a quarto gradu, ſcilicet ab abavo uſque ad atavum, ſic a quinto gradu, ab atavo uſque ad tritavum, qui obtinet in computatione ſextum gradum, ulterius autem non fit computatio aſcenſus, quia talis computatio excederet memoriam hominum, et ſic reſolvendo a tritavo computato pro patre, vel tritavia pro matre, fieri poterit deſcenſus jure uſque ad trinepotem et trineptem.* And in another Place he ſays, [a] *in primo vero gradu ſedent pater et mater, qui facient ſtipi em communem, in ſecundo vero gradu in linea deſcendente ſunt filius et filia, in tertio, nepos et neptis.* And in another Place he ſhews how thoſe are called who are in the direct Line paravail the Nephew, viz. *Pronepos, Abnepos, Atnepos, Trinepos.* And further he ſhews how the others in the collateral Lines deſcending and aſcending are called, and how they are inheritable as Heirs, for his Words are, [b] *Item frater patris et ſoror dicuntur patruus et amita, et ſi ex amita procedat filius vel filia, dici poterunt, quantum ad nepotem, proprior amitivus et proprior amitiva, et ſic eorum filii et filiæ, nepos et neptis, et ulterius deſcendendo in infinitum. Illi vero qui ex patruo procedunt, filius vel filia, patrueles nuncupantur, et ſic deinceps eorum filius et filia in infinitum deſcendendo. Item in linea recta deſcendente vel tranſverſali ex parte filiæ alicujus, ſoror filiæ vel frater de uno eodemque patre et diverſa matre conſobrina dici poterit, et frater ex talibus conſobrinis, et eorum filius et filia, nepos et neptis, et ſic deinceps. Item ſoror filiæ vel frater de una eademque matre, ſed diverſo patre, ſoror uterina, frater ulterinus, dici poterunt, et ſic eorum filius et filia, et ſic deinceps ut ſupra. Item ſoror patris dicitur amita, et ſoror matris dicitur matertera, et eorum filius et filia, et ſic in infinitum. Et iſtis omnibus deficientibus, ad ſuperiores fiet deſcenſus, ſicut ad fratrem avi vel aviæ, vel ad ſororem in linea tranſverſali, ſicut ad patruum magnum, vel amitam magnam, et ad eorum hæredes, filium vel filiam, et ſic deinceps. Et illis omnibus deficientibus, tunc ad fratrem proavi ex parte patris, qui dicitur propatruus magnus, vel ejus ſororem, quæ dicitur proamita magna, et ſic deinceps ad filios et filias, eorum nepotes et neptes. Illis autem deficientibus ex parte patris, tunc vocentur fratres abavi et abaviæ, qui dicuntur abpatruus magnus, et abavita magna, et eorum hæredes in infinitum. Et iſtis deficientibus ex parte patris, frater atavi vel ataviæ, qui dicuntur atpatruus magnus et atavia magna, et eorum hæredes in infinitum. Quibus deficientibus vocantur ex parte patris frater et ſoror triavi et triaviæ, qui dicuntur tripatruus magnus, et tritavia magna, et eorum hæredes in infinitum. Et ex alia parte tranſverſali a parte matris, ut ſi avunculus vel matertera et omnes alii hæredes defecerint, tunc vocantur fratres et ſorores avi vel aviæ ex parte matris, et vocantur avunculus magnus et matertera magna, et eorum hæredes in infinitum. Et illis deficientibus, tunc vocantur ex parte matris frater proavi et proaviæ, vel ſoror, qui dicuntur proavunculus magnus et Promatertera magna, et eorum hæredes in infinitum; et ſic gradatim vocandi ſunt abavunculus magnus et abmatertera magna, et atavunculus magnus et atmatertera magna, ex parte matris in linea tranſverſali, triavunculus magnus et trimatertera magna aſcendendo, et eorum hæredes in infinitum.* So that (*Loveleſs* ſaid) *Bracton* has here ſhewn how the Law was taken in his Time touching the Courſe of Deſcents, viz. that an Inheritance in Land, as a Thing ponderous, deſcends downwards in the direct Line paravail the Purchaſer, and if there is none in that Line, then in the collateral or tranſverſal Line (as he terms it) paravail, and if there is none ſuch paravail, then it ſhall go to the Heirs in the collateral or tranſverſal Line aſcending paramount, wherein he prefers the Deſcendants of the male Line of the Father, Grandfather, Great-grandfather, and Great-great-grandfather of the Purchaſer's Father, and if there is none ſuch, then he prefers the Heirs on the Part of the Mother of the Purchaſer's Father, and ſo the Heirs of other Females paramount accoupled to the male Line aſcending, and if there is none ſuch, then the Heirs on the Part of the Purchaſer's Mother ſhall inherit; for when he ſays, *et ex alia parte tranſverſali a parte matris*, this is to be intended for Default of other Heirs *a parte patris*, for he puts it after the others; ſo that he makes the Brother of the Mother of the Purchaſer's Father, and his Iſſues, to be Heir to the Purchaſer before the Brother of the Purchaſer's Mother, which is our very Caſe here, and ſo he diſables the Plaintiff from being Heir to *Clere Hadden.* And he ſaid that *Bracton* in his ſaid ſecond Book *cap.* 30. ſays, [c] *Maſculus ſexus ſemper in ſucceſſione preferri debet ſexui fœmineæ, nunquam enim ad ſucceſſionem vocatur fœmina, quamdiu aliquis hæres ſuperfuerit ex maſculis:* And therefore, he ſaid, a Son ſhall be preferred before a Daughter. And to this Purpoſe *Loveleſs* cited diverſe Sentences out of *Britton* in the Chapters of [d] *Proximity*, and of [e] *Succeſſion*, which Book follows *Bracton* very much in the ſaid Points of Deſcents to the Heirs lineal paravail, and to the Heirs tranſverſal (as the Manuſcript Copies of *Britton* term them, but as *Loveleſs* cited it, and as it is in the printed Book of *Britton*, Heirs *traverſal*, that is, as well to them in the Line paravail, as to them in the Line aſcending) in which Chapter of *Succeſſion Britton* treats of the Perſons to whom Land ſhall deſcend, and for the better underſtanding thereof, he tells us that he had made and drawn out in his Book a Figure reſembling a Leaf, one Side whereof

* Bract. 67. a.

[a] Bract. 68. a.

[b] Bract. 68. b.

[c] Bract. 65. a.

[d] Britt. 268 b.

[e] Ibid. 269. a.

whereof represents the Issue of the male Ancestors, and the other Side the Issue of the female Ancestors, but the Figure is not printed in the Book, however it is to be taken that the Issues of the female Ancestors, which he meant, are the Issues of those Ancestors who come from Females coupled in Marriage with male Ancestors, as the Grandmother, or Great-grandmother, or the like, coupled in Marriage with the male Ancestors on the Part of the Purchaser's Father, who, as he intends, are to be preferred before the Heirs on the Part of the Purchaser's Mother. And *Loveless* said that if *Clere Hadden* here had made a Waraanty upon any Feoffment, and had died without Issue, the Warranty should have descended upon *Edward Young*, and not upon the the Plaintiff. Which *Dyer* Chief Justice affirmed after the Argument of *Loveless*.

Where several are equally worthy in Blood, as if all are of the male Line on the Part of the Father ascending, or of the female Line on the Part of the Father, the neareſt ſhall be preferred in the Succeſſion; but if one is more worthy in Blood than another, as if one is Heir of the male Line on the Part of the Father aſcending, and the other is Heir of the female Line on the Part of the Father, there Proximity is not regarded, but the more worthy, viz. the Heir of the male Line, tho' more remote, ſhall be preferred.

And as to the Objection which has been made, viz. that if Proximity of Blood ſhould not be preferred in Deſcents, it would create infinite Confuſion, and would perhaps ſet up many Competitors for one and the ſame Inheritance, to this *Manwood* Juſtice anſwered, that there never will be any ſuch Confuſion, if the more worthy in Blood is preferred, but if they are equally worthy in Blood, then the neareſt ſhall be preferred. [a] As if the Purchaſer dies without Iſſue, and the Brother of the Purchaſer's Father claims the Land, and the Brother of the Purchaſer's Grandfather, that is to ſay, the Brother of the Father of the Purchaſer's Father, alſo claims the Land, and the Brother of the Purchaſer's Great-grandfather, that is to ſay, on the Part of the Father in the lineal Aſcent of Males, alſo claims the Land, there the Brother of the Purchaſer's Father ſhall be preferred as Heir, for he is the neareſt of the Blood of the Purchaſer's Father, and they are all equally worthy in Blood, for they are all of the Blood of Males, which is the more worthy Sex, and therefore the neareſt ſhall be preferred as Heir; and if there is no ſuch Brother of the Purchaſer's Father, nor any Iſſue of ſuch Brother, nor any Siſter of the Purchaſer's Father, nor any Iſſue of her, (for the Siſter ſhall be in the ſame Degree as the Brother ſhould, where there is no Brother) then the Brother of the Purchaſer's Grandfather, or his Iſſue, or the Siſter of the Purchaſer's Grandfather, or her Iſſue, ſhall be preferred before the Brother or Siſter of the Purchaſer's Great-grandfather, and their Iſſues, and ſo on from them *in infinitum*. [b] And ſo the Brother or Siſter of the Purchaſer's Grandmother, viz. the Mother of the Purchaſer's Father, ſhall be preferred before the Brother or Siſter of the Purchaſer's Great-grandmother, viz. the Mother of the Purchaſer's Father's Father, becauſe they are equally worthy in Blood, (for ſuch Heirs come from the Blood of the female Sex, from which the Purchaſer's Father iſſued) and where they are all equally worthy, the next of Blood ſhall always be preferred as Heir. [c] But on the other Hand, if the Purchaſer dies without Iſſue, and the Brother of the Purchaſer's Grandmother on the Part of the Father, that is to ſay, the Brother of the Mother of the Purchaſer's Father, claims the Land as Heir to the Purchaſer, and the Brother or Siſter of the Purchaſer's Great-grandfather, that is to ſay, the Brother or Siſter of the Father of the Purchaſer's Father's Father, alſo claims the Land as Heir to the Purchaſer, there the Brother or Siſter of the Purchaſer's Great-grandfather ſhall be preferred as Heir before the other, and yet the other is nearer in Blood, but he is leſs worthy in Blood. For altho' he is of the Blood on the Part of the Purchaſer's Father, yet that Blood is accrued by a Female, but the Blood of the Brother or Siſter of the Purchaſer's Great-grandfather is accrued by male Blood throughout, for ſuch Brother or Siſter was Son or Daughter to the Purchaſer's Great-great grandfather, and therefore an Heir of them ſhall exceed the Heir of the other in Dignity of Blood. So here in the principal Caſe the Heir on the Part of the Mother of *Walter Hadden* the Father of *Clere Hadden* the Purchaſer, whoſe Blood is conveyed to the Purchaſer by a Male, viz. by his Father, is to be preferred before the Heir of the Purchaſer's Mother, altho' he is nearer in Blood, for as he is nearer in Blood to *Clere Hadden*, ſo is he leſs worthy in Blood, becauſe his Blood accrues immediately by a Female only, and therefore the Plaintiff here ſhall not be Heir to *Clere Hadden*. And of this Opinion was the whole Court. Wherefore the laſt Day of *Eaſter* Term 15 *Elizabeth* the Court gave Judgment againſt the Plaintiff, which Judgment was as follows.

[a] S. P. Hale's Hiſt. Com. Law 242, 243.

[b] S. P. Hale's Hiſt. Com. Law 244, the 4th Rule there. See *Infra* at the Reporter's Note, where upon ſome Doubt being conceived of this Matter, he put the Queſtion to all the Juſtices of the Common Pleas, who concurred with this Opinion. Yet *Quære*, if this Poſition ſhould be allowed, whether it would not tend to overturn one of the main Foundations of the principal Caſe here adjudged.

For one of the great Reaſons which induced the Court to give the Preference to the Brother of the Grandmother, before the Brother of the Mother, of the Purchaſer, was, becauſe the Blood of the former was conveyed to the Purchaſer by a Male, which the Blood of the latter was not: And tho' here the Caſe put by *Manwood* ſo far differs *in terminis* from the principal Caſe, that the Blood of the one Competitor and of the other, viz. of the Grandmother's and the Great-grandmother's Brother, is conveyed to the Purchaſer by Males, more or leſs, yet in Fact the true Deciſion of both Caſes ſtands pretty much upon the ſame legal Reaſon, viz. the Preference of the male Blood, and therefore it ſeems more regular, and agreeable to the great Principle in the Law of Deſcents, to decide in Favour of the Brother of the Great-grandmother here, in whom there is more male Blood than there is in the Brother of the Grandmother. And by ſuch Conſtruction the Uniformity of the Courſe of Deſcents will be preſerved, and the Authority of the Judgment in the principal Caſe unimpeached. So that it does not ſeem to hold univerſally true, that Proximity of Blood is the Pole-ſtar by which we are to direct the Succeſſion in Caſes where all the Claimants are equally worthy in Blood. See Law of Inheritances 30, 38, 61, 62, 66. Blackſtone of Deſcents 64, 65, where this Doctrine is clearly and ingeniouſly diſcuſſed, and moſt weighty Reaſons given againſt the Poſition here laid down by *Manwood*.

[c] S. P. Hales Hiſt. Com. Law 243, 244, the 3d Rule there. See Ante 445, the 1 Point there agreed, and the Note in the Margin at (*).

The reſt of the Record.

At which Day here came as well the aforeſaid *Edward Clere* as the aforeſaid *Henry* and *Anne* by their Attornies aforeſaid. And thereupon the Premiſſes being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here that the Plea of the aforeſaid *Henry* and *Anne* above in Bar pleaded, and the Matter in the ſame Plea contained, is lawful and ſufficient in Law to preclude the aforeſaid *Edward Clere* from having his Action aforeſaid againſt the aforeſaid *Henry* and *Anne*. Therefore it is conſidered that the aforeſaid *Edward Clere* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim therein: And that the aforeſaid *Henry* and *Anne* go thereof without Day, &c.

Judgment.

Note,

Note, in the Caſe before put, where the Purchaſer in Fee dies without Iſſue, and the Brother of the Grandmother on the Part of the Father claims the Land as Heir, and the Brother of the Great-Grandmother on the Part of the Father alſo claims the Land as Heir, many were of Opinion that, becauſe there was no nearer Heir of the male Line, the Brother of the Grandmother ſhould not be preferred, (as Juſtice Manwood *had ſaid) but that the Brother of the Great-Grandmother ſhould be adjudged Heir, for his Blood is derived to the Purchaſer by two Males,* viz. *by his Father and Grandfather, whereas the Blood of the Brother of the Grandmother is derived to the Purchaſer but by one Male, and the Grandfather was not of the Blood of the Brother of the Grandmother, but he was of the Blood of the Brother of the Great-Grandmother, and therefore ſuch Blood is more worthy. And upon this I put the Queſtion again to* Manwood *in the Preſence of* Harper *another of the Juſtices of the Common Bench, both of whom held clearly that the Brother of the Grandmother ſhould be Heir to the Purchaſer, and not the Brother of the Great Grandmother, becauſe the former is nearer in Blood to the Purchaſer on the Part of his Father, which Proximity holds Place on the Part of Females conjoined by Marriage to Males, where ſuch Blood is once derived by a Male to the firſt Purchaſer. And at another Day I put the ſame Queſtion to* Mounſon *puiſne Juſtice of the ſame Bench, and he was of the ſame Opinion with the other Juſtices, for the ſame Cauſe. And at another Time afterwards I put the ſame Queſtion to the Lord* Dyer, *who was of the ſame Opinion alſo. So that all the Juſtices of the Common Bench unanimouſly agreed in the ſaid Caſe, that the Brother of the Purchaſer's Grandmother on the Part of the Father ſhould be prefer'd before the Brother of the Purchaſer's Great-Grandmother on the Part of the Father.*

Nota bene by the Reporter.

And note that Bracton *and* Britton *alſo make Mention that they had drawn out in their Books a Tree of Parentage, by which it would plainly appear how the Degrees of Conſanguinity are to be accounted. For* Bracton *ſays,* * Et qualiter gradus cognationis computentur, et quo gradu, et quis diſtat ab alio in linea deſcendente vel aſcendente, in figura ſuperiùs in arbore ante principium libri pictâ manifeſtiùs quaſi ad oculum apparebit, *which Figure or Tree is not printed in either of their Books, and therefore I have here drawn it out in the Line direct deſcending and aſcending, according to the Notion of* Bracton *(as far as I was able to collect from his Book), which is agreeable with the Civil Law.*

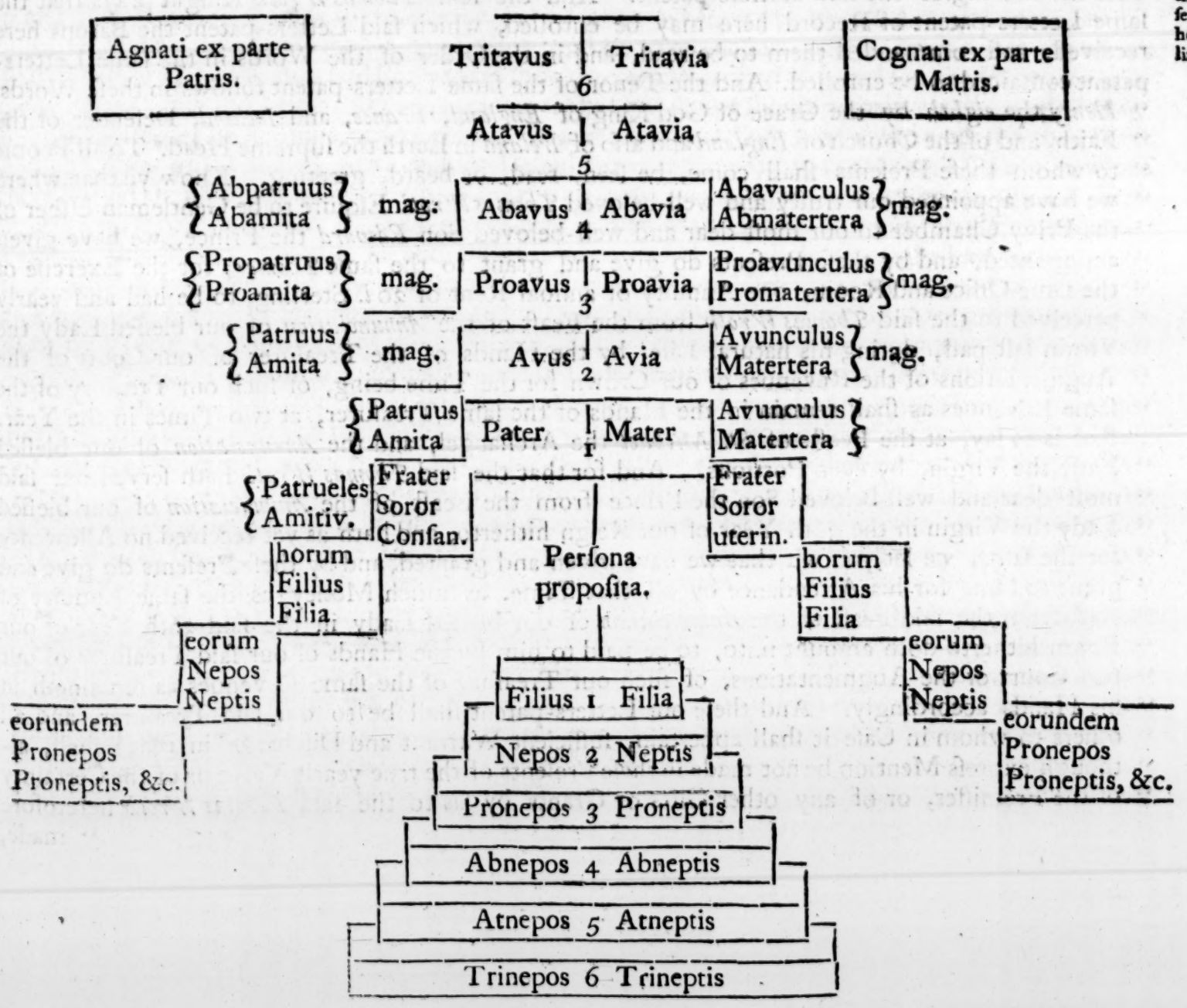
* Bract. 68. b.

A

FIGURE or TREE of CONSANGUINITY,

As it is laid down by BRACTON.

See this Tree delineated in Hale's Hiſt. Com. L. 248. And ſee the Names of the ſeveral Branches hereof in Engliſh, Ibid. 234.



A Report of a Judgment given by the Barons of the Exchequer *in* Trinity *Term in the* 15*th Year of the Reign of Queen* Elizabeth, *upon a* Petition *made to the Court of* Exchequer *by Sir* Thomas Wroth *Knight to be paid the Arrears of an Annuity of* 20 l. per Ann. *granted to him for his Life by King* Henry 8. *by Patent bearing Date the* 13*th Day of* October *in the* 38*th Year of his Reign, for the Exerciſe of the Office of Uſher of the Privy-Chamber to Prince* Edward *his Son, to which Office the King had appointed him, and the* Petition *was for the Payment of all the Arrears due to him ſince the Date of the Patent. And the Record was entered in the Remembrances of the* Exchequer *amongſt the Records of* Eaſter *Term* 14 Elizabeth, Roll *on the Side of the Treaſurer's Remembrancer. And was as follows.*

England. *BE it remembered*, that *Thomas Wroth* Knight came here before the Barons of this Exchequer the 14th Day of *May* in this Term in his own proper Perſon, and exhibited to the Court here certain Letters-patent of Lord *Henry* the *eighth* late King of *England*, bearing Date at *Weſtminſter* the 13th Day of *October* in the 38th Year of the Reign of the ſame late King, made to the ſame *Thomas Wroth*, by the Name of *Thomas Wroth* Eſquire Gentleman-Uſher of the Privy-Chamber to *Edward* then Prince the moſt dear and well-beloved Son of the ſame late King *Henry* the *eighth*, for the giving and granting an Annuity or annual Rent of 20 *l.* Sterling for the Exerciſe of the ſame Office and Place, to have and annually to perceive to the aforeſaid *Thomas Wroth*, from the Feaſt of the *Annunciation* of the bleſſed *Mary* then laſt paſt before the making of the ſaid Letters-patent, during the natural Life of the ſaid *Thomas*, by the Hands of the Treaſurer of the Court of the aforeſaid late King *Henry* the *eighth* of Augmentations of the Revenues of the Crown of the ſame late King for the Time being, out of ſuch Treaſury of the ſaid late King of the ſame Revenues as ſhould remain in the Hands of the ſame Treaſurer, at two Terms of the Year, *viz.* at the Feaſts of *St Michael* the Archangel and of the *Annunciation* of the bleſſed Virgin *Mary*, by equal Portions, and alſo for the Payment of ſo much Money, by the Hands of the Treaſurer aforeſaid, out of the Treaſury aforeſaid, as the aforeſaid Annuity or annual Rent of 20 *l.* ſhould amount unto from the Feaſt of the *Annunciation* of the bleſſed *Mary* in the 36th Year of the ſaid late King unto the making of the ſaid Letters-patent. And the ſame *Thomas Wroth* Knight prays that the ſame Letters-patent of Record here may be enrolled, which ſaid Letters-patent the Barons here received, and commanded them to be read, and in the Order of the Words in the ſame Letters-patent contained to be enrolled. And the Tenor of the ſame Letters-patent follows in theſe Words.

" *Henry* the *eighth* by the Grace of God King of *England*, *France*, and *Ireland*, Defender of the " Faith, and of the Church of *England* and alſo of *Ireland* in Earth the ſupreme Head. To all People " to whom theſe Preſents ſhall come, be ſeen, read, or heard, greeting. Know ye that where " we have appointed our truſty and well-beloved *Thomas Wroth* Eſquire to be Gentleman Uſher of " the Privy Chamber to our moſt dear and well-beloved Son *Edward* the Prince, we have given " and granted, and by theſe Preſents do give and grant to the ſame *Thomas*, for the Exerciſe of " the ſame Office and Room, one Annuity or annual Rent of 20 *l.* Sterling, to be had and yearly " perceived to the ſaid *Thomas Wroth* from the Feaſt of the *Annunciation* of our bleſſed Lady the " Virgin laſt paſt, during his natural Life, by the Hands of the Treaſurer of our Court of the " Augmentations of the Revenues of our Crown for the Time being, of ſuch our Treaſury of the " ſame Revenues as ſhall remain in the Hands of the ſame Treaſurer, at two Times in the Year, " that is to ſay, at the Feaſts of *St. Michael* the Archangel, and the *Annunciation* of our bleſſed " Lady the Virgin, by even Portions. And for that the ſaid *Thomas Wroth* hath ſerved our ſaid " moſt dear and well-beloved Son the Prince from the Feaſt of the *Annunciation* of our bleſſed " Lady the Virgin in the 36th Year of our Reign hitherto, and hath as yet received no Allowance " for the ſame, we let you wit that we have given and granted, and by theſe Preſents do give and " grant to him, for his Attendance by all that Time, as much Money as the ſame Annuity of " 20 *l.* from the ſaid Feaſt of the *Annunciation* of our bleſſed Lady in the ſaid 36th Year of our " Reign hitherto doth amount unto, to be paid to him by the Hands of our ſaid Treaſurer of our " ſaid Court of the Augmentations, of ſuch our Treaſury of the ſame Revenues as remaineth in " his Hands accordingly. And theſe our Letters-patent ſhall be to our ſaid Treaſurer, and all " others to whom in Caſe it ſhall appertain, ſufficient Warrant and Diſcharge in that Behalf, al- " though expreſs Mention be not made in theſe Preſents of the true yearly Value or of the Certainty " of the Premiſſes, or of any other Gifts or Grants by us to the ſaid *Thomas Wroth* heretofore

" made,

" made, or any Statute, Act, Ordinance, Proviſion, or Reſtraint to the contrary thereof hereto-
" fore had, made, ſet forth, ordained, or provided, or any other Thing, Cauſe, or Matter what-
" ſoever to the contrary thereof notwithſtanding. In Witneſs whereof we have cauſed theſe our
" Letters to be made patent, and ſealed with the Great Seal of our ſaid Court of the Augmenta-
" tions. Given at *Weſtminſter* the 13th Day of *October* in the 38th Year of our Reign."

Which ſaid Letters-patent being read, the aforeſaid *Thomas Wroth* Knight ſays that afterwards the aforeſaid late King *Henry* the *eighth*, the 28th Day of *January* in the 38th Year of his Reign, died. And that he the ſame *Thomas Wroth*, after the aforeſaid making of the ſaid Letters-patent to him in Form aforeſaid made, the Office and Place aforeſaid to the aforeſaid *Edward* the *ſixth* King of *England*, during the Life of the ſaid King *Edward* the *ſixth*, exerciſed. And that afterwards, he the ſame *Thomas Wroth* the Office and Place aforeſaid ſo exerciſing, the aforeſaid King *Edward* the *ſixth*, the 7th Day of *July* in the 7th Year of his Reign, died. And the aforeſaid *Thomas Wroth* Knight further ſays, that afterwards by a certain Act made in the ſecond and laſt Seſſion of a Parliament holden by Prorogation at *Weſtminſter* the 24th Day of *October* in the 1ſt Year of the Reign of the late Queen *Mary*, and there continued and held until the Diſſolution of the ſame happening the 6th Day of *December* then next following, touching the Alteration, Change, Union, Tranſpoſition, Diſſolution, or Determination of all or any Court commonly called the Court of Augmentations of the Revenues of the Crown, the Court of Firſt-Fruits and Tenths, the Court of the King's Wards, the Court of general Surveyors of the King's Lands, and the Court of the Dutchy of *Lancaſter*, it was publiſhed, provided, and enacted by the Authority of the ſame Parliament, amongſt other Things, that that Act or any Thing in the ſame Act contained ſhould not in any wiſe extend or be conſtrued to take away, extinguiſh, or determine from any Perſon or Perſons, their Heirs, Succeſſors, or Aſſigns, or from any of them, any Fees, Annuities, Penſions, Stipends, or annual Payments of any Sums of Money, which they or any of them of Right might or ought lawfully to have by any Letters-patent or any ſufficient Writing under the Seal of the ſaid late Court of Augmentations of the Revenues of the King's Crown, before the 7th Day of *July* then laſt paſt before the making of the Act aforeſaid made, but that all and ſingular Perſon and Perſons, their Heirs, Succeſſors, Executors, and Aſſigns, and every of them, who at the ſaid Time of making the Act aforeſaid of Right had or ought to have, or thence afterwards ſhould have, any Fee, Annuity, Stipend, Penſion, or annual Payment of any Sum or Sums of Money under the ſaid Seal of the ſaid late Court of Augmentations, or in the ſame Court being lawfully allowed and paid, the ſame ſhould and might perceive, accept, and receive, according to the Tenor of the ſame Grant, and annually thereof ſhould be paid out of the Treaſury of the aforeſaid late Queen her Heirs and Succeſſors, at the Days and Times in ſuch Letters-patent or other Writing contained, in any ſuch Court or Courts to which the ſame Court, wherein the aforeſaid Annuities or annual Sums of Money were paid, ſhould be ſo united and annexed, or in any ſuch Court or Courts which by the Authority of the aforeſaid Parliament ſhould be newly erected and made in the Place of any of the aforeſaid Courts ſo being diſſolved, as long as the ſame Court ſhould remain and have any Being, and afterwards in ſuch Court or Courts as it ſhould pleaſe the Queen newly to erect, by the Hands of ſuch Officer of the ſame Court, and for Default thereof, in any of the Queen's Courts in which there ſhould be ſufficient Revenue to anſwer the ſame, out of the Treaſury of the Queen there, by the Hands of the Officer of the ſame Court, in ſuch Manner and Form as the ſame Perſon and Perſons, their Heirs, Executors, and Aſſigns, or any of them, could or might have done or have been paid in any other Place or Court, if the aforeſaid Act of Parliament had never been made nor enacted; any Thing in the ſame Act contained, or any other Thing from thence afterwards to be done by Colour or Authority of the ſame Act, to the contrary thereof notwithſtanding, as by the aforeſaid Act of Parliament, amongſt other Things, more fully appears. And the aforeſaid *Thomas Wroth* further ſays, that he of the aforeſaid Annuity or annual Rent of 20*l.* from the aforeſaid Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin in the aforeſaid 36th Year of the Reign of the aforeſaid late King *Henry* the *eighth*, unto the Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin laſt paſt in the 14th Year of the Reign of the aforeſaid Lady the Queen now, and for the ſame Feaſt, is unpaid. And he prays that the aforeſaid Letters-patent of the aforeſaid late King *Henry* the *eighth*, according to the Tenor and Effect of the Act of Parliament aforeſaid, and of the aforeſaid Proviſion of the ſame Act above recited, by the Court here may be allowed. And that all and ſingular Sums of Money of the aforeſaid Annuity or annual Rent of 20*l.* from the aforeſaid Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin in the aforeſaid 36th Year of the Reign of the aforeſaid late King *Henry* the *eighth*, unto the aforeſaid Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin laſt paſt in the aforeſaid 14th Year of the Reign of the aforeſaid Lady the Queen now, and for the ſame Feaſt of the *Annunciation* of the bleſſed *Mary* in the ſame 14th Year, being in Arrear and unpaid, to him the ſame *Thomas Wroth* may be paid; and alſo that the aforeſaid Annuity or annual Rent of 20*l.* from the aforeſaid Feaſt of the *Annunciation* of the bleſſed

Mary in the aforeſaid 14th Year of the ſaid Lady the Queen now, to him the ſame *Thomas Wroth* Knight, at the aforeſaid Feaſts in the aforeſaid Letters-patent above ſpecified, during the Life of him the ſaid *Thomas* annually may be paid.

The CASE.

King *Henry* 8. grants to one an Annuity for the Exerciſe of the Office of Uſher of the Privy Chamber to Prince *Edward* his Son, in this Caſe if the Service is not done, the Annuity ſhall ceaſe as well as it ſhould if the Service was to be done to King *Henry* 8. himſelf, and though by the Death of King *Henry* 8. and the Prince's Acceſſion to the Crown, the Patentee was diſcharged by Law from doing the Service any longer to *Edward* when King, and by the Death of King *Edward* he was diſcharged by Law from doing the Service at all after his Death, yet he ſhall have the Annuity, not only during the Life of King *Edward*, but after his Death, as long as he (the Patentee) himſelf lives, and this notwithſtanding King *Henry* 8. did not expreſly bind his Heirs or Succeſſors in the Grant of the Annuity, but wholly omitted to mention them in the Patent. See touching this Caſe 5 Mod. 47, 50, 53.

The Effect of this Record is as follows. Sir *Thomas Wroth* Knight came before the Barons of the Exchequer, and exhibited to the Court the Letters-patent of King *Henry* 8. bearing Date the 13th Day of *October* in the 38th Year of his Reign; the Subſtance of which was, that whereas the ſaid King had appointed the ſaid Sir *Thomas* (who was then Eſquire) to be Gentleman Uſher of the Privy-Chamber to his Son Prince *Edward*, he had given and granted, and by the ſaid Letters-patent gave and granted to the ſaid *Thomas*, for the Exerciſe of the ſame Office and Place, an Annuity or annual Rent of 20 *l.* Sterling, to be had and annually perceived to the ſaid *Thomas*, from the Feaſt of the *Annunciation* of our Lady then laſt paſt, during his natural Life, by the Hands of the Treaſurer of his Court of Augmentations of the Revenues of the Crown for the Time being, out of ſuch his Treaſury of the ſame Revenues as ſhould remain in the Hands of the Treaſurer, at two Times of the Year, *viz.* at the Feaſts of *St. Michael* the Archangel and of the *Annunciation* of our Lady, by equal Portions; and becauſe the ſaid *Thomas Wroth* had ſerved his ſaid Son the Prince from the Feaſt of the *Annunciation* of our Lady in the 36th Year of his Reign until the making of the Patent, and had not then received any Allowance for it, he gave and granted to him for his Attendance all that Time as much Money as the Annuity of 20 *l.* amounted unto from the ſaid Feaſt of the *Annunciation* in the ſaid 36th Year of his Reign until the making of the Patent, to be paid to him by the ſaid Treaſurer, out of the ſaid Treaſury of the ſame Revenues which remained in his Hands, as by the ſame Letters-patent appears. And the ſaid Sir *Thomas Wroth* prayed that the ſaid Letters-patent might be there enrolled of Record, which Letters-patent the Barons received, and cauſed them to be read, and to be enrolled according to the Tenor aforeſaid. And the ſaid Sir *Thomas Wroth* further ſaid, that the ſaid King *Henry* 8. died the 28th Day of *January* in the 38th Year of his Reign. And that he the ſame Sir *Thomas Wroth*, after the making of the ſaid Letters-patent, exerciſed the Office and Place aforeſaid to the ſaid King *Edward* 6. during the Life of the ſame King *Edward* 6. and that he ſo exerciſing it, the ſaid King *Edward* 6. died the 7th Day of *July* in the 7th Year of his Reign. And further he ſaid, that in the Act made in the 1ſt Year of the Reign of Queen *Mary* touching the Alteration, Union, and Determination of the ſaid Court of Augmentations, there is a Proviſion that the ſaid Act ſhould not extend to extinguiſh or to take from any Perſons any Annuity or annual Payment of any Sum which they ought to have, but that it ſhould be paid of the Revenues of the Court to which it ſhould be annexed. And further he ſaid, that the ſaid Annuity of 20 *l.* was in Arrear, and he not ſatisfied thereof, from the ſaid Feaſt of the *Annunciation* of our Lady in the ſaid 36th Year of *Henry* 8. until the Feaſt of the *Annunciation* of our Lady in the 14th Year of the Reign of the preſent Queen, and alſo at the ſame Feaſt. And he prayed that the ſaid Letters-patent made to him might be allowed, and that all the ſaid Sums of the ſaid Annuity of 20 *l.* being in Arrear might be paid to him, and that the ſaid Annuity of 20 *l.* from the ſaid Feaſt of the *Annunciation* of our Lady in the ſaid 14th Year might be paid to him the ſaid Sir *Thomas Wroth* during his Life. And upon this the Queen's Attorney demurred in Law, and Sir *Thomas Wroth* alſo.

A Recital of a Matter of Fact in the King's Grant is not material, as if he, reciting that I had done him ſuch Service at ſuch a Time, grants to me an Annuity for it, here tho' in Fact I never did him any ſuch Service, yet the Grant is good, and therefore upon Petition for the Annuity I need not aver that I did him the Service, for it is a Thing paſſed and executed. S. P. Lane 12, 14, 76, 109. 2 Co. 54. b. See like Point contra 6 Ed. 2, 7. Bro. Charter de pardon 74. Vide 1 Co. 42. b. 43. a.

And hereupon divers Points aroſe to be conſidered. The firſt was, whether or no the Record is a ſufficient Warrant to give Judgment for Sir *Thomas Wroth* for the Arrears due from the Feaſt of the *Annunciation* of our Lady *Anno* 36 *H.* 8. until the Date of the Patent. For Sir *Thomas Wroth* in his Petition has not averred that he had ſerved the Prince from the ſaid Feaſt of the *Annunciation* of our Lady *Anno* 36 *H.* 8. until the Date of the Patent, (but has only averred that he ſerved him from the making of the Patent during the Life of King *Edward*) and his Service for that Time was the Conſideration of the Grant of the ſaid 20 *l. per Ann.* for that Time. For the Patent expreſſes, that whereas the ſaid Sir *Thomas Wroth* had ſerved the ſaid Son the Prince from the Feaſt of the *Annunciation Anno* 36 *H.* 8. until the Date of the Patent, and had not then received any Allowance for it, the King gave and granted to him for his Attendance all that Time ſo much Money as the Annuity of 20 *l.* amounted to from the ſaid Feaſt of the *Annunciation Anno* 36 *H.* 8. until the Date of the Patent, to be paid to him by the ſaid Treaſurer. So that the Service before was the Conſideration of the Grant of this Sum, as the Words of the Patent purport, and now Sir *Thomas Wroth* has not averred that he did the Service for that Time, and inaſmuch as he has not averred it, it ſhall be taken that he did not do it, for his Petition ſhall be taken moſt ſtrongly againſt himſelf, ſo that if the Non-feaſance of the Service be material, then his Petition is inſufficient, as to this Part, for Want of an Averment.

But the Court gave Judgment that he ſhould have the ſaid Sum, notwithſtanding he omitted to aver that he did the Service before the Date of the Patent, for ſuch Service is a Thing paſſed and executed, and not executory, ſo that the King ſhall not avail himſelf of that which is paſſed, and therefore ſuch Recital is not material, whether it be true or not. [a] And to this Purpoſe is the Caſe in 21 *Ed.* 4. where the King had granted to an Abbot, that becauſe the Abbey was the King's free-Chapel, he ſhould not be Collector when any Tithe ſhould be granted by the Clergy of *England*, and afterwards a Tithe was granted, and the Abbot was appointed Collector, and in Diſcharge thereof he pleaded in the Exchequer the ſaid Grant, and he did not aver that it was the King's free-Chapel, and yet, notwithſtanding the Omiſſion of the Averment, the Plea was held good enough, for it is there ſaid by *Huſſey*, [b] that if the King grants to me a Manor for my good Service done to him, I ſhall not be compelled to aver that I have done him good Service; [c] but if the Grant is *pro eo quod relaxabit, &c.* there I ought to aver that I have made the Releaſe, becauſe the King is to have Benefit by the Thing rehearſed in the Patent, and ſo is the Diverſity. [d] And of the like Opinion was *Fitzherbert* in 26. *H.* 8. where he ſays that the Recital of a Matter of Fact in the King's Grant is not material, as if the King, reciting the good Service which I had done him in his Wars beyond Sea, grants to me Land or other Thing, altho' I never did him any Service, yet the Grant is good *. So here notwithſtanding Sir *Thomas Wroth* never did the Prince any Service before the Date of the Patent, yet the Grant is good; and therefore the Omiſſion of an Averment of that which is not material ſhall not vitiate the Petition, for which Reaſon it was adjudged *ut ſupra.*

[a] M. 21. Ed. 4. 49. a. Fitz. Grants 29. Bro. Patents 71. Lane 12, 77. Hob. 231. Vin. Abr. tit. Prerogative R. b. 2. pl. 1.
[b] Vin. Abr. ubi ſupra pl. 6.
[c] S. P. Lane 76, 78. Hob. 231. Vin. Abr. ubi ſupra pl. 5.
[d] P. 26. H. 8. 1. pl. 4. Bro. Patents 1. 2 Co. 54. b. Lane 109.
* But ſee Bro. Bro. Charter de pardon 74, where the King pardoned a Man *pro ſervitio ſuo in G. impenſo*, and it was detained until it was certified whether or no he did the Service, 6 Ed. 2. 7. *Itin. Kanc.*

But the Matters upon which the Court chiefly reſted, and to which an Apprentice of the Middle Temple, who was of Counſel with the ſaid Sir *Thomas Wroth*, ſpoke many Times, were theſe. The Points of the Caſe.
Firſt, if the Annuity, which is granted for Service to be done to the Prince after the Date of the Patent, is determinable by the Non-feaſance of it to the Prince, as well as it ſhould be by the Non-feaſance of it to the King, if it had been appointed to be done to the King. Secondly, foraſmuch as the Service was appointed to be done to the Prince by Sir *Thomas Wroth*, and when King *Henry* 8. died, the Prince became King, if the Service which Sir *Thomas Wroth* was appointed to do to Prince *Edward* may be done by him to *Edward* being King, or if he is diſcharged from doing it by the Act of the Law. Thirdly, if ſo be that he is diſcharged by the Act of the Law from doing the Service to *Edward* after the Time that he becomes King, then if he ought to have the Annuity paid him during that Time, or not. Fourthly, when the ſaid King *Edward* died, and thereby all the Service appointed to be done by Sir *Thomas Wroth* ceaſed by the Death of the Perſon to whom it ought to be done, if nevertheleſs Sir *Thomas Wroth* ſhall have the Annuity from thenceforth for his Life, or not. Laſtly, if none of theſe Cauſes are ſufficient to determine the Annuity at any Time after the Death of King *Henry* 8. yet if the Grant ſhall be void by the Death of King *Henry* 8. becauſe his Heirs or Succeſſors were not mentioned in the Grant of the Annuity, but were wholly left out of the Patent.

And as to the firſt Point, the whole Court agreed (as *Saunders* Chief Baron ſaid to me, upon whoſe Report alone in this and the following Points I have written the Reſolutions hereafter ſhewn, for they were not reſolved in open Court, but agreed by the Barons upon Conference among themſelves) that the Annuity which is granted by the King for Service to be done to the Prince ſhall be determined by Non-feaſance of the Service to the Prince, as well as it ſhould be by Non-feaſance of the Service to the King himſelf, if the Annuity had been appointed for Service to be done to the King. For the Prince was the King's Iſſue, and Nature urges the King to take Care of his Education, and to provide him with Things that are ſuitable to his Honour and Eſtate, and the Service here appointed is a neceſſary Service, and a Thing which concerns the King in that it concerns his Iſſue, and the Service is the Cauſe of the Grant, and it is executory as the Annuity is, and the King is to have Benefit for the Annuity, viz. Service done to his Son, which is the ſame in a Manner as if done to himſelf, and if the Service was not done to his Iſſue, but to another, the Annuity ſhould ceaſe for the Non-feaſance of it. As if the King grants an Annuity to a Phyſician for his Life, for his Counſel in Phyſic to be given to a Stranger, there if he refuſes to give him Counſel, the Annuity ſhall ceaſe. So if the King grants an Annuity for Life to a Schoolmaſter to inſtruct Scholars, it is determinable by the Non-feaſance of it, for Annuities which the King grants out of his own Liberality and free Will, for Benefit to be done to another, import the King's Intent to be, that if the Thing which is the Cauſe of his Grant is not done to the Perſon to whom it is appointed to be done, the Grantee ſhall not have the Thing granted. *A fortiore* then, when the Prince, who is the King's natural Son, is the Perſon to whom the Service is to be done, if the ſaid Sir *Thomas Wroth* had withdrawn the Service from the Prince as long as he was Prince, the Annuity ſhould have ceaſed by the Non-feaſance of it. And ſo all the Barons agreed.

1 Point. King H. 8. grants an Annuity to one for Service to be done to Prince *Edward* his Son, if the Service is not done, the Annuity ſhall ceaſe, as well as if it was granted for Service to be done to King H. 8. himſelf.

As to the ſecond Point, inaſmuch as it appears by the Averment of Sir *Thomas Wroth* that he did the Service to Prince *Edward* from the Time of the Date of the Patent until the Death of King

2 Point. King H. 8. grants to one the Office of Uſher of the Privy Chamber to *Edward* when now to be done

to Prince *Edward* his Son, and dies, whereby the Prince becomes King, now the Patentee is diſcharged by Law from exerciſing the Office any longer King; for by the Acceſſion of the Eſtate royal to the Prince, the Office is changed in Point of Dignity from what it was before, and the Service is to the King, as King, and ſo the ſame Patent which ſerved before will not ſerve now.

Henry 8. (for that Time is comprehended in the Averment, which reaches to the whole Time from the Date of the Patent until the Death of King *Edward* 6.) which is confeſſed by the Demurrer, and ſo there was no Cauſe to ſtop the Annuity during the Life of King *Henry* 8. it is to be ſeen whether or no, when King *Henry* 8. died, and thereby Prince *Edward* became King, the Service which was appointed to be done to him being Prince might be done to him when he was King. For if the Law diſcharged Sir *Thomas Wroth* of the Service all the Time that Prince *Edward* was King, then the Averment that he did the Service all that Time, altho' it is confeſſed by the Demurrer, is of no Effect. And as to this, the whole Court was of Opinion that he was by Law diſcharged from the Service after the Death of King *Henry* 8. For by the Death of King *Henry* 8. the Eſtate-royal deſcended to the Prince, which raiſed his Perſon to a higher Eſtate and Dignity, in which Caſe his royal Perſon requires higher Officers and Miniſters; for the royal Majeſty requires Officers of Honour, who underſtand the honourable Service that is due to Majeſty, and ſuch ought to be Men not only of accompliſhed Carriage and Deportment, but alſo of great Skill, Underſtanding, and Experience. So that in Judgment of Law ſuch Miniſters as were ſuitable enough for him when he was Prince, are not ſo when he is King. But if the Service was ſuch as touched the natural Body only, and that as well when he was King as when he was Prince, then it ſhould be otherwiſe. As if King *Henry* 8. had granted an Annuity of 20 *l. per annum* to a Phyſician or Surgeon for his Counſel and Service to the Prince, and the King dies, and the Prince becomes King, there the Service is not diſcharged, but for the Non-feaſance of it the Annuity ſhall ceaſe, for the Service is to be done in Reſpect of the natural Body, which has Need of Phyſic and Surgery, and is ſubject to Infirmities and Accidents as well after the Acceſſion of the Eſtate-royal to it as before, ſo that the royal Majeſty cauſes no Alteration as to the Service in this Caſe. And ſo is it in other like Caſes, as to teach the Prince Grammar, Muſic, &c. where the Service to be done has Reſpect meerly to the Body natural, and not to the Majeſty of the Body politic. But here the Service appointed to be done by Sir *Thomas Wroth* was to be done to *Edward* when he was King, as King, and with Reſpect to his Body politic, which includes the Body natural, ſo that by the Acceſſion of the Eſtate-royal to the Prince the Office and Service received an Alteration, and became more honourable than it was before, for which Reaſon Sir *Thomas Wroth* was immediately upon the Death of King *Henry* 8. diſcharged by Law from his Service, in which Caſe the Averment that he did the Service to King *Edward* 6. all the Time that he was King, is of no Signification, for it is an Averment that he did that which the Law did not require him to do. And therefore the Opinion of all the Barons was, that he was diſcharged by Law from the Service as well all the Time when Prince *Edward* was King, as ever ſince the Death of the ſame King *Edward*.

3 Point. King H. 8. grants an Annuity to one for Life, for the Exerciſe of the Office of Uſher of the Privy Chamber to Prince *Edward* his Son, tho' by the Death of King H. 8. and by the Prince's Acceſſion to the Crown, the Patentee is diſcharged by Law from doing the Service to *Edward* when King, and by the Death of King *Edward*, from doing the Service at all after his Death, yet the Patentee ſhall have the Annuity not only during the Life of King *Edward*, but after his Death as long as the Patentee himſelf liver, for the Cauſe of the Non-performance of the Service came by the Act of God, viz. by the Death of King H. 8. and the Prince's Acceſſion to the Crown, and his

As to the third Point, viz. whether Sir *Thomas Wroth* ſhall have the Annuity paid him all the Time after the Death of King *Henry* 8. and of King *Edward* 6. all the Barons were of Opinion, that notwithſtanding the Service ought not to be done after the Death of King *Henry* 8. but that Sir *Thomas Wroth* was diſcharged from it as well when King *Edward* 6. was King, as after his Death, yet Sir *Thomas Wroth* ſhall have the Annuity always during his Life. For ſuch Diſcharge came by the Act of God, and not by Default of the Party, for the Death of King *Henry* 8. and the Deſcent of the Eſtate-royal to the Prince, and alſo the Death of King *Edward* 6. came by the Act of God, which Deaths were the Cauſe why Sir *Thomas Wroth* could not do the Service, and ſuch Act of God ſhall never hurt the Party. [a] For they held that if an Annuity be granted to a Counſellor or Phyſician for their Lives, *pro conſilio ſuo impendendo* to the Grantor, and the Grantor dies, the Annuity ſhall not ceaſe, but the Grantee ſhall hold it for Term of his Life, and yet it was granted and was executory for the Counſel, but no Counſel could be given to the Grantor when he was dead, and therefore the Grantee is by the Act of God diſcharged from giving the Counſel. So here by the Death of King *Edward* 6. Sir *Thomas Wroth* was diſcharged from his Service to be done to him from thenceforth, if there had been no other Matter to diſcharge him, but by the Deſcent of the Crown to him before, by which he was raiſed in Dignity and Eſtate, Sir *Thomas Wroth*, who was appointed to ſerve him when he was in a lower Eſtate, was from thenceforth diſcharged from his Service during his Life, which Diſcharge accrued by the Act of God, viz. by the Death of King *Henry* 8. and by the Deſcent of the Crown to the Prince. [b] But if there had been any Default in Sir *Thomas Wroth*, as if he had withdrawn himſelf from his Service of the Prince, when he was Prince, or if, in the other Caſes before, the Counſellor or Phyſician Grantee of an Annuity had refuſed to give Counſel when he was required, there the Annuity ſhould ceaſe by the Refuſal, becauſe the Non-performance of the Service comes by the Default of the Grantee, and the Grantor has no Means to compel him by Law to do the Service or to give the Counſel, and therefore the Annuity ſhall ceaſe in Judgment of Law. And ſo is the Diverſity. Wherefore the Opinion of the Court was, that Sir *Thomas Wroth* ſhould have the Annuity for his Life from the Time that the Prince became King, notwithſtanding that he is diſcharged by Act of Law from doing the Service, if ſo be the other Point which remains to be diſcuſſed does not make againſt him.

Death, which Act of God ſhall not prejudice the Patentee without any Default in himſelf.

[a] S. P. Noy 70 *Warnford & Gilet.* 2 Danv. Abr. 59. pl. 9. in Margine. Vin. Abr. tit. Condition B. b. pl. 11. II.

[b] S. P. Ante 134 (g) and ſee the Books there cited.

And as to this Point, viz. whether the Grant of the Annuity ſhall be void by the Death of King *Henry* 8. becauſe his Heirs or Succeſſors were not mentioned in the Grant, all the Barons were of Opinion that the Grant ſhall bind the Heirs and Succeſſors of the King, notwithſtanding they were omitted out of the Patent, becauſe he granted the Annuity as King, and the Body politic of the King is charged, which Body politic is perpetual, and has perpetual Continuance, and never dies, altho' the Body natural, in which the Body politic is repoſed, dies, as other Bodies natural do; for the Body politic is a Body immortal, and not ſubject to Death, and therefore if he that is King dies, [a] ſuch Death is not called in Law the Death of the King, but the Demiſe of the King, not ſignifying by the Word *(Demiſe)* that the Body politic of the King is dead, (for Death extinguiſhes Life in every Thing it comes to, which it does not with Regard to the Body politic of the King) but that there is a Separation of the two Bodies, and that the Body politic has left the Body natural now dead or now removed from the Dignity-royal, and is conveyed over to, and repoſed in, another Body natural. And then if the Body, which granted the Annuity here to Sir *Thomas Wroth*, is not dead nor extinguiſhed, but continues unchangeably all the Life of Sir *Thomas Wroth*, (as it does here, for the Body politic was the Body that granted the Annuity) there is no Manner of Cauſe to determine the Annuity. [b] And if an Abbot with the Aſſent of the Convent, by Deed under their Common Seal, grants an Annuity to another in Fee, and does not ſay that he grants it for him and his Succeſſors, and the Abbot dies, and a new Succeſſor is choſen, he ſhall be charged with the Annuity, for the Grant of the Abbot with the Aſſent of the whole Convent charges all the Corporation, which has perpetual Continuance, and therefore the Annuity ſhall have Continuance. So an Obligation made by the Predeceſſor with the Aſſent of the Convent, without Recompence or other Cauſe, ſhall bind the Succeſſors, tho' they be not named, *cauſa qua ſupra*. [c] But no Man's Heir ſhall be charged by the Obligation, or Grant of an Annuity, or Warranty of his Anceſtor, unleſs the Heir is expreſly mentioned in the Obligation, Grant, or Warranty, becauſe the Obligation, &c. came from the Body natural, which Body natural being diſſolved by Death, the Charge ſhall alſo be diſſolved, and even if the Heirs are mentioned in the Obligation, &c. yet they ſhall not be charged without Aſſets from the ſame Anceſtor. But this Reaſon does not hold Place where the Body that makes the Grant or *Lien* has perpetual Continuance, as it has in our Caſe, and alſo Aſſets cannot be ſaid to be wanting in the Crown, (if it was neceſſary to have Aſſets, as it is not in our Caſe). [d] And *Note*, if the King grants to an Abbot a Licenſe to purchaſe in Mortmain, and dies, this Licenſe ſhall ſerve him to purchaſe in the Time of another King, as it appears in the *Regiſter* in the Writ of *Ad quod damnum*, where there is a ſpecial Writ in ſuch Caſe, which Writ *F. N. B.* recites in the Writ of *Ad quod damnum*, and there makes an Obſervation that a Licenſe made to an Abbot in the Time of one King is good to enable him to purchaſe Lands in the Time of another King; and this ſeems to be very reaſonable, altho' the Grant was not for the King and his Heirs, becauſe the Body politic of the King granted it, and it is more than a Licenſe, for it is a Licenſe and alſo an Intereſt to purchaſe an Inheritance to the Houſe. [e] But in 2 *Ed.* 3. in a Writ of Covenant to levy a Fine of a Manor which was held of the King *in capite*, the Defendant ſhewed a Charter of Licenſe granted by King *Edward* 2. the Father of King *Edward* 3. and there *Scrope* ſaid, "You are Tenant of this Manor to the King who now is, wherefore without his Licenſe we will "not receive the Fine." Where it is to be obſerved, that the Licenſe was only to his Tenant to alien, but in the other Caſe of Mortmain it is a Licenſe and an [f] Intereſt alſo to acquire an Inheritance. [g] And the Caſe in 2 *H.* 7. was often cited upon Motions made in this Caſe, where it appears that King *Edward* 4. had granted to the Earl of *Northumberland* the County of *Northumberland* for Term of his Life, to have, occupy, and exerciſe that Office, and all other Offices belonging to the Sheriff in the County aforeſaid, rendering for the ſame to the King and to his Heirs annually 100 *l. without any other Account thereof to be rendered or made to the King*, and there it is ſaid that the Earl ſhould render an Account to the King of common Right, becauſe the Grant, by which he was diſcharged from the Account, was not binding any longer than for the Life of the King who made it, for the Words are, *without any Account (to us) to be rendered*, and it does not ſay, *to us and to our Heirs*, and this is the King's Inheritance, which cannot paſs without Words of Inheritance; [h] as if the King grants a Manor to a Man and to his Heirs, and further ſays that he and his Heirs ſhall have Conuſance of all Manner of Pleas within the Precinct of his ſaid Manor, out of the King's Courts, and does not make any Mention of his Heirs or Succeſſors, the Grantee ſhall only have Conuſance during the Life of the King; and all this is ſo reported in the ſaid Book of 2 *H.* 7. And it was ſaid that that Caſe is founded upon good Reaſon, for where a Thing is of meer Right to be done to the Crown, as it was for the Earl to render an Account to the King, there if the King ſays, *without Account (to us) to be rendered*, or if the Words of Diſcharge be *(againſt us)*, it is not reaſonable that it ſhould extend further than the ſame King, for the Thing is perceptible by the Crown, and executory to the Crown, and therefore there ought to be as preciſe Words to diſcharge the Thing againſt the Succeſſor, as againſt the preſent King himſelf. But it is not ſo with Regard to a Thing newly granted, which is preſently executed altho' the Thing is executory, as it is here, for if the King grants to a Man a Fair, Market, Warren, or the like, and does not ſay *for himſelf and his Heirs*, yet the Grantee ſhall have it againſt the Heir of the King, and ſhall juſtify in a *Quo Warranto*, for the Thing paſſes preſently, and the Grant is executed immediately againſt the Crown, altho' the Thing is executory as to the Perception. So here this Grant to Sir *Thomas*

4 Point. King H. 8. grants an Annuity to one for Life, for the Exerciſe of the Office of Uſher of the Privy Chamber to Prince *Edward* his Son, this Annuity is not determined by the Death of King H. 8. but ſhall bind his Succeſſors, altho' no Mention was made of them in the Patent, for it was granted in the politic Capacity of the King, which never dies. S. P. Jenk. 209. pl. 41. Vin. Abr. tit. Prerogative Z. d. pl. 5. in Margine. See Dy. 92. pl. 19.

[a] See Ante 177 (c) and the Books there cited.

[b] Vin. Abr. tit. Annuity B. pl. 3. *in notis.*

[c] Bract. 37. b. Britt. 64. b. M. 2. H. 4. 13. pl. 54. Bro. Annuity 13. H. 21 H. 7. 1. b. Bro. Charge 54. H. 21 H. 7 4. a. *per Frowick* C. J. Bro. Eſtates 65. Dy. 14. pl. 69. 23. pl. 142. 344. b. pl. 2. 1 Rol. Abr. 226. B. pl. 1. Co. Litt. 144. b. 386. a. Poph. 87, 154. 1 Finch 100. 2 Finch 119. Godolph. Orph. Leg. 201. § 9. Cowel's Inſt. 171.

[d] Bro. Prerogative 106. F. N. B. 223. g. Co. Litt. 52. b. 1 Rol. Abr. 332. pl. 6. Lane 74. 102. Palm. 72. Hardr. 444. 1 Freem. 89. 1 Bac. Abr. 204. Vin. Abr. tit. Prerogative J. c. 3. pl. 5.

[e] P. 2 Ed. 3. Fitz. Office del Court 29. See T. 3. Ed. 3 29. pl. 35. where ſuch Fine was received upon a Writ-Cloſe of King *Ed.* 3. to allow the former Letters-patent. See S. P. that a Licenſe to the Tenant to alien is good only againſt the King that gave it, Bro. Prerogative 106. Palm. 72. Hardr. 444. Lane 74. 3 Keb. 80.

[f] See Yelv. 15.

[g] M 2 H. 7. 6. b. Fitz. Grants 33. Bro. Patents 45.

[h] See Bro. Confirmation 28. Vin. Abr. tit. Prerogative J. c. 3. pl. 2.

Wroth

Wroth was executed preſently by the Grant againſt the Crown, and ſhall bind the Heirs and Succeſſors of the King, altho' as to the *a prender* the Thing is executory. And ſo was the Opinion of the Court.

And *Saunders* Chief Baron ſaid to me, that a Caſe came lately before him and his Companions in the Exchequer, which was thus, viz. King *Edward* 6 granted by Patent a Penſion to a Clerk upon the Suppreſſion of a College whereof he was Member, with a Proviſo, " that if afterwards he ſhall " be promoted *per nos* to any Benefice of as great Value, then the Penſion ſhall ceaſe," and the ſaid King died, and Queen *Mary* promoted him to a Benefice of as great Value as the Penſion was, and whether or no the Penſion ſhould ceaſe, was the Queſtion; and it was his Opinion that the Penſion ſhould ceaſe, * becauſe the Words (if he ſhall be promoted *per nos*) are ſpoken by him in his politic Capacity, which contains the Heirs and Succeſſors, and conſequently comprehends Queen *Mary* who was his Heir, altho' there was no preciſe Mention made of his Heirs in the Patent; and he ſaid that this Matter yet hung in Debate, and waited for the Judgment of the Court.

* Vin. Abr. tit. Prerogative Z. d. pl. 3. See S. P. Ante 176 (b), that where an Act ſays, *the King*, or ſays, *we*, it is always ſpoken in the Perſon of him, as King, and in his Dignity-royal, and therefore it includes all his Succeſſors.

And afterwards the laſt Day of *Trinity Term* in the 15th Year of the Reign of Queen *Elizabeth*, Judgment was given that the Letters-patent ſhould be allowed, and that all the Arrears from the Feaſt of the *Annunciation* of our Lady in the 36th Year of *Henry* 8. until the Feaſt of the *Annunciation* of our Lady in the 14th Year of Queen *Elizabeth*, and that which was alſo due at the ſame Feaſt, ſhould be paid to him, and that the ſaid Annuity ſhould be paid to him afterwards during his Life, at the Feaſts contained in the Patent. And the Judgment (as the Record mentions) was given by the Aſſent of the Juſtices of the Common Bench. In which Judgment it is alſo expreſſed that there are Precedents of Patents in like Caſes, which don't make any expreſs Mention of the Heirs or Succeſſors of the King. And the Judgment was entered as follows.

The reſt of the Record.

And the Premiſſes being ſeen by the Barons, and mature Deliberation being had amongſt them, and as well the Serjeants of the ſaid Lady the Queen at Law, as the Attorney and Sollicitor-general of the ſame Lady the Queen, being hereunto called, and the Opinions of the Juſtices of the ſaid Lady the Queen of the Common Bench being had in the Premiſſes, and for that Judgments and like Allowances of like Letters-patent without expreſs Words for the King, the Heirs and Succeſſors of the Kings by whom they were made, not only in the Time of the late Queen *Mary*, but alſo in the Time of the ſaid Queen now, without any other Letters-patent in the ſame Caſes obtained, have been given and allowed; it is conſidered by the aforeſaid Barons that the aforeſaid Letters-patent of the aforeſaid late King *Henry* the *eighth*, according to the Tenor and Effect of the Act of Parliament aforeſaid, and of the aforeſaid Proviſion of the ſame Act above recited, be allowed, and that all and ſingular Sums of Money of the aforeſaid Annuity or annual Rent of 20 *l.* from the aforeſaid Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin in the aforeſaid 36th Year of the Reign of the aforeſaid late King *Henry* the *eighth*, unto the aforeſaid Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin laſt paſt in the aforeſaid 14th Year of the Reign of the aforeſaid Lady the Queen now, and for the ſame Feaſt of the *Annunciation* of the bleſſed *Mary* in the ſame 14th Year, being in Arrear and unpaid, to the aforeſaid *Thomas Wroth*, at the Receipt of this Exchequer by the Hands of the Treaſurer and Chamberlain of the ſame Receipt, out of the Treaſury of the aforeſaid Lady the Queen in the Hands of the ſame Treaſurer and Chamberlain being, be paid; and alſo that the aforeſaid Annuity or annual Rent of 20 *l.* from the aforeſaid Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin in the aforeſaid 14th Year of the ſaid Lady the Queen now, to the aforeſaid *Thomas Wroth* Knight, at the aforeſaid Feaſts in the aforeſaid Letters-patent above ſpecified, at the aforeſaid Receipt of this Exchequer by the Hands of the Treaſurer and Chamberlain of the ſame Receipt for the Time being, out of the Treaſury of the Queen in the Hands of the ſame Treaſurer and Chamberlain from Time to Time being, at the aforeſaid Feaſts in the aforeſaid Letters-patent above ſpecified, during the Life of the ſame *Thomas*, annually be paid, ſaving always the Right of the Queen, if, &c.

Judgment.

The Writ of Execution.

And after this Judgment the ſaid Sir *Thomas Wroth* prayed a Writ of Execution common in ſuch Caſe, viz. " The Writ of the Lady the Queen now to the Treaſurer and Chamberlains of the afore- " ſaid Receipt of the Exchequer aforeſaid who now are and who from henceforth ſhall be, for the " Payments aforeſaid to him in Form aforeſaid to be made; and it is granted him; and the Tenor " of the ſame Writ follows in theſe Words, *Elizabeth* by the Grace of God, &c." And the Writ is recited in the Record Word for Word, and it is directed to the Treaſurer and Chamberlains of the ſaid Receipt of the Exchequer at *Weſtminſter*, " who now are, and who from henceforth for " the Time ſhall be," and it recites the Petition, and the Judgment thereupon, and at the End of the Writ there are theſe Words, " We command you that all and ſingular Sums of Money " of the aforeſaid Annuity or annual Rent of 20 *l.* from the aforeſaid Feaſt of the *Annunciation* " of the bleſſed *Mary* the Virgin in the ſaid 36th Year of the Reign of our ſaid late " Father, unto the aforeſaid Feaſt of the bleſſed *Mary* the Virgin in the aforeſaid 14th " Year of our Reign, and for the ſame Feaſt, being behind and unpaid, to the aforeſaid " *Thomas Wroth* Knight, out of our Treaſury in the Hands of you or any of you being, " you pay, and alſo that the aforeſaid Annuity or annual Rent of 20 *l.* from the aforeſaid " Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin in the aforeſaid 14th Year of

our

" our Reign, to the aforeſaid *Thomas Wroth* Knight, out of our Treaſury in the Hands of " you or any of you from Time to Time being, at the aforeſaid Feaſts in the aforeſaid Letters- " patent ſpecified, during the Life of the ſame *Thomas* annually you pay, taking from the ſame " *Thomas Wroth* Knight Letters of Acquittance, or other Diſcharge which ſhall be ſufficient for " us in this Behalf."

And afterwards Payment was made according to the Effect of the Writ.

Note (Reader) after this Report was drawn out, and before I had cauſed it to be written in my Commentary, I delivered it to Saunders *Chief Baron of the Exchequer in order to be peruſed and corrected by him, if in any Part I had miſtaken the true Cauſe of the Judgment, which I had upon his Relation, for the Cauſes of the Judgment were not pronounced in open Court. And he peruſed it, and conſidered it well, and put it to the other Barons his Companions, and afterwards it was delivered to me again by the Chief Baron, corrected and reformed with his own Hand in ſome little Points, and allowed by him to be a good and true Report. And at the End the Chief Baron had added with his own Hand this following Note.* *Nota bene* by the Reporter.

" *Note*, that *Saunders* Chief Baron put the other Barons in mind of the great Aſſembly of all " the Juſtices the 28th Day of *April* in the firſt Year of the Reign of Queen *Mary*, of which " Aſſembly the ſaid Chief Baron was one, together with *Hare* Maſter of the Rolls, *Baker* Under- " treaſurer of the Exchequer, *Griffin* Attorney General, and *Cordel* then Sollicitor General, where " it was reſolved * that Patents without the Words *pro nobis, hæredibus, et ſucceſſoribus noſtris*, " being granted for the corporal Exerciſe of an Office or Service, are good. Which Reſolution " gave the Barons good Ground to approve of and allow the above Report, and the Cauſes of " the Judgment here written." *This was added by the Chief Baron's own Hand-writing.*

* Dy. 92. pl. 20. Vin. Abr. tit. Prerogative J. c. 3. pl. 8. in margine. Z. d. pl. 2.

A Report of a Judgment given in the Common-Bench *in* Eaſter *Term in the* 16*th Year of the Reign of Queen* Elizabeth, *upon a ſpecial Verdict given in an* Ejectione firmæ *brought by* Thomas Eyſton *Plaintiff againſt* Richard Studd *Defendant. And the Record was as follows.*

Whiteley.

Eaſter Term 16 *Eliz. Rot.* 1011 *Suff.*

OTHERWISE, as appears in the Term of the *Holy Trinity* in the 15th Year of the Reign of the Lady the Queen now, *Roll* 106. it is contained thus, *Suff.* viz. *Richard Studd* late of *Ipſwich* in the County aforeſaid *Cooper* was attached to anſwer *Thomas Eyſton* of a Plea, wherefore with Force and Arms the Moiety of one Meſſuage with the Appurtenances in *Ipſwich*, which *John Latton* Gentleman to the aforeſaid *Thomas* demiſed for a Term which is not yet paſſed, he entered, and him from his Farm aforeſaid ejected, and other Wrongs to him did, to the great Damage of the ſaid *Thomas*, and againſt the Peace of the ſaid Lady the Queen now, *&c.* And whereupon the ſame *Thomas* by *William Nelſon* his Attorney complains, that whereas the aforeſaid *John* the 6th Day of *May* in the 14th Year of the Reign of the Lady the Queen now, at *Ipſwich* demiſed to the aforeſaid *Thomas* the aforeſaid Moiety with the Appurtenances, to have and to hold the ſame Moiety with the Appurtenances to the aforeſaid *Thomas Eyſton* and his Aſſigns from the 3d Day of *May* in the Year aboveſaid, unto the End and Term of 21 Years then next following, and fully to be compleat and ended. By Virtue of which ſaid Demiſe the ſame *Thomas Eyſton* was of the Moiety aforeſaid with the Appurtenances poſſeſſed,

Declaration. Same Precedent Raſt. Entr. 256. b pl. 14.

and he being ſo thereof poſſeſſed, the aforeſaid *Richard*, the 8th Day of *May* in the 14th Year aboveſaid, with Force and Arms, *&c.* the Moiety aforeſaid with the Appurtenances, which the aforeſaid *John Latton* to the aforeſaid *Thomas Eyſton* in Form aforeſaid demiſed for a Term which is not yet paſſed, entered, and him from his Farm aforeſaid ejected, and other Wrongs, *&c.* to the great Damage, *&c.* and againſt the Peace, *&c.* Wherefore he ſays that he is damnified and has Damage to the Value of 20 *l.* and therefore he produces the Suit, *&c.*

Not guilty. And the aforeſaid *Richard* by *Thomas Whetcroft* his Attorney comes and defends the Force and Injury when, *&c.* and ſays that he is not guilty of the Treſpaſs and Ejectment aforeſaid; as the aforeſaid *Thomas* above againſt him complains. And of this he puts himſelf upon the Country,

Venire facias. and the aforeſaid *Thomas* likewiſe. Therefore the Sheriff is commanded that he cauſe to come here from the Day of the *Holy Trinity* in three Weeks, twelve, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* At which Day here came the Parties, *&c.*

Alias Venire facias. And the Sheriff hath not ſent the Writ, therefore the Sheriff is commanded as before that he cauſe to come here on the Octave of *St. Michael*, twelve, *&c.* to recognize in Form aforeſaid, *&c.*

The Jury continued. Afterwards the Proceſs between the Parties aforeſaid in the Plea aforeſaid being continued by the Jury thereof between them being reſpited until this Day, *viz.* from the Day of *Eaſter* in one Month then next following, and now here at this Day came as well the aforeſaid *Thomas Eyſton* as the aforeſaid *Richard* by their Attornies aforeſaid, and the Jurors thereupon impanneled being

Special Verdict. called likewiſe came: Who to ſay the Truth in the Premiſſes being choſen, tried, and ſworn, ſay upon their Oaths, that before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid above ſuppoſed to be done, one *William Latton* Gentleman and *Margaret* his Wife were ſeized of the Moiety aforeſaid with the Appurtenances, among other Things, in their Demeſn as of Fee-tail, *viz.* to the aforeſaid *Margaret* and to the Heirs of her Body lawfully begotten, in Right of the aforeſaid *Margaret*. And they being ſo ſeized thereof, a certain Fine levied in the Court of Lord *Edward* the *ſixth* late King of *England* on the Octave of *St. Hillary* in the ſecond Year of his Reign, before *Edward Mountague*, *Humphry Brown*, and *John Hinde*, Juſtices of the ſaid late King, and afterwards from the Day of *Eaſter* in 15 Days in the 3d Year of the Reign of the ſame late King *Edward* the *ſixth* there granted and recorded before the ſame Juſtices and other faithful Men of the ſame late King then there preſent, between one *Richard Alexander* Complainant and the aforeſaid *William Latton* and *Margaret* Deforceants, of the aforeſaid Moiety with the Appurtenances, among other Things, whereof a Plea of Covenant was ſummoned between them in the ſame Court, *viz.* that the aforeſaid *William* and *Margaret* acknowledged the Moiety aforeſaid with the Appurtenances, among other Things, to be the Right of the ſaid *Richard*, as them which the ſame *Richard* had of the Gift of the aforeſaid *William* and *Margaret*, and them remitted and quit-claimed from them the ſaid *William* and *Margaret* and the Heirs of the ſaid *Margaret* to the aforeſaid *Richard* and his Heirs for ever: And further they the ſame *William* and *Margaret* granted for themſelves and the Heirs of the ſaid *Margaret*, that they would warrant to the aforeſaid *Richard* and to his Heirs the Moiety aforeſaid with the Appurtenances, among other Things, againſt all Men for ever. And for that Acknowledgment, Remiſe, Quit-claim, Warranty, Fine and Agreement, the aforeſaid *Richard* granted to the aforeſaid *William* and *Margaret* the aforeſaid Moiety with the Appurtenances, among other Things, and the ſame to them rendered in the ſame Court, to have and to hold to the ſame *William* and *Margaret*, and to the Heirs of the Bodies of the ſaid *William* and *Margaret* between them lawfully begotten, to hold of the chief Lords of the Fee by the Services which to the aforeſaid Moiety, among other Things, in Form aforeſaid granted belong for ever. And if it ſhould happen that the ſame *William* and *Margaret* ſhould die without Heirs of their Bodies between them lawfully begotten, then after the Death of the ſaid *William* and *Margaret* the aforeſaid Moiety with the Appurtenances, among other Things, ſhould wholly remain to the right Heirs of the ſaid *Margaret*; to hold of the chief Lords of the Fee by the Services which to the aforeſaid Moiety with the Appurtenances, among other Things, belong for ever. By virtue of which ſaid Fine in Form aforeſaid levied, the ſame *William* and *Margaret* were of the Moiety aforeſaid with the Appurtenances, among other Things, ſeized in their Demeſn as of Fee-tail, *viz.* to them and to the Heirs of their Bodies lawfully begotten, the Remainder thereof in Form aforeſaid belonging. And they being ſo ſeized thereof, the ſame *William* and *Margaret* had Iſſue between them lawfully begotten one *John Latton*. And the aforeſaid *William* afterwards at *Upton* in the County of *Berks* died, and the aforeſaid *Margaret* ſurvived him, and held herſelf in the aforeſaid Moiety of the Meſſuage aforeſaid with the Appurtenances, among other Things, and was thereof ſole ſeized in her Demeſn as of Fee-tail by Right of Survivorſhip, *&c.* And ſhe being ſo ſeized thereof, the ſame *Margaret* afterwards, at *Rickmerſworth* in the County of *Hertford*, took to Huſband the aforeſaid *Richard Alexander*, by Reaſon whereof the ſame *Richard* and *Margaret* were of the aforeſaid Moiety of the Meſſuage aforeſaid with the Appurtenances, among other Things, ſeized in their Demeſn as of Fee-tail, in Right of the aforeſaid *Margaret*, in Manner and Form aforeſaid. And they being ſo ſeized, by a certain Indenture bearing Date the 21ſt Day of *May* in the 7th Year of the Reign of the Lady the Queen now, made at *London* in the Pariſh

Pariſh of *St. Dunſtan* in the Weſt in the Ward of *Fleetſtreet Without*, between the aforeſaid *Richard Alexander* and *Margaret* his Wife of the one Part, and one *John Kettle* and *John Walker* of the other Part, it was covenanted, concluded and agreed between the ſame *Richard* and *Margaret* and the aforeſaid *John* and *John* in Manner and Form following, that is to ſay, the ſaid *Richard* and *Margaret* covenanted and granted to and with the ſaid *John Kettle* and *John Walker*, that they the ſaid *Richard* and *Margaret* and their Heirs, before the Feaſt of *All Saints* then next following after the Date of the ſaid Indenture, before the Juſtices of the Lady the Queen of Common Pleas at *Weſtminſter*, ſhould levy a Fine with Proclamations in due Order and Form of Law, of and in all and ſingular their Manors, Lands, Tenements, Rents, Reverſions, Services, and other their Hereditaments whatſoever with the Appurtenances freely held within the County of *Suffolk*, whereof the aforeſaid Moiety of the Meſſuage aforeſaid with the Appurtenances in the Declaration aforeſaid above ſpecified is, and at the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid above ſuppoſed to be done was, Parcel, that is to ſay, of and in the Moiety of the Manors of *Piſtres*, *Oſmonds*, *Rendliſham*, *Ipſwich*, *Alverds*, otherwiſe *St. Peters*, and *Stafferton-Hall*, and alſo of the Moiety of 100 Meſſuages, 30 Cottages, 20 Tofts, 800 Acres of Land, 200 Acres of Meadow, 1000 Acres of Paſture, 20 Acres of Wood, 200 Acres of Furze and Heath, 100 Acres of Marſh, and of 4 *l.* 6 *s.* Rent, with their Appurtenances in *Ipſwich*, *Sutton*, *Chatteſham*, *Ramſholt*, *Helmingham*, *Oatley*, *Ayſh*, *Rendliſham*, *Eyke*, *Blaxale*, *Ufford*, *Bromeſwold*, *Lowdham*, *Balinghoe*, *Butley*, *Orford*, *Wanſden*, *Melton*, *Woodbridge*, *Woodbridge-haſten*, *Haſketon*, *Herkſtead*, *Holbrooke*, *Stoke* near *Ipſwich*, *Weſterfield*, *Raydon*, *Groundſborough*, *Delitch*, *Clopton*, *Williſham*, *Capell*, *Arwarton*, *Brawnford*, *Sprowton*, *Trimley*, *Nacton*, and *Stoneham*, to the ſaid *John Kettle* and *John Walker*, and to the Heirs of the ſaid *John Kettle* for ever, only to ſuch Uſe and Uſes as in the ſame Indenture ſhall be limited, expreſſed, and declared, that is to ſay, firſt the ſaid *John Kettle* and *John Walker* and the Heirs of the ſaid *John Kettle* ſhould ſtand and be ſeized, and the ſaid Fine ſhould be adjudged, accepted, and deemed to be, to the proper Uſe and Behoof of the ſaid *Richard* and *Margaret* for and during the Term of their natural Lives, and of the longer Liver of them, without Impeachment of any Waſt; and after the Death of the ſaid *Richard* and *Margaret*, then to the Uſe of the ſaid *Richard*, his Executors and Aſſigns, for and during the Term of 60 Years then next following, and fully to be compleat, without Impeachment of Waſt: And after the End of the Term of the ſaid 60 Years, then the ſaid *John Kettle* and *John Walker* and the Heirs of the ſaid *John Kettle* ſhould ſtand and be ſeized, and the ſaid Fine ſhould be adjudged and accepted, of, for, and concerning all the ſaid Moiety of the ſaid Manor called *Ipſwich*, *Alverds*, otherwiſe *St. Peter's*, with the Appurtenances, whereof the Moiety of the aforeſaid Meſſuage with the Appurtenances was Parcel, and of all and ſingular the ſaid Meſſuages, Lands, Tenements, and Hereditaments with their Appurtenances ſituate, lying, and being within the Towns, Pariſhes and Hamlets of *Herkſtead*, *Holbrooke*, *Ipſwich*, *Stoke* near *Ipſwich*, *Weſterfield*, *Raydon*, *Groundſborough*, *Delitch*, *Clopton*, *Williſham*, *Capell*, *Arwarton*, *Brawnford*, *Sprowton*, *Trimley*, *Nacton*, *Stoneham*, *Oatley*, and *Helmingham*, to the Uſe and Behoof of *Paul Alexander* eldeſt Son of the ſaid *Richard* and *Margaret*, and of the Heirs of the Body of the ſaid *Paul* lawfully begotten: And if the ſaid *Paul* ſhould happen to die without ſuch Iſſue of his Body, that then the ſaid *John Kettle* and *John Walker* and the Heirs of the ſaid *John Kettle* ſhould ſtand and be ſeized of the laſt recited Premiſſes, and the ſaid Fine thereof ſhould be adjudged and accepted to be, to the Uſe and Behoof of *Henry Alexander* younger Son of the ſaid *Richard* and *Margaret*, and of the Heirs of the ſaid *Henry* lawfully begotten: And if the ſaid *Henry* ſhould happen to die without ſuch Heir, then to the Uſe of *Auguſtin Alexander* another Son of the ſaid *Richard* and *Margaret*, and of the Heirs of his Body lawfully begotten: And if the ſaid *Auguſtin* ſhould happen to die without ſuch Iſſue, then to the Uſe of the aforeſaid *John Latton* Son and Heir of the aforeſaid *William Latton* deceaſed of the Body of the ſaid *Margaret* begotten, and of the Heirs Males of his Body lawfully begotten: And if the ſaid *John* ſhould happen to die without ſuch Iſſue, then to the Uſe and Behoof of the ſaid *Richard* and *Margaret*, and of the Heirs Males of the Bodies of the ſaid *Richard* and *Margaret* lawfully begotten, and for Default of ſuch Iſſue, then to the only Uſe and Behoof of the right Heirs of the ſaid *Margaret* for ever. And that for all the Reſidue of all and ſingular the ſaid Manors, Lands, Tenements, Hereditaments, and Premiſſes above ſpecified, the ſaid *John Kettle* and *John Walker*, and the Heirs of the ſaid *John Kettle*, ſhould ſtand and be ſeized, and the ſaid Fine thereof ſhould be adjudged and accepted, after the Death of the ſaid *Richard* and *Margaret*, and after the End and Expiration of the ſaid 60 Years, to the proper Uſe and Behoof of the ſaid *Auguſtin Alexander*, and of the Heirs of his Body lawfully begotten; and if the ſaid *Auguſtin* ſhould happen to die without ſuch Heir, then to the Uſe of the ſaid *Henry Alexander*, and of the Heirs of his Body lawfully begotten; and if the ſaid *Henry* ſhould die without ſuch Heir, then to the Uſe of the ſaid *Paul Alexander*, and of the Heirs of his Body lawfully begotten, and if the ſaid *Paul Alexander* ſhould happen to die without ſuch Iſſue, then to the Uſe of the ſaid *John Latton* Son and Heir of the ſaid *William Latton* of the Body of the ſaid *Margaret* begotten, and of the Heirs Males of his Body lawfully begotten; and if the ſaid *John*

ſhould

ſhould happen to die without ſuch Iſſue, then to the Uſe and Behoof of the ſaid *Richard* and *Margaret*, and of the Heirs Males of the Bodies of the ſaid *Richard* and *Margaret* lawfully begotten, and for Default of ſuch Iſſue, then to the only Uſe and Behoof of the right Heirs of the ſaid *Margaret* for ever, as by the ſame Indenture more fully appears. And afterwards in Performance, Execution, and Accompliſhment of the Covenants aforeſaid in the aforeſaid Indenture above ſpecified, a certain Fine was levied in the Court of the Lady the Queen now at *Weſtminſter* on the Morrow of the *holy Trinity* in the 7th Year of her Reign aboveſaid, before *James Dyer*, *Anthony Brown*, *Richard Weſton*, and *John Walſh* Juſtices of the ſaid Lady the Queen, and afterwards on the Octave of *St. Michael* then next following there granted and recorded before the ſame Juſtices and other Liegers of the ſaid Lady the Queen then there preſent, between the aforeſaid *John Kettle* and *John Walker* Complainants and the aforeſaid *Richard Alexander* and *Margaret* Deforceants, of the aforeſaid Moiety with the Appurtenances whereof, *&c.* among other Things, whereof a Plea of Covenant was ſummoned between them in the ſame Court, *viz.* that the aforeſaid *Richard* and *Margaret* acknowledged the aforeſaid Moiety with the Appurtenances to be the Right of the ſaid *John Kettle*, as that which the ſame *John* and *John* had of the Gift of the aforeſaid *Richard* and *Margaret*, and the ſame remitted and quit-claimed from them the ſaid *Richard* and *Margaret* and their Heirs to the aforeſaid *John* and *John* and to the Heirs of the ſaid *John Kettle*, for ever. And further the ſame *Richard* and *Margaret* granted for themſelves and the Heirs of the ſaid *Margaret*, that they would warrant to the aforeſaid *John* and *John*, and to the Heirs of the ſaid *John Kettle*, the aforeſaid Moieties with the Appurtenances againſt all Men for ever. Which ſaid Fine in Manner and Form aforeſaid levied by the aforeſaid *Richard* and *Margaret* of all the Premiſſes in the ſame Fine contained, was to the Uſe and Behoof and to the Uſes in the aforeſaid Indenture above recited, ſpecified and contained, and to no other Uſes or Intentions. By Reaſon whereof, and by Force of a certain Act in a Parliament of Lord *Henry* the *Eighth* late King of *England* holden at *Weſtminſter* in the County of *Middleſex* the 4th Day of *February* in the 27th Year of his Reign, concerning the transferring of Uſes into Poſſeſſion made and provided, the aforeſaid *Richard* and *Margaret* were ſeized of the Moieties aforeſaid with the Appurtenances whereof, *&c.* in their Demeſn as of Freehold for Term of their Lives, and of the longer Liver of them, without Impeachment of Waſt, the Remainders thereof in Form aforeſaid belonging. And the ſaid *Richard* and *Margaret* being ſo ſeized of the Moieties aforeſaid with the Appurtenances, the Remainders thereof in Form aforeſaid belonging, the ſame *Richard* and *Margaret* before the aforeſaid Time when, *&c. viz.* the 26th Day of *September* in the 13th Year of the Reign of the Lady the Queen now, at *Ipſwich* aforeſaid, demiſed to the aforeſaid *Richard Studd* the aforeſaid Moiety of the Meſſuage aforeſaid with the Appurtenances, to have to him from the Feaſt of *St. Michael* the Archangel from thence next following for the Term of ſix Years from thence next following, by virtue whereof the ſame *Richard Studd* was thereof poſſeſſed. And he being ſo thereof poſſeſſed, the aforeſaid *John Latton*, ſuppoſing that the aforeſaid *Richard* and *Margaret*, by the Acknowledgment and levying of the Fine aforeſaid by them in Form aforeſaid acknowledged and levied, had forfeited their Eſtates of and in the Moieties aforeſaid with the Appurtenances whereof, *&c.* by virtue of a certain Statute made in the 11th Year of Lord *Henry* the *ſeventh* late King of *England* concerning the Diſcontinuance of Right and Eſtate, into the aforeſaid Moiety with the Appurtenances in the Declaration aforeſaid above ſpecified, as Son and Heir of the Bodies of the aforeſaid *William* and *Margaret* between them lawfully begotten, entered, and the ſame Moiety to the aforeſaid *Thomas Eyſton* in Form aforeſaid demiſed, by virtue whereof the ſame *Thomas* was thereof poſſeſſed, upon the Poſſeſſion of which ſaid *Thomas* the aforeſaid *Richard Studd* re-entered, and him thereout ejected. And whether the ſame levying of the Fine aforeſaid to the Uſes aforeſaid be a Cauſe of Forfeiture of the Eſtates of the ſame *Richard* and *Margaret* of and in the Moieties aforeſaid with the Appurtenances whereof, *&c.* or not, upon the whole Matter aforeſaid, the ſame Jurors are wholly ignorant, and they pray the Advice and Diſcretion of the Court here, *&c.* And if upon the whole Matter aforeſaid it ſhall ſeem to the Juſtices here that the aforeſaid *Richard* and *Margaret* their Eſtates of and in the Moieties aforeſaid with the Appurtenances whereof, *&c.* had forfeited, then the ſame Jurors ſay that the aforeſaid *Richard Studd* is guilty of the Treſpaſs and Ejectment aforeſaid, as the aforeſaid *Thomas Eyſton* above complains againſt him, and then they aſſeſs Damages of the ſaid *Thomas* by Occaſion of the Treſpaſs and Ejectment aforeſaid, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to 26*s.* 8*d. d.* and for thoſe Coſts and Charges to 20*s.* And if upon the whole Matter aforeſaid it ſhall ſeem to the ſame Juſtices here that the aforeſaid *Richard* and *Margaret* their Eſtates therein had not forfeited, then the ſame Jurors ſay that the aforeſaid *Richard Studd* is not guilty of the Treſpaſs and Ejectment aforeſaid, as the aforeſaid *Thomas* above complains againſt him. And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here untill the Morrow of the *holy Trinity* to hear their Judgment thereon, becauſe the Juſtices here thereof not yet, *&c.*

THE Caſe appears by the Record to be thus. *Thomas Eyſton* has brought a Writ of *Ejectione firmæ* againſt *Richard Studd*, for entring into and ejecting him out of one Moiety of a Meſſuage with the Appurtenances in *Ipſwich* the 8th Day of *May* in the 14th Year of the Reign of the Lady the Queen now, which one *John Latton* leaſed to the ſaid *Thomas Eyſton* the 6th Day of *May* in the ſame 14th Year for the Term of 21 Years next enſuing. And the Defendant pleaded not guilty. And the Jury found a ſpecial Verdict as follows, *viz.* that before the Ejectment *William Latton* and *Margaret* his Wife were ſeized of the ſaid Moiety of the ſaid Meſſuage with the Appurtenances in their Demeſn as of Fee, in Right of the ſaid *Margaret*. And they being ſo ſeized, a Fine was levied on the Octave of *St. Hillary* in the 2d Year of the Reign of King *Edward* 6. between *Richard Alexander* Complainant and the ſaid *William Latton* and *Margaret* his Wife Deforceants, of the ſaid Moiety, by which the ſaid *William* and *Margaret* acknowledged the ſaid Moiety to be the Right of the ſaid *Richard Alexander*, as that which he had of their Gift, with Warranty of them and the Heirs of the ſaid *Margaret* againſt all Men. And the ſaid *Richard Alexander* granted and rendered the ſaid Moiety to the ſaid *William Latton* and *Margaret* his Wife, and to the Heirs of their Bodies begotten, the Remainder to the right Heirs of the ſaid *Margaret*, whereby they were ſeized in Tail, with the Remainder over to the right Heirs of the ſaid *Margaret*. And they being ſo ſeized had Iſſue *John Latton*, and *William Latton* died, and his Wife held herſelf in, and afterwards took to Huſband the ſaid *Richard Alexander*, whereby they were ſeized in Fee-Tail in Right of the ſaid *Margaret* in Form aforeſaid. And they being ſo ſeized, by a Fine levied on the Morrow of the *Holy Trinity* in the 7th Year of the Reign of the preſent Queen they acknowledged the ſaid Moiety to be the Right of one *John Kettle*, as that which the ſaid *John Kettle* and one *John Walker* had of the Gift of the ſaid *Richard Alexander* and *Margaret*, with Warranty of them and of the Heirs of the ſaid *Margaret*. Which Fine was to the Uſe of the ſaid *Richard Alexander* and *Margaret* for Term of their two Lives, without Impeachment of Waſt, and after their Deaths, to the Uſe of the Executors and Aſſigns of the ſaid *Richard* for the Term of 60 Years, without Impeachment of Waſt, and after the Expiration of thoſe 60 Years, to the Uſe of *Paul Alexander*, Son of the ſaid *Richard Alexander* and *Margaret*, in Tail, the Remainder in Tail to another Son, the Remainder in Tail to a third Son, the Remainder to the right Heirs of the ſaid *Margaret* in Fee. By Reaſon whereof, and by Force of the Statute of 27 *H.* 8. *of Uſes*, the ſaid *Richard Alexander* and *Margaret* were ſeized of the ſaid Moiety in their Demeſn as of Freehold for Term of their Lives, the Remainders over in Manner and Form aforeſaid. And they, being ſo ſeized, the 26th Day of *September* in the 13th Year of the Reign of the preſent Queen, leaſed the ſaid Moiety to the ſaid *Richard Studd*, to have and to hold from the Feaſt of *St. Michael* then next following unto the End of 6 Years from thence next enſuing, by Reaſon whereof the ſaid *Richard* was poſſeſſed of the ſaid Moiety. And he being ſo poſſeſſed, the ſaid *John Latton*, ſuppoſing that the ſaid *Richard Alexander* and *Margaret*, by the ſaid Fine by them levied in Manner and Form aforeſaid, had forfeited their Eſtate in the ſaid Moiety, by Force of the Statute made in the 11th Year of the Reign of King *Henry* 7. entered into the ſaid Moiety, as Son and Heir of the Body of the ſaid *William Latton* and the ſaid *Margaret* between them begotten, and the ſame Moiety demiſed to the ſaid *Thomas Eyſton* in Manner and Form aforeſaid; by Reaſon whereof the ſaid *Thomas Eyſton* was poſſeſſed, upon whoſe Poſſeſſion the ſaid *Richard Studd* re-entered and ejected him. And whether or no, upon the whole Matter aforeſaid, the ſaid Fine levied to the Uſes aforeſaid be a Cauſe of Forfeiture of the Eſtate of the ſaid *Richard Alexander* and *Margaret*, the ſaid Jurors ſaid that they did not know, and thereof they prayed the Advice and Diſcretion of the Court. And if upon the whole Matter aforeſaid it ſhould appear to the Court that the ſaid *Richard Alexander* and *Margaret* have forfeited their Eſtate in the ſaid Moiety, then the Jurors ſaid that the ſaid *Richard Studd* was guilty, and then they aſſeſſed Damages: And if the Court ſhould adjudge otherwiſe, then they ſaid that the Defendant was not guilty.

The CASE. Huſband and Wife ſeized in Fee in Right of the Wife levy a Fine *comeceo*, &c. and the Conuſee grants and renders the Land back again to the Huſband and Wife in ſpecial Tail, Remainder to the right Heirs of the Wife, they have Iſſue a Son; and the Huſband dies, and the Wife takes a ſecond Huſband, and they two levy a Fine in Fee to a Stranger, and take back, &c. and then the Son of the firſt Marriage enters as for a Forfeiture by the Statute of 11 *H.* 7. *cap.* 20. and adjudged that his Entry is not lawful, and that it is no Forfeiture within that Statute; for in this Caſe the Eſtate of the Land originally moved from the Wife, and the Jointure was made by the Wife to the Huſband, and not by the Huſband to the Wife, and therefore to reſtrain her from diſpoſing of her own Inheritance after his Death would be contrary to Reaſon, and is quite foreign to the Intent of the Act, and tho' it be the Purchaſe of the firſt Huſband by the firſt Fine within the Letter of the Act, yet not being within the Purview, it ſhall not be taken within the Meaning of the Act. S. C. Kelw. 214. pl. 25. N. Bendl. 238. pl. 266. Co. Litt. 366. a. 2 Danv. Abr. 579. 2 Bac. Abr. 92. Vin. Abr. tit. Jointure J. pl. 4. See S. P. Dy. 354. pl. 34 *Per Plowden*. 4 Leon. 90. 3 Mod. 33. Vide Cro. E. 2. pl. 4.

And this Matter was debated at the Bar, but I was not preſent, and therefore what I here report is upon the credible Relation of others. And it was held by the Counſel for the Plaintiff that the Eſtate of the ſaid *Alexander* and his Wife was forfeited by the Act of 11 *H.* 7. *cap.* 20. and that the Eſtate-Tail of *William Latton* and *Margaret* his Wife, which was taken from *Alexander* by the firſt Fine, was and ought to be conſidered as the Purchaſe of the Huſband. For although before the firſt Fine *William Latton* and his Wife were ſeized in Fee-ſimple in Right of the Wife, ſo that it ſhall be adjudged the Land of the Wife, and not the Purchaſe of the Huſband, yet when they acknowledged the Land to be the Right of *Richard Alexander* the Conuſee in the Fine, thereby the Land was out of the Wife, and it became the Land of the Conuſee, and he was the Purchaſer of it, and it was his own to all Intents, ſo that it ſhould be ſubject to ſuch Statutes-Merchant or Staple or to ſuch Recognizances as he had before made, and to all other Purpoſes it ſhould be adjudged the Land of the Conuſee, and the Eſtate which the Wife had before was gone out of her, and veſted in the Purchaſer, *viz.* the Conuſee. And when the Conuſee granted and rendered the Land, which was abſolutely his own, to the Huſband and Wife in Tail, now this is a joint Eſtate in them by Purchaſe. And whoſe Purchaſe is it? Sir, it is the Purchaſe of the Huſband. But

For the Plaintiff.

perhaps it will be objected that it is the Purchaſe of the Wife as well as of the Huſband, moſt certainly it is ſo, for it is the Purchaſe of them both, but nevertheleſs it is the Purchaſe of the Huſband, for that which is the Purchaſe of the Huſband and Wife may be called the Purchaſe of the Huſband. And ſuch Purchaſe is intended by the Act, for the Act ſays, *if any Woman, who has any Eſtate in Tail jointly with her Huſband in any Land of the Purchaſe or Inheritance of her Huſband, diſcontinues*, &c. So that the Act calls the joint Eſtate, which the Huſband and Wife have in Tail, the Purchaſe of the Huſband, for the Words, *(of the Purchaſe of the Huſband)* are not to be intended of Land which he had purchaſed before the Jointure made, for the Word *(Inheritance)* may contain it, (for, as *Littleton* ſays, [a] the Land purchaſed by the Huſband may be called the Inheritance of the Huſband, as well as the Land which he has by Deſcent) and becauſe ſuch Purchaſe is included in the Word *(Inheritance)*, and the Act is in the Disjunctive, *viz. the Inheritance or Purchaſe*, the Purchaſe here ſhall be intended that which firſt veſted in the Huſband and Wife, and was not in the Huſband before. And ſo it muſt of Neceſſity be taken, for a joint Eſtate which the Huſband and Wife have in Tail cannot come to them by Deſcent, but only by Acquiſition, and every Acquiſition whatſoever may be termed a Purchaſe. So here the Eſtate-Tail which *Richard Alexander* gave to the Huſband and Wife is an Eſtate by Purchaſe, and the Purchaſe of the Huſband, as if a Stranger for Money given to him by the Huſband gives Land to Huſband and Wife in Tail, this ſhall be ſaid a joint Eſtate-Tail in them in the Land of the Purchaſe of the Huſband, and ſhall be within the Danger of the Statute. So is it here. And this Act, which was made to preſerve the Right to the Heirs of the Huſband, ſhall be conſtrued moſt favourably and beneficially for the Heir, and moſt ſtrongly againſt the Women, as appears by the Caſe of [b] *Wimbiſh v. Tailbois*, where the Huſband made a Feoffment to the Uſe of himſelf and of his Wife in Tail, and died, having Iſſue by the Wife, and the Wife ſurviving him took another Huſband, and they ſuffered a feint Recovery, and there it was the clear Opinion of the Court that the Iſſue ſhould enter, and yet the Jointure of the Wife was not fully within the expreſs Letter of the Act, for the Wife had no joint Eſtate-Tail with her Huſband in any Land which was the Inheritance or Purchaſe of her Huſband, but the Huſband had an Eſtate-Tail jointly with his Wife in Uſe, which aroſe out of Land which was once the Inheritance of her Huſband. So that there the Judges extended the Words of the Act, and took the Intent of the Makers of the Act moſt ſtrongly in both the ſaid Caſes againſt the Women and their Eſtates, and moſt favourably for the Preſervation of the Eſtate of the Heirs of their Huſbands. And ſo here the Words of the Act ſhall be taken moſt ſtrongly againſt the Wife, and in Reſtraint of her Liberty. So that the Eſtate-tail here taken by the Render ſhall be called a joint Eſtate-Tail in the Land of the Purchaſe of the Huſband, and therefore the ſecond Fine levied by the Wife and her ſecond Huſband ſhall be adjudged a Forfeiture of their Eſtate by the Act, ſo that it ſhall be lawful for *John Latton* the Leſſor, being Heir in Tail to the ſaid *William Latton* and *Margaret* his Wife, to enter and ouſt the Wife and her ſecond Huſband, from whence it follows that his Leaſe is lawful, and the Entry and Ejectment of the Defendant is unlawful, for which Reaſon Judgment ought to be given for the Plaintiff.

[a] Litt. § 9. See Ante 47, 53.

[b] Ante 42.

E contra for the Defendant.

But the Counſel for the Defendant and the whole Court were of Opinion to the contrary. For they took it that the [c] Intent of Statutes is more to be regarded and purſued than the preciſe Letter of them, for oftentimes Things, which are within the Words of Statutes, are out of the Purview of them, which Purview extends no further than the Intent of the Makers of the Act, and the beſt Way to conſtrue an Act of Parliament is according to the Intent rather than according to the Words. And the Intent of the Statute of 11 *H.* 7. was to reſtrain Women, who had Jointures which proceeded originally from their Huſbands or from the Anceſtors of their Huſbands, from diſinheriting or doing other Injury to the Heirs of their Huſbands. But in the principal Caſe there was no Jointure made to the Wife by *William Latton*, or by any of his Anceſtors, of any of their Land, but on the contrary the Wife here has made a Jointure to her Huſband of the Land of the Wife which was her Inheritance, and to this Purpoſe *William Latton* and his Wife levied the Fine to *Richard Alexander*, who granted and rendered the Land back again to them in Tail, with the Remainder in Fee to the Wife, ſo that the Foundation of this Matter originally proceeded from the Wife, and it was to make a Jointure to her Huſband, and to advance him, and not to be advanced by him. And then to bar her, after the Death of her Huſband, from diſpoſing of her Inheritance, would be contrary to all Reaſon, and it has no Affinity nor Connection with the Matter or Intent of the Statute of 11 *H.* 7. Wherefore a Man ought not to reſt upon the Letter of an Act, nor think that when he has the Letter on his Side, he has the Law on his Side in all Caſes. [d] For if a Woman is ſeized of Land in Fee-ſimple, and ſhe intends to marry, and before the Marriage ſhe infeoffs the Father of him whom ſhe intends to marry, to the Intent that after the Marriage he ſhall give the Land back again to her and to him whom ſhe intends to marry, with Remainder over in Tail, and afterwards they intermarry, and then the Father gives the Land to his ſaid Son and to his Wife according to the Intent, and they have Iſſue, and the Huſband dies, and ſhe levies a Fine to other Uſes, now the Wife is within the Words of the Statute of 11 *H.* 7. for the Land was given to her and to her Huſband in Tail by the Anceſtor of the Huſband, and after the Death of the Huſband ſhe has levied a Fine to bar the Iſſue, but notwithſtanding that ſhe is within the Words of the Act, yet ſhe is out of the Intent of the Act, and therefore the Iſſue ſhall not enter; for the Eſtate-Tail was made by the Wife by Circumſtance, and is derived from her, and the Father of the Huſband had the Land to no other Intent but to make the Eſtate, and to that End and Purpoſe he was made

[c] See Ante 205 (g) and the Books there cited.

[d] S. P. Moor 508. Palm. 215. Vin. Abr. tit. Jointure J. pl. 4. in Margine. See Pig. on Recov. 79, 80.

made Uſe of as an Inſtrument, ſo that the Effect of the whole Matter was to make a Jointure to the Huſband out of the Land of the Wife, which although within the Letter of the Act of 11 *H.* 7. yet it is out of the Intent of it, and conſequently out of the Purview. And ſo ſhall it alſo be in the principal Caſe. Wherefore the Court awarded that the Plaintiff ſhould take nothing by his Writ. Which Judgment was as follows.

At which Day here came as well the aforeſaid *Thomas Eyſton* as the aforeſaid *Richard Studd* by their Attornies aforeſaid. Whereupon the Premiſſes being ſeen, and by the Juſtices here more fully underſtood, it is conſidered that the aforeſaid *Thomas Eyſton* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim therein, and that the aforeſaid *Richard Studd* go thereof without Day, *&c.* The reſt of the Record. Judgment.

From this Judgment and the Cauſe of it the Reader may obſerve [a] *that it is not the Words of the Law but the internal Senſe of it that makes the Law, and our Law (like all others) conſiſts of two Parts,* viz. *of Body and Soul, the Letter of the Law is the Body of the Law, and the Senſe and Reaſon of the Law is the Soul of the Law,* quiâ ratio legis eſt anima legis. *And the Law may be reſembled to a Nut, which has a Shell and a Kernel within, the Letter of the Law repreſents the Shell, and the Senſe of it the Kernel, and as you will be no better for the Nut if you make Uſe only of the Shell, ſo you will receive no Benefit by the Law, if you rely only upon the Letter, and as the Fruit and Profit of the Nut lies in the Kernel, and not in the Shell, ſo the Fruit and Profit of the Law conſiſts in the Senſe more than in the Letter. And it often happens that when you know the Letter, you know not the Senſe, for ſometimes the Senſe is more confined and contracted than the Letter, and ſometimes it is more large and extenſive. And Equity, which in Latin is called* Equitas, *enlarges or diminiſhes the Letter according to its Diſcretion, which Equity is in two Ways:* [b] *The one* Ariſtotle *defines thus, (which is touched by* Catline *Chief-Juſtice in* Stowell's *Caſe)* Equitas eſt correctio legis generatim latæ quâ parte deficit, *or as the Paſſage is explained by* Perionius, Equitas eſt correctio quædam legi adhibita, quia ab ea abeſt aliquid propter generalem ſine exceptione comprehenſionem, *both which Definitions come to one and the ſame Thing. And this Correction of the general Words is much uſed in the Law of* England; [c] *as when an Act of Parliament ordains that whoever does ſuch an Act ſhall be a Felon, and ſhall ſuffer Death, yet if a Man of unſound Mind, or an Infant of tender Age who has no Diſcretion, does the Act, they ſhall not be Felons, nor ſhall they be put to Death.* [d] *And if a Statute be made that all Perſons who ſhall receive or give Meat or Drink or other Aid to him that ſhall do ſuch an Act (knowing the ſame to be done) ſhall be Acceſſaries to the Offence, and ſhall be put to Death, yet if a Man commits the Act, and comes to his own Wife, who knowing the ſame receives him, and gives him Meat and Drink, ſhe ſhall not be Acceſſary to his Offence, nor a Felon, for one that is of unſound Mind, an Infant, or a Wife, were not intended to be included in the general Words of the Law. So that in theſe Caſes the general Words of the Law are corrected and abridged by Equity. So the Statute* [e] *of Champerty prohibits Men generally from receiving Lands or Tenements whilſt the Thing is in Plea,* [f] *yet in* M. 19 R. 2. *it was ſaid by the whole Court in a Writ of Champerty, that if a Man bargains Land before a Writ brought againſt him, and after the Writ purchaſed he delivers Seizin, the Writ of Champerty does not lie, becauſe it ſhall not be intended that the Bargain was made for ſuch Purpoſe; and therefore although it is within the Words of the Act, it is out of the Purview of the Act, and that by Equity, which is called by ſome* [g] Epichaia, *which often puts an Exception to the Generality of the Text for ſome reaſonable Cauſe, as that was in the Caſe laſt mentioned, for when he had bargained and promiſed the Land for a juſt Conſideration before the Action brought againſt him, it was his Duty to perform it notwithſtanding the Action. And the Statute of* 23 H. 6. cap. 10. *which was made to prevent Extortion in Sheriffs, Goalers, and their Miniſters, ordains that none of them by Colour of their Office ſhall take any Thing, Profit, or Reward of any Perſon for a Fine, Fee, or Eaſe of the Perſon, except for the Sheriff* 20d. *the Bailiff who makes the Arreſt* 4 d. *and the Goaler (if the Priſoner be committed to his Cuſtody)* 4 d. [h] *And in* 21 H. 7. Coſt *the King's Promoter ſued an Action of Extortion grounded upon this Statute, againſt an Under-Sheriff, ſuppoſing that he had taken* 20d. *above the Sum limited by the Statute, of one who was in his Cuſtody; and on Demurrer upon Evidence it appeared to the Court that all Under-Sheriffs of the ſame County had uſed from Time immemorial to have of every Priſoner in their Cuſtody upon Suſpicion of Felony, when they were acquitted,* 20d. *called a Bar-fee, and that the* 20d. *ſuppoſed to be taken was taken of the Perſon named in the Count, being acquitted of Felony, as a Bar-fee; and there it was ſaid that notwithſtanding the Party was acquitted, yet he remained a Priſoner, for the Judgment is, that the Court diſcharges him, paying his Fees, and therefore he is a Priſoner until he has paid his Fees, and the ſaid Statute takes away all Preſcription for any other Fees than thoſe which are limited in the ſame Statute, ſo that this taking of the* 20d. *is within the Words of the Act, and conſequently the Under-Sheriff ought to have the Puniſhment inflicted by the Act: But the whole Court was of Opinion to the contrary, for they ſaid that this Caſe was out of the Statute, notwithſtanding it was within the Words of the Statute, for this Sum for a Bar-fee was originally granted to the Sheriff by the Order and Diſcretion of the Court, in reſpect of the Labour and Charge he had undergone about the Priſoners, and of the Attendance of himſelf and his Officers upon them when they were brought to their Delivery, ſo that the Payment of this Fee ſtands with Reaſon and good Conſcience, and it was not the Intent of the Makers of the Act to take it away. From which Caſe it appears that Equity or* Epichaia *puts an Exception to the Generality of the Text of the Statute Law. And the Statute of* Weſtminſter 1 cap. 4. *touching Wreck of the Sea, ordains* "*that where a Man, Dog, or Cat eſcape* "*alive out of the Ship, ſuch Ship or any Thing within it ſhall not be adjudged Wreck, but the Goods ſhall* "*be ſaved and kept by View of the Sheriff, Coroner, or King's Bailiff, and delivered into the Hands of*

Nota bene by the Reporter.

[a] Hardr. 208. Weſt's Symb. pt. 2. fo. 176. a. b. Ante 82 (d) *per Saunders.* 363(a). Poſt 467 (f).

[b] Ariſt. Ethic. lib. 5. cap. 10. 2 Brownl. 306. 1 Finch 40. 2 Finch 56. 4 Bac. Abr. 649. Ante 375 (a).

[c] See Weſt's Symb. pt. 2. fo. 174. b. Dr. & Stud. lib. 1. cap. 16.

[d] Weſt's Symb. pt. 2. fo. 176. a. 4 Bac. Abr. 649. See Ante 19 (f) and (g)

[e] Stat. Weſtm. 2. cap. 49. Artic. ſup. Chart. cap. 11.

[f] M. 19. R. 2. Fitz. Champerty 15. H. 9. H. 7. 18. pl. 12. Bro. Champerty 9. F. N. B. 172. d. O. Bendl. 101. 2 Inſt. 563.

[g] Dr. & Stud. lib. 1. cap. 16.

[h] H. 21. H. 7. 16, 17. Bro. Fees del Court 6.

" *such as are of the Town where the Goods were found, so that if any sues for the Goods, and can prove* " *that they were his within a Year and a Day, they shall be restored to him without Delay, and if not,* " *they shall remain to the King, and shall be seized by the Sheriffs, Coroners,* &c. *and be delivered to* " *them of the Town, who shall answer before the Justices for the Wreck which belongs to the King, and* " *where Wreck belongs to another than to the King, he shall have it in like Manner, and he that does* " *otherwise, and thereof is attainted, shall be awarded to Prison, and make Fine at the King's Will,*
[a] 2 Inst. 168. 1 Freem. 185. 3 Keb. 381. " *and shall yield Damages also:*" *Now put the Case that the Goods in such Ship are fresh Victuals, as Flesh, fresh Fish, or Apples, or Oranges, or such perishable Goods as cannot be kept for a Year, and the Sheriff sells them, and delivers the Money arising from the Sale of them to the Town to answer for it, in this Case he has broken the Words of the Act, and therefore if we should adjudge according to the Words, the Sheriff should be sent to Prison, and be fined at the Will of the King, and should pay Damages; but on the other Hand if we follow the Sense and Meaning of the Act, he has done well, and shall not be punished, for the Meaning of the Act is, that such Things as could be kept for a Year without Spoil or Damage should be kept so long, but if the Things are so perishable that they cannot be preserved a whole Year, nor perhaps two Days, then it was not the Intent of the Makers of the Act that the Sheriff should let them fall to Decay, but rather that he should immediately make the most of them he could: So that although the Sheriff has done contrary to the Words of the Law by selling the Goods within a Year, yet he has not broken the Law, but has punctually observed it, inasmuch as he has observed the Intent and Meaning of the Makers of the Law. And I greatly commend the Opinion and Discretion of*
[b] T. 44. Ed. 3. 21. pl. 24. Fitz. Charge 7. Bro. 4. Tail. 6. Ante 436 (c). *the Judges in* [b] Octavian Lumbard's *Case in* 44 Ed. 3. *where the said* Octavian *sued a Replevin against one* John, *who had taken his Cattle by Way of Distress for Rent of* 20l. *granted to him by one* Nicholas, *who was surmised to be Tenant in Tail at the Time of the Grant, and was dead, and the Wife of* Octavian *was his Sister and Heir in Tail, and wanted to avoid the Rent granted by her Brother Tenant in Tail, as is aforesaid, and the Case was that* John, *to whom the Rent was granted, having an indefeasible Right to the Land, and having put the Inheritance in Dispute, an Agreement was afterwards made between* John *and* Nicholas, *that* John *should release his Right to* Nicholas, *and that* Nicholas *for that Release should grant to him an annual Rent of* 20l. *to be taken of the same Tenements with Distress, which was accordingly done, and for this Rent in Arrear* John *avowed, and there it was the Opinion of the whole Court, that although* Nicholas, *who charged the Land with the said Rent, had only an Estate-Tail in it at that Time, whereupon* John *who was the right Heir might have entered, yet the Rent being granted by the said Agreement in Consideration of a Release of the other's Right, it was for the Benefit of the Issue in Tail, and therefore the Rent charge should be levied against the Issue, and against every other Man: So that although the Statute* de donis conditionalibus *was made to restrain the Power of Tenant in Tail as to Alienations or other Charges, and ordains* " *that the Will of the Giver* " *from henceforth shall be observed, so that they to whom the Land was so given upon Condition shall* " *not have Power to alien the Land so given, but that after their Death it shall remain to the Issue of* " *them to whom the Land was so given, or shall revert to the Giver or to his Heir, if Issue fail,* &c." *and although by the Intent of these Words Charges and other Acts of the Tenant in Tail are restrained as well as Alienations of the Land itself, yet in that Case the Judges took it that it was not the Intent of the Makers of the Act to restrain the Tenant in Tail, because the Act which he did was for the Benefit of the Estate-tail, for whereas it was defeasible before, now by Means of the Grant of the Rent it became defeasible. From whence it appears that Acts which injure the Estate-Tail are restrained by the Statute, but not Acts which tend to the Benefit or Advantage of the Estate, as Equity or* Epichaia *shews*
[c] Palm. 125. *us.* [c] *And the Act of* 1 Edw. 6. cap. 14. *which gives Chauntries and Colleges to the King, gives also to him all Lands and Tenements by any Assurance, Conveyance, or otherwise given, assigned, or limited for the finding of any Priest to have Continuance for ever, or with which any Priest hath been found within five Years before the Act, now if the Act be taken according to the Generality of the Letter, it gives to the King all the Houses and Glebe-lands of all Parsons and Vicars, and all their Parsonages and Vicarages, which was not the Intent of the Makers of the Act, and therefore Equity or* Epichaia *makes an Exception of Parsonages and Vicarages from the general Words of the Text, which Exception is as strong as if it had been expresly put in the Act; so that the Sages of our Law, who have had the Exposition of our Acts of Parliament, have in these and many other Cases almost infinite restrained the Generality of the Letter of the Law by Equity, which seems to be a necessary* [d] *Ingredient in the Exposition of all Laws. For (as* Aristotle *says)* cum de toto genere lex dicit, atque aliquid iis in rebus contra generalem legis comprehensionem exiſtit, tum percommodè accidit ut quâ parte scriptor legis aliquid prætermiserit ac peccaverit omnino, ac semel locutus, id quod prætermissum sit corrigatur, quod etiam legislator, si adesset, admoneret, etiamsi jam legem tulisset. *And Experience shews us that no*
[d] Hardr. 208. [e] Dr. & Stud. lib. 1. cap. 16. fo. 48. *Law-makers can* [e] *foresee all things which may happen, and therefore it is fit that if there is any Defect in the Law, it should be reformed by Equity, which is no Part of the Law, but a* [f] *moral Virtue which corrects the Law.* Nam dirigens et directum sunt diversa, et sic Equitas sive Epichaia non jus legitimum est, sed juris legitimi emendatio, et Justitiæ directio. *And* Geraldus a Odo, *who wrote a Commentary upon* Aristotle, *puts this Case:* [g] Lex est in quadam civitate quòd peregrini muros civitatis ascendentes capite puniantur, contingit autem quòd peregrini innocenter transeuntes per illam civitatem audiverunt clamorem quòd hostes contra civitatem repente irruerunt, qui peregrini promptiores quam cives muros ascenderunt, et urbem defendentes salvaverunt; nunc ergo quid juris? utrum mori debeant sicut lex dicit? respondit Epichaia quòd non, quia contra jus naturale est reddere malum pro bono, nec legislator, si præsens fuisset, reos dixisset. *From whence the Reader may observe how convenient a Thing this Equity is, and the wise Judges of our Law deserve great Commendation*
[f] 1 Finch 40. 2 Finch 56. Preced. Cha. 244.
[g] See this Case put with some little Variation Ante 18 (e). Like Case Dr. & Stud. lib. 1. cap. 16. fo. 49.

for having made Uſe of it where the Words of the Law are rigorous, for thereby they have ſoftened the Severity of the Text, and have made the Law tolerable.

[a] *The other Kind of Equity differs much from the former, and is in a Manner of a quite contrary Effect, and may well be thus defined,* Equitas eſt verborum legis directio efficacius, cum una res ſolummodò legis cavetur verbis, ut omnis alia in æquali genere eiſdem caveatur verbis. *And this Definition ſeems agreeable to that of* Bracton, *which is thus,* [b] Equitas eſt rerum convenientia quæ in paribus cauſis paria deſiderat jura, et omnia bene coæquiparet, et dicitur equitas quaſi æqualitas. *So that when the Words of a Statute enact one Thing, they enact all other Things which are in the like Degree.* [c] *As the Statute which ordains that in an Action of Debt againſt Executors he who comes firſt by Diſtreſs ſhall anſwer, is extended by Equity to Adminiſtrators, and ſuch of them as comes firſt by Diſtreſs ſhall anſwer by the Equity of the ſaid Statute,* quia ſunt in æquali genere. *And the Act of* 4 H. 4. cap. 8. *gives a ſpecial Aſſize to him who is diſſeized and ouſted of his Land by Force againſt the Diſſeizor, and enacts that he ſhall recover againſt him double Damages; and in the Book of Entries* [d] *ſo.* 406. *it appears that the Plaintiff recovered by Judgment double Damages in an Aſſize of Nuſance for turning a Water-courſe with Force, to the Nuſance of his Mills, wherein it was found for the Plaintiff, and yet there he was not ouſted of his Land, nor did he ſuffer any Diſſeizin, but only a Nuſance to the Damage of his Freehold, viz. of his Mills, whereof he continued ſeized: So that by the Equity of the ſaid Statute the Plaintiff recovered his double Damages for the Nuſance, becauſe it is in like Degree with a Diſſeizin of Land.* [e] *And the Statute of* Glouceſter *gives an Action of Waſt and the Puniſhment therein againſt him that holds for Life or for Years, and by the Equity thereof a Man ſhall have an Action of Waſt againſt him who holds but for a Year, or for* 20 *Weeks, and yet this is out of the Words of the Act, for he that holds but for one Year does not hold for Years, but it is within the Intent of the Act, and the Words which enact the one do by Equity enact the other. And ſo there are an infinite Number of Caſes in our Law which are in equal Degree with others provided for by Statutes, and are taken by Equity within the Meaning of thoſe Statutes. And from hence it appears that there is a great Diverſity between theſe two Equities, for the one abridges the Letter, the other enlarges it, the one diminiſhes it, the other amplifies it, the one takes from the Letter, the other adds to it. So that a Man ought not to reſt upon the Letter only,* nam qui hæret in litera, hæret in cortice, *but he ought to rely upon the Senſe, which is temperated and guided by Equity, and therein he reaps the Fruit of the Law, for as a Nut conſiſts of a Shell and a Kernel, ſo every Statute conſiſts* [f] *of the Letter and the Senſe, and as the Kernel is the Fruit of the Nut, ſo the Senſe is the Fruit of the Statute.* [g] *And in order to form a right Judgment when the Letter of a Statute is reſtrained, and when enlarged, by Equity, it is a good Way, when you peruſe a Statute, to ſuppoſe that the Law-maker is preſent, and that you have aſked him the Queſtion you want to know touching the Equity, then you muſt give yourſelf ſuch an Anſwer as you imagine he would have done, if he had been preſent. As for Example, in the Caſe before mentioned where the Strangers ſcale the Walls, and defend the City, ſuppoſe the Law-maker to be preſent with you, and in your own Mind put this Queſtion to him, ſhall the Strangers be put to Death? then give yourſelf the ſame Anſwer which you imagine he, being an upright and reaſonable Man, would have given, and you will find that he would have ſaid, "they ſhall not be put to Death." So in the Caſe of the Glebe-lands of Parſons, if the Law-makers had been aſked whether they intended that the King ſhould have all Parſonages and Vicarages, and their Glebe lands, they would certainly have ſaid, "God forbid." And ſo if the Queſtion had been put to them in the other Caſe, whether one of the Adminiſtrators ſhould anſwer at the grand Diſtreſs, they would have anſwered, "Yes, for in this Reſpect they are to be looked upon as Executors." And therefore when ſuch Caſes happen which are within the Letter, or out of the Letter, of a Statute, and yet don't directly fall within the plain and natural Purport of the Letter, but are in ſome Meaſure to be conceived in a different Idea from that which the Text ſeems to expreſs, it is a good Way to put Queſtions and give Anſwers to yourſelf thereupon, in the ſame Manner as if you were actually converſing with the Maker of ſuch Laws, and by this Means you will eaſily find out what is the Equity in thoſe Caſes. And if the Law-maker would have followed the Equity, notwithſtanding the Words of the Law, (as* Ariſtotle *ſays he would, for he ſays,* quod etiam legiſlator, ſi adeſſet, admoneret, etiamſi jam legem tuliſſet) *you may ſafely do the like, for while you do no more than the Law-maker would have done, you do not act contrary to the Law, but in Conformity to it. And ſo the Judges did in the principal Caſe here by following* Epichaia. *And where the Statute of* 37 H. 8. cap. 8. *took away Clergy from him that ſtole* any Horſe, *and the Statute of* 1 Edw. 6. cap. 12. *enacted that thoſe who were attainted of ſtealing* Horſes *ſhould not have their Clergy, but that in all other Caſes of Felony Perſons attainted ſhould have their Clergy, I by no Means commend the Scrupuloſity of the Judges in thoſe Times, who took the Law to be thereupon,* [h] *that he who ſtole one Horſe only ſhould have his Clergy, and therefore procured the Act of* 2 Edw. 6. cap. 33. *to be made, which ouſted him of his Clergy who ſtole one Horſe only, for where the Statute ſpeaks of ſtealing* Horſes, *altho' it ſpeaks in the plural Number, yet by Equity (which conſiders the Intent of the Legiſlature) it ought alſo to comprehend one ſingular Horſe only, and that as fully as if it had ſaid (Horſes or Horſe) and the Clauſe in the Act, which ſays that in all other Caſes of Felony Perſons attainted thereof ſhall have their Clergy, is to be interpreted and intended of others than thoſe who ſteal Horſes or a Horſe; for as the Statute of* Glouceſter, *which gives an Action of Waſt againſt him that holds for Years, in the plural Number, may be taken to comprehend him who holds but for one Year, ſo may the ſaid Statute which ſpeaks of Horſes in the plural Number, be interpreted to comprehend one Horſe in the ſingular Number. And*

[a] Co. Litt. 24. b. 4 Bac. Abr. 649.

[b] Bract. fo. 3. a. § 5. Co. Litt. 24. b. Weſt's Symb. pt. 2. fo. 176. b. 2 Brownl. 306.

[c] Stat. 9 Ed. 3. cap. 3. See the Books cited Ante 36 (h) 178 (h).

[d] Raſt. Entr. laſt. Edit. 442. a.

[e] Stat. Glouceſter cap. 5. See Ante 178 (a), and the Books there cited.

[f] See Ante 465 (a). and the Books there cited.

[g] Hardr. 208. 3 Keb. 381. 4 Bac. Abr. 649.

[h] See 2 H. H. P. C. 365. 2 Hawk. P. C. 345. § 39.

if it be ſaid that the Law is penal in this Caſe, to this it may be anſwered that ſo it is alſo in the other Caſe, but Equity knows no Difference * *between penal Laws and others, for the Intent, (which is the only Thing regarded by Equity, as may appear to every one who purſues the Method of Enquiry by Way of Queſtion and Anſwer in the Manner before intimated) ought to be followed and taken for Law, as well in penal Laws as in others. And this King of Learning is largely treated of in the Caſe of* Stradling v. Morgan *before reported, where the Reader will find much Matter upon this Head. And my Advice to the Student is, that when he conceives any Doubt upon a Statute, he will have theſe two Equities ready in his Mind, and purſue the Inſtructions before given, and he will perceive great Light and Aſſiſtance from them, as I have done heretofore.*

* Hardr. 208. Ante 46 (l). *per Whiddon.*

† Ante 201. &c.

A Report of a Judgment given in the King's Bench *in* Hillary *Term in the* ſeventeenth *Year of the Reign of Queen* Elizabeth, *in a Bill of* Attachment *upon a* Prohibition *ſued by* William Soby *for himſelf and the Queen againſt* John Molins *Parſon of the Church of* Thaidon-Garnon *in the County of* Eſſex, *for ſuing him in Court-chriſtian for the Tithes of the Branches above* 20 *Years old growing upon great Trees called* Horn-beams *of the Age of* 20 *Years and more. And the Record was entered in* Hillary *Term* 16 Elizabeth, Rot. 354. *and was as follows.*

Eſſex. Declaration. Same Precedent Raſt. Entr. 489. b. 490.

BE it remembered that otherwiſe, viz, in the Term of *St. Michael* in the 14th and 15th Years of the Reign of the Lady *Elizabeth* now Queen of *England*, before the ſame Lady the Queen at *Weſtminſter* came *William Soby* of *Thaidon-Garnon* otherwiſe *Garniſh* in the County of *Eſſex*, who as well for the Lady the Queen as for himſelf proſecutes, by *Richard Beſt* his Attorney, and brought here into the Court of the ſaid Lady the Queen then there his certain Bill againſt *John Molins*, Rector of the Parochial-church of *Thaidon-Garnon* otherwiſe *Garniſh* aforeſaid, in the Cuſtody of the Marſhal, &c. of a Plea of Treſpaſs and Contempt againſt thoſe who proſecute in the Court Chriſtian contrary to the royal Prohibition to the contrary thereof to them firſt directed and delivered. And there are Pledges of proſecuting, viz. *John Doe* and *Richard Roe*. Which ſaid Bill follows in theſe Words, viz. *Eſſex*, viz. *William Soby* of *Thaidon-Garnon* otherwiſe *Garniſh* in the County of *Eſſex*, who proſecutes as well for the Lady the Queen as for himſelf, complains of *John Molins*, Rector of the Parochial-church of *Thaidon-Garnon* otherwiſe *Garniſh* aforeſaid, in the Cuſtody of the Marſhal of the Marſhalſea of the Lady the Queen before the Queen herſelf, for this, to wit, where-

as

as in a Statute made in a Parliament of Lord *Edward* late King of *England* the *third* from the Conqueſt in the 45th Year of his Reign held, among other Things it was ordained that Tithes ſhall not be given of great Trees of the Growth of 20 Years and more, nevertheleſs the aforeſaid *John*, not ignorant of the Premiſſes, but contriving him the aforeſaid *William*, contrary to the due Form of the Law of the Realm of *England*, and contrary to the Tenor and Effect of the Statute aforeſaid, unduly to aggrieve, oppreſs, and fatigue, him the ſaid *William* in the Court-Chriſtian, before the reverend and excellent Man *John Hammond* Doctor of Laws, of the Conſiſtory Court of the Biſhop of *London* Official lawfully conſtituted, the 20th Day of *April* in the 14th Year of the Reign of the Lady the Queen now, at *Thaidon Garnon* otherwiſe *Garniſh* aforeſaid, of and for the withdrawing of Tithes of the Branches called *Loppings* of certain great Trees in a certain Place called *Gine's-park* within the Pariſh of *Thaidon-Garnon* otherwiſe *Garniſh* aforeſaid, and the Bounds, Limits, and Places titheable of the ſame Pariſh, lately growing, and by him the ſaid *William* lately cut and felled down, hath drawn in Plea, craftily and ſubtilely libelling againſt the ſame *William* in the Court-Chriſtian aforeſaid for the withdrawing of the Tithes of 100 Cart-loads of combuſtible Wood, called the *Loppings* of Trees, in and of a certain Wood called *Gine's-park* growing, ariſing, and happening, within the aforeſaid Pariſh of *Thaidon-Garnon* otherwiſe *Garniſh*, where in Truth the aforeſaid Trees by the aforeſaid *William* cut down, from which the Branches aforeſaid came, and the Branches aforeſaid in Form aforeſaid cut off, were of the Growth of 20 Years and more. And the ſame *John* him the ſaid *William* by the Officer of the Court-Chriſtian aforeſaid on that Occaſion to be cited, and before the aforeſaid Judge Spiritual in the ſaid Court-Chriſtian to appear, and to the ſame *John* of and for the withdrawing of the Tithes aforeſaid of the Branches of great Trees aforeſaid to anſwer hath unjuſtly compelled, and that Plea in the ſame Court-Chriſtian then and there hath proſecuted, and him the ſaid *William* to make Payment to the ſame *John* for the Tithes of the Branches of the ſaid great Trees by the definitive Sentence of the ſaid Court-Chriſtian with all his Might hath endeavoured and contrived, in Contempt of the ſaid Lady the Queen now, againſt the Form of the Statute aforeſaid, and to the Damage of him the ſaid *William Soby* 100 *l.* And therefore as well for the Lady the Queen as for himſelf he produces the Suit, &c.

And now at this Day, viz. *Saturday* next after the Octave of *St. Hillary* in this ſame Term, until which Day the aforeſaid *John* had Leave to imparl to the Bill aforeſaid, and then to anſwer, &c. before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *William* by his Attorney aforeſaid, as the aforeſaid *John* by *William Stamp* his Attorney. And the ſame *John* defends the Force and Injury when, &c. all Contempt and whatever, &c. and ſays that he hath not proſecuted in the Court-Chriſtian aforeſaid after the royal Prohibition to him therein directed, in Manner and Form as the aforeſaid *William Soby* above againſt him complains: And of this he puts himſelf upon the Country, and the aforeſaid *William* likewiſe. But for obtaining the Writ of the Lady the Queen of Conſultation in this Behalf, the ſame *John* ſays that the Branches called *Loppings* of Trees, for the Tithes of which Branches he the ſame *John* the ſaid *William* in the Court Chriſtian aforeſaid drew in Plea, were the Branches of Trees called *Hornbeam-pollenger-Trees*, growing in the aforeſaid Place called *Gine's-Park*, within the Pariſh of *Thaidon-Garnon* otherwiſe *Garniſh* aforeſaid; and that the aforeſaid Trees, upon which the Branches aforeſaid grew, were topped and lopped before any of the Branches aforeſaid, for the Tithes of which he the ſame *John Molins* drew in Plea the ſaid *William Soby*, of the Trees aforeſaid grew. And becauſe the aforeſaid *William Soby* the ſame Tithes of the Branches aforeſaid withdrew, he the ſame *John*, then being Rector of the parochial Church aforeſaid, the ſaid *William* in the Court-Chriſtian aforeſaid, before the Prohibition aforeſaid in Form aforeſaid thereof directed and delivered, for the withdrawing of the Tithes of the ſaid Branches drew in Plea, as it was well lawful for him to do. And this he is ready to verify, wherefore he prays Judgment, and the Writ of the Lady the Queen of Conſultation in this Behalf to be granted to him, &c. Plea. See Dy. 171. pl. 5.

And the aforeſaid *William Soby* ſays, that, by any Thing by the aforeſaid *John Molins* above by pleading alledged, the ſame *John* the Writ of the Lady the Queen of Conſultation by no Means ought to have, becauſe he ſays that the Plea aforeſaid by the ſaid *John* in Manner and Form aforeſaid above by pleading pleaded, and the Matter in the ſame contained, are inſufficient in Law to obtain the Writ of the ſaid Lady the Queen of Conſultation, to which he the ſame *William* has no Neceſſity, nor is by the Law of the Land in anywiſe bound to anſwer, wherefore for Want of a ſufficient Anſwer in this Behalf he the ſame *William Soby* prays Judgment, and his Damages aforeſaid by the Occaſion aforeſaid to be adjudged to him, &c. Plaintiff demurs.

And the aforeſaid *John Molins* ſays, that the Plea aforeſaid by him the ſaid *John* in Manner and Form aforeſaid above by pleading pleaded, and the Matter in the ſame contained, are good and ſufficient in Law to obtain the aforeſaid Writ of the ſaid Lady the Queen of Conſultation, which ſaid Plea, and the Matter in the ſame contained, he the ſame *John* is ready to verify and prove as the Court, &c. And becauſe the aforeſaid *William Soby* to that Plea hath not anſwered, nor the ſame hitherto in any wiſe denied, he the ſame *John* as before prays Judgment, and the Writ of the ſaid Lady the Queen of Conſultation to be granted to him, &c. And becauſe the Court of the Lady the Queen here is not yet adviſed of giving their Judgment of and upon the Premiſſes, Day is given to the Parties aforeſaid before the Lady the Queen at *Weſtminſter* until *Wedneſday* next Joinder in Demurrer. Continuance.

next after eighteen Days of *Easter*, to hear their Judgment of and upon the Premiſſes, becauſe the Court of the Lady the Queen here thereof not yet, &c.

And ſo there were further Continuances, becauſe the Court would adviſe, until Hillary *Term* 17 Eliz.

THE CASE.

Hill. Term 17 *Eliz.* Hornbeam Pollengers, tho' of the Age of 20 Years and more, are not ſuch great Wood as is intended by the Statute of 45 *Ed.* 3. *cap.* 3. for they are not Timber, nor ſerviceable in Building, but only fit for Fuel, and therefore if they are cut down at that or any greater Age whatever, Tithe ſhall be paid for them, and by the ſame Reaſon Tithe ſhall alſo be paid for the Branches and Loppings of them, tho' they are of the Age of 20 Years and more. S. P. Watſ. Compl. Incumb. 558. But ſee the contrary Degge 242. 2 P. Wms. 606 *per* Ld. C. *King*. 2 Inſt. 643, where it is ſaid that this Caſe was denied to be Law, Paſch. 2 Jac. 1. in the Caſe of *Hall* and *Fittiplace*. See 1 Lev. 189, *Windham*.

IT appears by the Record that the Plaintiff complains againſt the Defendant, for that whereas by the Statute of 45 *Ed.* 3. *cap.* 3. it is ordained that no Tithes ſhall be given of great Trees of the Growth of 20 Years and more, yet the Defendant hath drawn him into the Court-Chriſtian, the 20 Day of *April* in the 14th Year of the preſent Queen, for withdrawing the Tithes of Branches called *Loppings* of certain great Trees growing in a Place called *Gine's-park* within the Pariſh of *Thaidon-Garnon*, and cut down by the Plaintiff, where in Fact the ſaid Trees, and alſo the Branches cut down, were of the Growth of 20 Years and more. And to this the Defendant has pleaded in Bar, that the Branches called *Loppings* of Trees, for the Tithe whereof he ſued, were Branches of Trees called *Hornbeam-pollengers* growing in the ſaid Place called *Gine's-park*, within the ſaid Pariſh, and that the ſaid Trees, upon which the ſaid Branches grew, were topped and lopped before any of the Branches, for which the Tithes were demanded, grew, and therefore that he (the Defendant) being Parſon at the Time of cutting them down, drew the Plaintiff into Suit for the Tithes, as it was lawful for him to do. And upon this they demurred in Law.

And the Matter was argued at large at the Bar by *Atkinſon* on the one Side, and by *Anderſon* on the other Side. And *Bell* an Apprentice was alſo of Counſel in the Caſe. And he ſpoke to the Matter the ſame Day with the other Counſel, after their Arguments on both Sides. And it was ſaid againſt the Defendant, that he ought not to have Tithes here, becauſe the Trees are old Trees above the Age of 20 Years, in which Caſe they are an Inheritance, and for cutting down Trees above the Age of 20 Years a Man ſhall have an Action of Waſt, and ſhall ſay therein that the Termor has cut them down to his Diſheriſon. And if a Man has an Inheritance in the Trees, and they themſelves are an Inheritance, from thence it follows that no Tithe ſhall be paid of them, for Tithes are payable of the Increaſe of the Inheritance, as of Hay, Apples, and ſuch like, which are Chattles, but not of that which is an Inheritance in itſelf, as Trees above the Age of 20 Years are. And this is proved by the ſaid Statute of 45 *Ed.* 3. *cap.* 3. which ordains *that touching Tithes of great Wood of the Age of* 20 *Years, or of greater Age, a Prohibition in ſuch Caſe ſhall be granted upon Attachment, as hath been uſed before this Time*; which Words *(as hath been uſed before this Time)* ſhew us what the Common Law was, and that at the Common Law Tithes were not payable for great Wood before the ſaid Statute, ſo that the Statute is made in [a] Confirmation of the Common Law. [b] And to this Purpoſe was cited the Opinion of *Belknap* in 50 *Ed.* 3. in the Caſe of an Attachment upon a Prohibition for a Suit in the Spiritual Court for the Tithes of great Trees, where he ſays, "it never was ſeen that Tithes were demanded of great Trees, nor of Timber," which Saying of his was within five Years of the making of the ſaid Statute of 45 *Ed.* 3. So that he, who lived in the Time before the Act was made, teſtifies that there never was an Inſtance before the Act where Tithes had been paid of ſuch great Trees, and the Reaſon thereof is, becauſe they were an Inheritance of themſelves. And as Tithes ſhall not be paid of the Trees themſelves, ſo ſhall not they be paid of the Branches which come of the Loppings and Toppings of the great Trees, for if the Tree itſelf, which is the principal, be excuſed from paying Tithe, ſo ſhall the Branches thereof, which follow the Degree of the Principal, be alſo excuſed, and eſpecially in this Caſe, becauſe the Branches are of the Age of 20 Years and more, which Age makes them to be accounted great Trees themſelves. And for theſe Reaſons it was prayed that the Defendant might be convicted of the Contempt.

[a] 2 Inſt. 642, 643. Degge 240.

[b] H. 50 Ed. 3. 10. b. Fitz. Attachment ſur Prohibition 7. Bro. 5. 11 Co. 48. b.

Curia. And the Juſtices did not argue the Matter openly, but at laſt they agreed among themſelves that Tithes were due to the Defendant in this Caſe, and they granted him a Conſultation. And becauſe they did not openly declare the Reaſons of their Judgment, I afterwards enquired them of *Wray* Chief Juſtice of *England*, who told me that the Reaſon, upon which he and his Companions gave the Judgment, was, becauſe the Trees are of a baſe Nature, and are not Timber, nor can be of any Service in Building, for they cannot in their Nature endure long, but they are only fit for Fuel, and other trifling Uſes. And therefore if the Hornbeams themſelves had been cut down, Tithes ſhould have been paid for them, and by the ſame Reaſon they ſhall be paid for the Bows and Branches of them; for the Branches, which are of the Age of 20 Years and more, ſhall be of the ſame Nature with the Trees out of which they ſpring and grow, and of no other Nature. [c] For if the Tree itſelf is priviledged from Tithes, ſo ſhall the Germins above 20 Years of Age which grow from it be priviledged, as the Germins of that Age of Oak and Aſh, and ſuch like, ſhall be exempt from the Payment of Tithes as well as the Oak or Aſh itſelf ſhall, for he ſaid that a Branch above 20 Years of Age of an Oak, or Aſh, or the like, may be of Service in Building, and therefore it ſhall be exempt from Tithe, as well as the principal Tree ſhall. But Hornbeams ſhall pay Tithes, tho' they are of the Age of 40 or 50 Years, as Haſels, or Sallows, and the like, ſhall do, and the *great Wood* ſpecified in the ſaid Statute is to be intended of Wood which conſiſts of Trees of Value, [d] as of Oaks and Aſhes, and Elms, and ſuch like, but not of [e] Hornbeams, [f] Sallows, Haſels, Maples, and the like, which in all Ages ought to pay Tithes, and ſo ſhall the Branches which ſprout from them, of what Age ſoever the ſame be. And all this he ſaid to me, and for this Reaſon they granted the Conſultation, as he ſaid. And the Judgment and Conſultation, after divers Continuances, were as follows.

[c] See 2 Inſt. 643. 11 Co. 48. b. 1 Rol. Abr. 640. pl. 3, 4. Watſ. Compl. Incumb. 558. 2 Finch 23.

[d] 2 Inſt. 643. Watſ. Compl. Incumb. 557. Degge 242. 2 Danv. Abr. 589. pl. 5. in notis.

[e] See the Books above citedat the Head of the Caſe.

[f] S. P. reſolved M. 5. Jac. 1. C. B. 1 Rol. Abr. 640. pl. 6. Cro. J. 199 pl. 29. But Watſ. Compl. Incumb. ſays that peradventure the Scarcity of other Timber, and the Cuſtom of the Country to put theſe Sort of Trees to the Uſes of good Timber, may free them, being 20 Years Growth or more,

At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid, whereupon all and ſingular the Premiſſes being ſeen and by the Court of the ſaid Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, for that it ſeems to the Court of the ſaid Lady the Queen here that the Plea of the aforeſaid *John Molins* above by pleading pleaded, and the Matter in the ſame contained, are good and ſufficient in Law to preclude the ſaid *William Soby* from having his Action aforeſaid againſt the ſame *John*, and to obtain the Writ of the Lady the Queen of Conſultation to the ſame *John*, it is conſidered * that the aforeſaid *William* take nothing by his Bill aforeſaid, but for his falſe Claim therein be in Mercy, *&c.* And the Writ of the Lady the Queen of Conſultation to the ſame *John* in this Behalf is granted, *&c.* The Judgment. * 1 Judgments 317.

And the Writ of Conſultation was thus. The Writ of Conſultation.

" *Elizabeth* by the Grace of God of *England*, &c. To the reverend and excellent Man *John* " *Hammond* Doctor of Laws, Official of the Conſiſtory Court of the Biſhop of *London* lawfully con- " ſtituted, Greeting. Hath ſhewn unto us *John Molins* Rector of the parochial Church of *Thai-* " *don-Garnon* otherwiſe *Garniſh* in the County of *Eſſex*, that whereas he in the Court chriſtian be- " fore you had impleaded *William Soby* of *Thaidon-Garnon* otherwiſe *Garniſh* aforeſaid, of this that " the ſame *William* the Tithes of 100 Cart-Loads of combuſtible Wood, called *Loppings* of Trees, " in and of a certain Wood called *Gines-park* growing, ariſing, and happening, within the aforeſaid " Pariſh of *Thaidon-Garnon* otherwiſe *Garniſh*, and to him the ſaid *John Molins* in Right of the " Rectory aforeſaid belonging, to the ſame *John Molins* had refuſed to pay, the aforeſaid *William* " *Soby* late in our Court before us ſuggeſted, that whereas in a Statute made in a Parliament of " Lord *Edward* late King of *England* the *third* after the Conqueſt in the 45th Year of his Reign " held, among other Things it was ordained, that of great Trees of the Growth of 20 Years and " more Tithes ſhould not be given, and thereupon a certain Prohibition at the Petition of the afore- " ſaid *William* to the ſame *William* we granted, and the ſame to you cauſed to be directed, by Rea- " ſon whereof you have delayed and yet do delay to proceed in that Cauſe; and becauſe upon " Examination of the Suggeſtion aforeſaid it manifeſtly appears to us that the Suggeſtion of the " aforeſaid *William* in our Court before us, as aforeſaid, is wholly contrary to Truth, we there- " fore being willing that what Juſtice adviſes in the Premiſſes be done to the Parties aforeſaid, ſig- " nify to you that in the Cauſe aforeſaid, as far as concerning the Tithes of the combuſtible Wood " aforeſaid called *Loppings* of Trees before you is only litigated, our royal Dignity, and the Laws " and Statutes of our Realm of *England* in that Behalf wholly unhurt, you may lawfully proceed, " and further do what to the Juriſdiction eccleſiaſtical you ſhall know to appertain, our ſaid Pro- " hibition to you before directed to the contrary in any wiſe notwithſtanding. Witneſs, *&c.*"

From this Record, which is agreeable with the common Practice at this Day, the Reader may obſerve the Method of Proceeding now made Uſe of to attain a Conſultation in theſe Caſes, which differs much from the ancient Method, as I take it; and as it differs much therefrom, ſo it ſeems to me to be the worſe Order and Form of Proceeding in theſe Suits. For at this Day upon a Surmiſe to have a Prohibition, it is uſual for him who makes the Surmiſe to be bound in an Obligation or Recognizance to exhibit a Bill of Attachment againſt the Party who ſues in the Court chriſtian, and againſt whom the Prohibition was awarded, if he againſt whom the Prohibition was awarded requires it; which is done to the End that the Party who ſues in the Court chriſtian may be brought into Court, and anſwer to the Effect of the Surmiſe, which is contained in the Body of the Bill of Attachment, and avoid it, if he can, either for Falſity or for any other Matter, and thereupon the Parties may join Iſſue or demur in Law, and if upon Trial or Demurrer the Matter paſſes for the Defendant (who ſued in the Court chriſtian), then he ſhall have a Conſultation directed to the ſpiritual Judge to proceed, which Grant of a Conſultation ſeems to me to be very ſtrange. For in ſuch Attachment upon a Prohibition the Defendant is not Actor in the King's Court againſt the Plaintiff, but is merely a Defendant, as other Defendants are in perſonal Actions, or in Suits founded upon other Contempts, and the Attachment is ſued againſt him as againſt an Offender who has proceeded in the ſpiritual Court contrary to a Prohibition, in which Caſe if it is found or confeſſed that he has done ſo, he ought to be convicted of the Contempt, and be impriſoned and fined; and if it be found that he has not proceeded in the ſpiritual Court contrary to the Prohibition, then he ought to have Judgment to go without Day. But to plead upon the Attachment touching the Right of the Tithes, and, if it is found for the Defendant, to grant him a Conſultation, as the Effect of the Judgment, is not (as I apprehend) conſonant to the ancient Form and Courſe of Law; and to make Uſe of ſuch a Circumſtance as to have him, at whoſe Suit the Prohibition was granted, bound to exhibit an Attachment without any Proceſs awarded, and ſo to bring him in voluntarily, where in Appearance he is compelled involuntarily to anſwer, ſeems rather to be a Confederacy than a due and fair Suit; and alſo to ſurmiſe that he has proceeded contrary to the Prohibition, where in Fact he has not, is a Falſhood and a Lie. And if he who is bound to exhibit his Bill upon an Attachment will not do it when he is required, but will forfeit his Bond, then the King ſhall have the Forfeiture, inaſmuch as the Bond is uſually made to him, and not to the Party; and then the Party has no Way to bring him, who had the Prohibition, into Court to plead with him, which would be a great Defect in the Law, if there was no other Means to bring the Party into Court, and to proceed to Trial upon the Matter. But there is in the Regiſter *a Writ which is called a* Scire facias quare Conſultatio non debeat concedi poſt prohibitionem, *which Writ the Party who ſued in the ſpiritual Court, and was delayed by the Prohibition, ſhall have againſt him who obtained the Prohibition;* Regiſt. 71.

Nota bene by the Reporter.

That the modern Form of proceeding to attain a Conſultation by Way of a Bill of Attachment upon a Prohibition is not ſo regular and good as the ancient Method upon a Writ of *Scire facias quare conſultatio non debeat oncedi poſt Prohibitionem.*

and this Writ recites the Surmiſe and the Prohibition granted thereupon, which is to the Hurt or Diſheriſon of him againſt whom the Prohibition was granted, and it requires the Sheriff to warn the Party to ſhew " if he have or know any thing to ſay for himſelf why our ſaid Writ of Prohibition ought " not to be revoked, and our other Writ of Conſultation be awarded to the aforeſaid Official or " other Judge ſpiritual, *&c.* to proceed in the Cauſe aforeſaid, and to do further and receive " what our Court hath conſidered in this Behalf." *And as it may not be improper to recite the Writ, it here follows Word for Word.*

" The King to the Sheriff of *Eſſex* Greeting. Whereas we lately, at the Proſecution of *Thomas* " and *Roger* ſuggeſting to us that the Chappel of *Roger* is ſituate within the Manor of the ſaid " *Thomas*, that the ſaid *Roger* holds the Chappel aforeſaid of the Advowſon of the aforeſaid *Tho-* " *mas*, and that the ſaid *Roger* and all his Predeceſſors Parſons of the Chappel aforeſaid all Tithes " as well greater as leſſer ariſing from the Demeſn-Lands of the ſaid *Thomas* of the aforeſaid Manor, " and of certain his Tenants of the ſaid Manor, of the Gift of the Anceſtors of the aforeſaid *Thomas* " ſometime Lords of the ſame Manor, from Time immemorial had perceived and had, and that " *L. Spark* Parſon of the Church of *Roger* claiming thoſe Tithes to belong to his Church afore- " ſaid, the ſaid *Thomas* and *Roger* thereof had drawn in Plea before the Official of the Biſhop of " *Lincoln* in the Court-chriſtian, and for that the Plea aforeſaid, as it was ſaid, touched us and " our Crown and Dignity, becauſe the Advowſon of the Chappel aforeſaid to us might devolve by " Reaſon of Wardſhip or Eſcheat, becauſe alſo the like Tithes in certain our Demeſnes we have " beſtowed, and hitherto have uſed to beſtow, and alſo many great Men of our Realm of *Eng-* " *land* ſuch Tithes in their Demeſnes have likewiſe uſed to beſtow, we prohibited the ſame Official " that he ſhould not hold that Plea in the Court-chriſtian, nor any Thing which might turn out " to the Derogation of our royal Dignity in this Behalf attempt, by Reaſon of which Prohibition " the ſame Official, as we have heard, hath delayed and yet doth delay to proceed in that Cauſe, " to the no ſmall Loſs and Grievance of the ſaid *L.* and to the manifeſt Danger of the Diſheriſon " of his Church aforeſaid: And now on the Behalf of the ſaid *L.* it is humbly prayed unto us, " that whereas in the Articles to the Prelacy and Clergy of our Realm of *England* lately granted it " is contained, that in Tithes, Oblations, Obventions, and Mortuaries (when they are propounded " under theſe Names) our royal Prohibition ſhall hold no Place, we would be willing to order our " ſaid Writ of Prohibition to be revoked, and to award our Writ of Conſultation to the aforeſaid " Official to proceed in the Cauſe in this Behalf, we being willing that what ſhall be juſt be done " to the Parties aforeſaid in the Premiſſes, command you that you make known to the aforeſaid " *Thomas* and *Roger* that they be in our Chancery on the Morrow of the *Epiphany* of our Lord next " coming, whereſoever it ſhall then be, to ſhew if they have or know any thing to ſay for them- " ſelves why our ſaid Writ of Prohibition ought not to be revoked, and our other Writ of Con- " ſultation to be awarded to the aforeſaid Official to proceed in the Cauſe aforeſaid, and to do fur- " ther and receive what our Court ſhall conſider in this Behalf. And have you there the Names " of thoſe by whom you ſhall make this known to him, and this Writ. Witneſs, *&c.* the " Year, *&c.*"

F. N. B. 54. c. *This Writ* Fitzherbert *makes Mention of in his* Natura Brevium *at the End of the Writ of* Conſultation, *and he ſeems to allow of it. And as the Writ above was returned into the Chancery, ſo one may have the like Writ in every other Court which grants Writs of Prohibition, returnable before the Judges of the ſame Court, and upon every Cauſe ſufficient to annul the Prohibition. And when the Defendant appears upon the Writ, he may anſwer to the Matter contained in the* Scire facias *(for it compriſes the Subſtance of the Matter), or if it is neceſſary to make a Declaration, the Plaintiff may declare upon the Writ, and the Defendant may anſwer to the Matter which the Plaintiff in the* Scire facias *has objected againſt the Surmiſe upon which the Prohibition was founded, and thereupon they may proceed in Plea, and by that Means the Right and Title of the Tithes may be tried; and if it is found for the Plaintiff in the* Scire facias, *then he ſhall have Judgment to have a Conſultation according to the Requeſt of his Writ of* Scire facias, *and if it is found againſt the Plaintiff, then the Prohibition ſhall ſtand in Force, and he ſhall be barred from having a Conſultation. And this Method of Proceeding ſeems to me to be more agreeable with the Law than the other, and therefore I would adviſe the Student to put in Practice this Writ, and to leave the other Form.*

A Report

A Report made in Hillary *Term in the* eighteenth *Year of the Reign of Queen* Elizabeth *of of the Opinions of* Dyer *Chief Juſtice of the Common Bench, and of* Barham *one of the Queen's Serjeants, Juſtices of Aſſize and Goal-delivery in the County of* Warwick, *in certain Caſes of Felony which came before them at their Seſſions of Goal-delivery held at* Warwick *on Friday in the third Week of Lent in the* fifteenth *Year of the Reign of Queen* Elizabeth, *the Record whereof here follows.*

THE Delivery of the Goal of the Lady the Queen of the County of *Warwick* before *James Dyer* Knight her Chief Juſtice of the Bench, and *Nicholas Barham* one of her Serjeants at Law, Juſtices of the ſaid Lady the Queen to deliver the Goal of the Priſoners therein being aſſigned, at *Warwick* on *Friday* in the third Week of *Lent* in the 15th Year of the Reign of the Lady *Elizabeth* by the Grace of God of *England*, *France*, and *Ireland* Queen, Defender of the Faith, *&c.* *Warw.*

John Saunders late of *Greneborough* in the County aforeſaid Huſbandman, and *Alexander Archer* late of *Framton* in the County aforeſaid Yeoman, being taken for this that they were indicted before the Juſtices of the Peace and alſo of general Goal-delivery of the County aforeſaid, of this that the aforeſaid *John Saunders*, the 20th Day of *September* in the 14th Year of the Reign of the Lady the Queen now, with Force and Arms, *&c.* at *Greneborough* in the County aforeſaid, being ſeduced by the Inſtigation of the Devil, two Pieces of a roaſted Apple mixed with Poiſon called *Arſenick* and *Roſeacre* to one *Eleanor Saunders* Daughter of the ſame *John* feloniouſly gave and miniſtred, with an Intention that the aforeſaid *Eleanor* might die by the Operation of the Poiſon aforeſaid called *Arſenick* and *Roſeacre*, which ſaid *Eleanor*, after the Receipt of the ſame Pieces of Apple aforeſaid ſo mixed with the Poiſon aforeſaid into her Body, of the Poiſon and the Operation of the ſame from the aforeſaid 20th Day of *September* in the 14th Year aboveſaid unto the 22d Day of *September* then next following languiſhed, on which ſaid 22d Day of *September* the aforeſaid *Eleanor* of the Poiſon aforeſaid died, and ſo the aforeſaid *John Saunders* the aforeſaid *Eleanor* the Day and Year aforeſaid at *Greneborough* aforeſaid in the County aforeſaid voluntarily and feloniouſly killed and murdered, againſt the Peace of the ſaid Lady the Queen now, *&c.* And that the aforeſaid *Alexander Archer*, before the Murder aforeſaid by the aforeſaid *John Saunders* in Form aforeſaid done and perpetrated, *viz.* the 16th Day of *September* in the 14th Year aboveſaid, at *Greneborough* aforeſaid in the County aforeſaid, the aforeſaid *John* to do and perpetrate the Murder aforeſaid feloniouſly procured and adviſed, againſt the Peace of the ſaid Lady the Queen now, *&c.* come before the Juſtices here by the Sheriff brought to the Bar, and being ſeparately aſked, as well the aforeſaid *John Saunders* as to the principal Fact of the Felony and Murder aforeſaid, as the aforeſaid *Alexander Archer* of the Acceſſary of the ſaid Felony and Murder, how they will acquit themſelves thereof, they ſay ſeparately that they are not, nor either of them is, guilty thereof, and of this of the good and ill they ſeparately put themſelves upon the Country; therefore let a Jury come thereon: The Jurors being called come, who to ſay the Truth in the Premiſſes being choſen, tried and ſworn, ſay upon their Oath that the aforeſaid *John Saunders* is guilty of the principal Fact of the Felony and Murder aforeſaid. And the Jurors aforeſaid further ſay upon their Oath, that the aforeſaid *Alexander Archer* is guilty of the Acceſſary of the Felony and Murder aforeſaid; the Goods or Chattles, Lands or Tenements of the ſaid *John* and *Alexander*, or of either of them, none, *&c.* Therefore let the aforeſaid *John Saunders* be hanged until, *&c.* And becauſe the aforeſaid Juſtices here will adviſe themſelves of and upon the Premiſſes before they give Judgment thereon againſt the aforeſaid *Alexander*, Day is given to the aforeſaid *Alexander* here until next, *&c.* And in the mean Time he is ſent back to the Goal aforeſaid in the Cuſtody of the Sheriff of the County aforeſaid, there to tarry and ſafely to be kept until next, *&c.* on the Peril that falls thereon.

IT appears by the Record that *John Saunders* late of *Greneborough* in the County of *Warwick* Huſbandman, and *Alexander Archer* late of *Framton* in the ſaid County Yeoman, were arraigned before the Juſtices upon an Indictment, for that the aforeſaid *John Saunders*, the 20th Day of *September* in the 14th Year of the Reign of the preſent Queen, with Force and Arms, *&c.* at *Greneborough* in the County aforeſaid, being ſeduced by the Inſtigation of the Devil, feloniouſly gave and miniſter'd to one *Eleanor Saunders* his Daughter two Pieces of a roaſted Apple mixed with Poiſon called *Arſenick* and *Roſeacre*, with an Intent that ſhe might die by the Operation of the ſame Poiſon; which ſaid *Eleanor*, after the Receipt of the ſame Pieces of Apple ſo mixed with Poiſon aforeſaid into her Body, languiſhed of the Poiſon and the Operation thereof from the aforeſaid 20th Day of *September* in the ſaid 14th Year unto the 22d Day of *September* then next following, on *The* CASE.

If A. intending to kill his Wife gives her a poiſoned Apple, and ſhe being ignorant or it gives it to a Child againſt whom A. never meant any Harm, and againſt his Will and Perſuaſion, and the Child eats it and dies, this is Murder in A. and a poiſoning by him, but the Wife, becauſe ignorant, is not guilty. S. P. Crompt. Juſt. 23. pl. 24. Lamb. Juſt. lib. 2. cap. 7. fo. 242. Dalt. Juſt. cap. 145. § 8. 3 Inſt. 51. H. P. C. 50. 1 H. H. P. C. 431. 1 Hawk. P. C. 79 § 7. 84, § 42. 2 Hawk. P. C. 316, § 18. Lane 47. Jenk. 290. pl. 29. Bac. Max. reg. 15. 1 Finch 63. 2 Finch 215. 3 Bac. Abr. 663, 670. See like Caſe 9 Co. 81, *Agnes Gore*'s Caſe.

which

which ſaid 22d Day of *September* ſhe died of the Poiſon aforeſaid: And that the aforeſaid *Alexander Archer* before the Murder aforeſaid by the ſaid *John Saunders* in Form aforeſaid perpetrated, *viz.* the 16th Day of *September* in the ſaid 14th Year, at *Greneborough* aforeſaid, felonioufly procured and adviſed the ſaid *John Saunders* to do and perpetrate the Murder aforeſaid, againſt the Peace, *&c.* And upon their Arraignment they pleaded, not guilty, and a Jury was empanneled to try them. And upon their Examinations and the Evidence given (as I was credibly informed, for I was not preſent, and therefore what I here report is upon the Relation of the ſaid Juſtices of Aſſize, and of the Clerk of Aſſize) the Truth of the Matter appeared to the Juſtices to be thus. The ſaid *John Saunders* had a Wife whom he intended to kill, in order that he might marry another Woman with whom he was in Love, and he opened his Deſign to the ſaid *Alexander Archer*, and deſired his Aſſiſtance and Advice in the Execution of it, who adviſed him to put an End to her Life by Poiſon. With this Intent the ſaid *Archer* bought the Poiſon, *viz.* Arſenick and Roſeacre, and delivered it to the ſaid *John Saunders* to give it to his Wife, who accordingly gave it to her, being ſick, in a roaſted Apple, and ſhe eat a ſmall Part of it, and gave the reſt to the ſaid *Eleanor Saunders* an Infant about three Years of Age, who was the Daughter of her and the ſaid *John Saunders* her Huſband. And the ſaid *John Saunders* ſeeing it blamed his Wife for it, and ſaid that Apples were not good for ſuch Infants, to which his Wife replied that they were better for ſuch Infants than for herſelf; and the Daughter eat the poiſoned Apple, and the ſaid *John Saunders* her Father ſaw her eat it, and did not offer to take it from her, leſt he ſhould be ſuſpected, and afterwards the Wife recovered, and the Daughter died of the ſaid Poiſon.

And whether or no this was Murder in *John Saunders* the Father was ſomewhat doubted, for he had no Intent to poiſon his Daughter, nor had he any Malice againſt her, but on the contrary he had a great Affection for her, and he did not give her the Poiſon, but his Wife ignorantly gave it her, and although he might have taken it from the Daughter, and ſo have preſerved her Life, yet the not taking it from her did not make it Felony, for it was all one whether he had been preſent or abſent, as to this Point, inaſmuch as he had no Malice againſt the Daughter, nor any Inclination to do her any Harm. But at laſt the ſaid Juſtices, upon Conſideration of the Matter, and with the Aſſent of *Saunders* Chief Baron, who had the Examination of the ſaid *John Saunders* before, and who had ſignified his Opinion to the ſaid Juſtices (as he afterwards ſaid to me) were of Opinion that the ſaid Offence was Murder in the ſaid *John Saunders*. And the Reaſon thereof (as the ſaid Juſtices and the Chief Baron told me) was, becauſe the ſaid *John Saunders* gave the Poiſon with an Intent to kill a Perſon, and in the giving of it he intended that Death ſhould follow. And when Death followed from his Act, although it happened in another Perſon than her whoſe Death he directly meditated, yet it ſhall be Murder in him, for he was the original Cauſe of the Death, and if ſuch Death ſhould not be puniſhed in him, it would go unpuniſhed; for here the Wife, who gave the poiſoned Apple to her Daughter, cannot be guilty of any Offence, becauſe ſhe was * ignorant of any Poiſon contained in it, and ſhe innocently gave it to the Infant by Way of neceſſary Food, and therefore it is reaſonable to adjudge her innocent in this Caſe, and to charge the Death of the Infant, by which the Queen has loſt a Subject, upon him who was the Cauſe of it, and who intended Death in the Act which occaſioned the Death here. [a] But if a Man prepares Poiſon, and lays it in ſeveral Parts of his Houſe, with an Intent to kill Rats and ſuch Sort of Vermine, and a Perſon comes and eats it, and dies of it, this is not Felony in him who prepared and laid it there, becauſe he had no Intent to kill any reaſonable Creature. [b] But when he lays the Poiſon with an Intent to kill ſome reaſonable Creature, and another reaſonable Creature, whom he does not intend to kill, is poiſoned by it, ſuch Death ſhall not be diſpuniſhable, but he who prepared the Poiſon ſhall be puniſhed for it, becauſe his Intent was evil. And therefore it is every Man's Buſineſs to foreſee what Wrong or Miſchief may happen from that which he does with an ill Intention, and it ſhall be no Excuſe for him to ſay that he intended to kill another, and not the Perſon killed. [c] For if a Man of Malice prepence ſhoots an Arrow at another with an Intent to kill him, and a Perſon to whom he bore no Malice is killed by it, this ſhall be Murder in him, for when he ſhot the Arrow he intended to kill, and inaſmuch as he directed his Inſtrument of Death at one, and thereby has killed another, it ſhall be the ſame Offence in him as if he had killed the Perſon he aimed at, for the End of the Act ſhall be conſtrued by the Beginning of it, and the laſt Part ſhall taſte of the firſt, and as the Beginning of the Act had Malice prepenſe in it, and conſequently imported Murder, ſo the End of the Act, *viz.* the killing of another, ſhall be in the ſame Degree, and therefore it ſhall be Murder, and not Homicide only. [d] For if one lies in wait in a certain Place to kill a Perſon, and another comes by the Place, and he who lies in wait kills him out of Miſtake, thinking that he is the very Perſon whom he waited for, this Offence is Murder in him, and not Homicide only, for the killing was founded upon Malice prepenſe. So in the principal Caſe, when *John Saunders* of Malice prepenſe gave to his Wife the Inſtrument of Death, *viz.* the poiſoned Apple, and this upon a ſubſequent Accident killed his Daughter, whom he had no Intention to kill, this is the ſame Offence in him as if his Act had met with the intended Effect, and his Intention in doing the Act was to commit Murder, wherefore the Event of it ſhall be Murder. And ſo the Juſtices declared their Opinions to the Jurors, whereupon they found both the Priſoners guilty, and *John Saunders* had his Judgment, and was hanged.

* And therefore for the ſame Reaſon it is, that if A. gives Poiſon to B. to give to C. and B. not knowing it to be Poiſon gives it to C. who dies of it, this is no Offence in B. tho' it is a Murder in A. Kely. 53. H. P. C. 218.

[a] 9 Co. 81. b. Jenk. 290. pl. 29. Crompt. Juſt. 23. pl. 24. H. P. C. 50. 1 H. H. P. C. 431. 1 Hawk. P. C. 84, § 43. Dalt. Juſt. cap. 145, § 8.

[b] See the Books cited Ante 273 at the Head of the Caſe.

[c] Lamb. Juſt. lib. 2. cap. 7. fo. 242. Dalt. Juſt. cap. 145, § 9. Crompt. Juſt. 23. pl. 21. H. P. C. 50. 1 H. H. P. C. 466. 1 Hawk. P. C. 83, § 41. 3 Bac. Abr. 670. And with this agrees *Bracton*, fo. 155. a. *Si quis unum percuſſerit et occiderit, cum alium percutere vellet, in felonia tenetur.*

[d] Crompt. Juſt. 23. pl. 25. Lamb. Juſt. lib. 2. cap. 7. fo. 243. Dalt. Juſt. cap. 145, § 9.

But the moſt difficult Point in this Caſe, and upon which the Juſtices conceived greater Doubt than upon the Offence of the Principal, was, whether or no *Archer* ſhould be adjudged Acceſſary to the Murder. For the Offence which *Archer* committed was the Aid and Advice which he gave to *Saunders*, and that was only to kill his Wife, and no other, for there was no parol Communication between them concerning the Daughter, and altho' by the Conſequences which followed from the giving of the Poiſon by *Saunders* the Principal it ſo happened that the Daughter was killed, yet *Archer* did not preciſely procure her Death, nor adviſe him to kill her, and therefore whether or no he ſhould be Acceſſary to this Murder which happened by a Thing conſequential to the firſt Act, ſeemed to them to be doubtful. For which Reaſon they thought proper to adviſe and conſider of it until the next Goal Delivery, and in the mean time to conſult with the Juſtices in the Term. Any thereupon it was entered thus in the Record, viz. *And becauſe the aforeſaid Juſtices here will adviſe themſelves of and upon the Premiſſes, before they give Judgment thereon againſt the aforeſaid* Alexander, *Day is given to the aforeſaid* Alexander *here until next, &c. And in the mean time he is ſent back to the Goal aforeſaid, in the Cuſtody of the Sheriff of the County aforeſaid, there to tarry and be ſafely kept until next, &c. on the Peril that ſhall fall thereon, &c.* And at the next Goal Delivery the Matter was reſpited until the next afterwards, and ſo from Seſſion to Seſſion until this preſent Term of *St. Hillary anno* 1575, at which Time, upon Conference before had with the Juſtices of both Benches, they were agreed that they ought not to give Judgment againſt the the ſaid *Alexander Archer*, becauſe they took the Law to be that he could not be adjudged Acceſſary to the ſaid Offence of Murder, for that he did not aſſent that the Daughter ſhould be poiſoned, but only that the Wife ſhould be poiſoned, which Aſſent cannot be drawn further than he gave it, for the poiſoning of the Daughter is a diſtinct Thing from that to which he was privy, and therefore he ſhall not be adjudged Acceſſary to it; and ſo they were reſolved before this Time. And altho' they were ſo agreed, yet, rather than make a Precedent of it, they reprieved him from one Seſſion to another for divers Seſſions, to the Intent that he might purchaſe his Pardon, and by that Means be ſet at Liberty. And this the Lord *Dyer* told me, to whom I ſhewed this Report this preſent *Hillary* Term *anno* 18 *Eliz.* and he approved of it, as did alſo Serjeant *Barham*, to whom I ſhewed it.

If A. perſuades B. to poiſon C. and B. accordingly gives Poiſon to C. who eats Part of it, and gives the reſt to D. who is killed by it, A. is not Acceſſary to the Murder of D. becauſe it was not the direct and immediate Effect of the Act done in Purſuance of A's Command, but happened accidentally thro' the Act of C. to which A. was no way Privy, and his Command ſhall not be carried over to any other than to the Perſon intended by him. S. P. Crompt. Juſt. 42. pl. 10. Lamb. Juſt. lib. 2. cap. 7. fo. 288. H. P. C. 217. 1 H. H. P. C. 436, 617. 2 Hawk. P. C. 316, § 18. Bac. Max. reg. 16. Dalt. Juſt. cap. 161, § 5.

Note, it ſeems to me reaſonable that he who adviſes or commands an unlawful Thing to be done ſhall be adjudged Acceſſary to all [a] *that follows from that ſame Thing, but not from any other diſtinct Thing.* [b] *As if I command a Man to rob ſuch a one, and he attempts to rob him, and the other defends himſelf, and a Combat enſues between them, and the Perſon attempted to be robbed is killed, I ſhall be Acceſſary to this* [c] *Murder, becauſe when he attempted to rob him, he purſued my Command, and then when he purſued my Command, and in the Execution thereof another Thing happened, I ought in Reaſon to be deemed a Party therein, becauſe my Command was the Cauſe of it.* [d] *So if I command one to beat another, and he beats him ſo that he dies thereof, I ſhall be Acceſſary to this Murder, for it is a Conſequence of my Command, which was the original Foundation thereof, and which naturally tended to endanger the Life of the other.* [e] *So if I command one to burn the Houſe of J. S. felonioufly in the Night, and he does ſo, and the Fire thereof burns another Houſe, I ſhall be Acceſſary to the burning of the other Houſe, ſo that altho' I am afterwards pardoned for being Acceſſary to the burning of the Houſe of J. S. yet I ſhall be hanged for the burning of the other Houſe, for inaſmuch as the burning of the ſecond Houſe followed from my Command, and I am clearly Acceſſary to the burning of the firſt Houſe, I ought alſo in Reaſon to be adjudged Acceſſary to all that followed from the burning of the firſt Houſe. But if I command him to burn the Houſe of ſuch a one, whom he well* [f] *knows, and he burns the Houſe of another, there I ſhall not be Acceſſary to this, becauſe it is another diſtinct Thing, to which I gave no Aſſent nor Command, but wholly different from my Command.* [g] *As if I command one to ſteal a Horſe, and he ſteals an Ox, or if I command him to ſteal a white Horſe, and he ſteals a yellow Horſe, this differs directly from my Command, and my Conſent cannot be carried over to it, for there is not the leaſt Connection or Affinity between this Act and my Command.* [h] *And ſo if I command a Perſon to rob ſuch a Goldſmith of his Plate in ſuch a Place as he is going to* Sturbridge-*fair, and he breaks open his Houſe in* Cheapſide, *and ſteals his Plate from thence, I ſhall not be Acceſſary to this* [i] *Burglary, becauſe it is a Felony of another* [k] *Kind from that which I commanded.* [l] *But if I command one to kill another by Poiſon, and he kills him with a Sword, or if I command one to kill another in the Fields, and he kills him in the City*

Nota bene by the Reporter.

[a] 3 Inſt. 51, Dalt. Juſt. cap. 161, § 5. See 1 Hawk. P. C. 316, § 19.

[b] Lamb. Juſt. lib. 2. cap. 7. fo. 286. Crompt. Juſt. 43. pl. 34. H. P. C. 217. 1 H. H. P. C. 617. 2 Hawk. P. C. 315, § 18. Dalt. Juſt. cap. 161, § 5. *Note*, as this Caſe is here put, it ſeems to make the Commander Acceſſary to the Murder, altho' the Perſon aſſaulted and killed was not robbed purſuant to the Command.

[c] Hereby note that this Offence is Murder in him that killed him, Crompt. Juſt. 22. pl. 13.

[d] S. P. C. 41. d. H. P. C. 217. 1 H. H. P. C. 435, 617. 2 Hawk. P. C. 315, § 18. 3 Inſt. 51. Crompt. Juſt. 22. pl. 12. 43. pl. 35. Lamb. Juſt. lib. 2. cap. 7. fo. 286. Dalt. Juſt. cap. 161, § 5. But if I command B. to beat C. with a ſmall Wand or Rod, which could not in all human Reaſon cauſe Death, and B. beats C. with a great Club, or wounds him with a Sword, whereof he dies, it ſeems that I am not Acceſſary, becauſe there was no Command of any Thing that could probably cauſe Death, and B. has varied from my Command in Subſtance, and not in Circumſtance, 1 H. H. P. C. 436.

[e] Lamb. Juſt. lib. 2. cap. 7. fo. 287. Crompt. Juſt. 43. pl. 36. 2 Hawk. P. C. 315, § 18. *Collige ex hoc*, that if one malicioufly intends to burn the Houſe of A. only, and not the Houſe of B. and yet in burning the Houſe of A. the Houſe of B. happens to be burnt, in this Caſe the burning of the Houſe of B. is Felony, and the Party may be indicted as having malicioufly burnt it, 3 Inſt. 67. H. P. C. 85. 1 H. H. P. C. 569. 1 Hawk. P. C. 106, § 5.

[f] Note well the Words here made Uſe of by *Plowden, (which he well knows)* whereby Serjeant *Hawkins* ſeems to think it is implied, that it is a neceſſary Ingredient in this Caſe, to make the Commander no Acceſſary, that the Perſon knew the Houſe which he was commanded to burn; for if he did not know it, but miſtook another for it, and intending only to burn the Houſe which he was commanded to burn, happen by ſuch Miſtake to burn the other, it may probably be argued that the Commander ought to be eſteemed an Acceſſary to ſuch Burning, becauſe it was the direct and immediate Effect of an Act wholly influenced by his Command, and intended to have purſued it, 2 Hawk. P. C. 316, § 22. But this Caſe is put at large without theſe Words in Crompt. Juſt. 42. pl. 11. Lamb. Juſt. lib. 2. cap. 7. fo. 287. Dalt. Juſt. cap. 161, § 5.

[g] Crompt. Juſt. 42. pl. 12. 1 H. H. P. C 617. 2 Hawk. P. C. 316, § 21. Lamb. Juſt. lib. 2. cap. 7. fo. 287. Dalt. Juſt. cap. 161, § 5.

[h] Crompt. Juſt. 42. pl. 12. Lamb. Juſt. lib. 2. cap. 7. fo. 287. Dalt. Juſt. cap. 161, § 5. 3 Inſt. 51. H. P. C. 217. 1 H. H. P. C. 617. 2 Hawk. P. C. 316, § 21. Bac. Max. reg. 16. But put the Caſe that A. commands B. to ſteal ſuch Things out of a Houſe ſometime when he is got into it, and expreſly reſtrains him from breaking into the Houſe, and yet B. breaks into it, the Lord *Bacon* ſays that A. is Acceſſary to this Burglary, for here the Facts are of a Kind, and differ only in Degree, and therefore the Variance is not of Subſtance, Bac. Max. reg. 16.

[i] Nevertheleſs I am Acceſſary to the Theft, tho' not to the Burglary, 1 H. H. P. C. 617.

[k] Therefore if A. commands B. to burn the Houſe of C. and B. kills, robs, or ſteals from C. A. is not Acceſſary, for it is an Offence of another Kind, 1 H. H. P. C. 617.

[l] Crompt. Juſt. 42. pl. 14. 3 Inſt. 51. 1 H. H. P. C. 617. 2 Hawk. P. C. 316, § 20. Bac. Max. reg. 16. Lamb. Juſt. lib. 2. cap. 7. fo. 287. Dalt. Juſt. cap. 161, § 5.

or Church, or if I command him to kill him ſuch a Day, and he kills him at another Day, there I ſhall be Acceſſary to ſuch Murder, becauſe the Death is the principal Matter, which has followed from my Command, and the Place, Inſtrument, Time, and the like, are but the Manner and Form how the Death of the Party ſhall be effected, and not the Subſtance of the Matter, and a Variance in the formal Part of the Execution of the Command ſhall not diſcharge a Man from being Acceſſary. But yet in ſome Caſes the Time may be material; [a] *for if I command one to kill J. S. and before the Fact done I go to him and tell him that I have repented, and expreſly charge him not to kill J. S. and he afterwards kills him, there I ſhall not be Acceſſary to this Murder, becauſe I have countermanded my firſt Command, which in all Reaſon ſhall diſcharge me, for the malicious Mind of the Acceſſary ought to continue to do ill until the Time of the Act done, or elſe he ſhall not be charged; but if he had killed J. S. before the Time of my Diſcharge or Countermand given, I ſhould have been Acceſſary to the Death, notwithſtanding my private Repentance. And in an Appeal lately brought by the Wife of* Cholmley *againſt one* Nicholas *who had aſſaulted her Huſband in the County of* Wilts, *with an Intent to rob him, and had killed him with a Gun, and afterwards obtained the Queen's Charter of Pardon, this Queſtion was put by an Apprentice of the Middle Temple to* Catline *Chief Juſtice of* England, *and to his Companions in the King's Bench, whether or no thoſe who had received* Nicholas, *and had given him Meat and Drink, after the Charter of Pardon, knowing of the Murder and the Pardon, ſhould be accounted Acceſſaries, with reſpect to the Appeal brought by the Wife: To which* Catline *anſwered that they ſhould, for altho' the Queen had granted her Pardon to* Nicholas, *whereby he was in Fact diſcharged of the Felony againſt the Queen, yet he remained a Felon as to the Wife, and by the ſame Reaſon thoſe who received him ſhall be Acceſſaries as to the Wife, for the Pardon could not diſcharge the Acceſſaries any more than the Principal, againſt the Wife: But* Popham *was of the contrary Opinion, and ſaid that this could not be, becauſe there can be no Acceſſary without an Offence to the Crown;* [b] *for an Appeal as well as an Indictment ſays, that they received him "againſt the Crown and Dignity of the Lady the Queen." And then if there was no Offence to the Crown at the Time of the Receipt, the Receipt cannot be Felony, but as to the principal Fact, it was an Offence as well to the Crown as to the Wife at the Time of the Act perpetrated, and therefore altho' the Queen has pardoned the principal Felon, yet the Wife may truly ſay, as to him, that the Act was againſt the Queen's Crown and Dignity, but not as to thoſe who received the Principal afterwards, becauſe at the Time of the Receipt there was no Offence continuing in the Principal againſt the Crown;* ad quod non fuit reſponſum. *But the Receipt of the Felon before the Pardon was Felony. So that in Caſes of Acceſſary the Time is to be conſidered, if ſo be that any Thing material happens intermediately, but otherwiſe the Day or Time when the Acceſſary commits the Offence is not more material than the Place where, or the Inſtrument with which, it is done.*

But I greatly approve of the ſaid Opinions of the Juſtices concerning the Acceſſary in the Caſe before reported, becauſe the poiſoning of the Daughter was a diſtinct Fact, to which Archer *gave no Advice nor Counſel, and whoſe Death he did not procure.*

[c] *And in the ſaid Caſe of the Appeal by* Cholmley, *it ſeems to me that if the Goaler after the Pardon had voluntarily let* Nicholas *go at large and eſcape, he would have committed Felony, for if* Nicholas *was detained in Priſon at the Suit of the Wife Appellant, then he was in for Felony,* ergo *the Goaler ſuffered a Felon to eſcape, altho' he was not a Felon as to the Queen.*

[a] 3 Inſt. 51. Crompt. Juſt. 42. pl. 16. H.P.C.217,218. 1 H. H. P. C. 436, 618. 2 Hawk. P. C. 315, §16. Lamb. Juſt. lib. 2. cap. 7. fo. 289. Dalt. Juſt. cap. 161, § 5.

Whether the Receipt of a Felon who is pardoned by the King, but ſtill liable to an Appeal, ſhall make the Receiver an Acceſſary. S. P. 2 Hawk. P. C. 319, § 31. Dalt. Juſt. cap. 161, § 7.

[b] See Notes on 1 Finch 215.

[c] S. P. 1 H. H. P. C. 593. But there it ſeems that this is only Felony in the Goaler *primâ facie*, and not abſolutely ſo, for if the Wife bring not her Appeal within the Year, according to the Statute of 3 *H.* 7. *cap.* 1. or bringing her Appeal N. is acquitted, then the Goaler ought to be diſcharged.

A brief

A brief Report of a Caſe argued in the Common Bench *in* Michaelmas *Term in the* ſeventeenth *and* eighteenth *Years of the Reign of Queen* Elizabeth, *and in other Terms before and after, and adjudged in* Hillary *Term then next following, in an Action of* Treſpaſs *brought by* Humphry Nichols *Plaintiff againſt* John Nichols *Defendant. And the Record appears among the Records of* Eaſter *Term* 16 Elizabeth, Rot. 349. *and was as follows.*

Salop. Declaration. Same Precedent N. Bendl. 245. pl. 268. Raſt. Entr. 633. a.

John Nichols late of *Bendley* in the County aforeſaid Yeoman was attached to anſwer *Humphry Nichols* of a Plea, wherefore with Force and Arms the Cloſe of the ſaid *Humphry* at *Alveley* he broke, and his Graſs to the Value of 40 *s.* there lately growing with certain Cattle eat up, trod down, and conſumed, and other Wrongs to him did, to the great Damage of the ſaid *Humphry*, and againſt the Peace of the Lady the Queen now. And whereupon the ſame *Humphry* by *William Pitt* his Attorney complains, that the aforeſaid *John*, the 20th Day of *December* in the 15th Year of the Reign of the Lady the Queen now, with Force and Arms the Cloſe of him the ſaid *Humphry* at *Alveley* broke, and his Graſs to the Value, &c. there lately growing with certain Cattle, viz. Horſes, Oxen, Cows, Hogs and Sheep eat up, trod down, and conſumed, and other Wrongs, &c. to the great Dnmage, &c. and againſt the Peace, &c. Wherefore he ſays that he is damnified and has Damage to the Value of 40 *l.* and therefore he produces the Suit, &c.

Bar.

And the aforeſaid *John* by *William Nelſon* his Attorney comes and defends the Force and Injury when, &c. and as to the coming with Force and Arms, &c. he ſays that he is not guilty thereof, and of this he puts himſelf upon the Country, and the aforeſaid *Humphry* likewiſe. And as to the Reſidue of the Treſpaſs aforeſaid above ſuppoſed to be done, the ſame *John* ſays that the aforeſaid *Humphry* his Action aforeſaid againſt him ought not to have, becauſe he ſays that the Cloſe aforeſaid and alſo the Places in which the Treſpaſs aforeſaid is ſuppoſed to be done, are, and at the aforeſaid Time when the Treſpaſs aforeſaid is ſuppoſed to be done, were, five Acres of Land with the Appurtenances in *Alveley* aforeſaid, parcel of a certain Grange or Farm called *Bowel*'s, of which ſaid five Acres of Land with the Appurtenances one *Francis Lovel* Knight Lord *Lovel*, long before the aforeſaid Time when, &c. was ſeized in his Demeſn as of Fee. And being ſo ſeized thereof, the ſame *Francis* afterwards, and before the aforeſaid Time when, &c. viz. the 20th Day of *January* in the 18th Year of the Reign of Lord *Edward* late King of *England* the *fourth*, by a certain Deed, the Date whereof is the ſame Day and Year, by the Name of *Francis Lovel* Knight, Lord *Lovel*, *Holland*, *Burnel*, *Dancort*, and *Grey*, demiſed the ſame five Acres of Land with the Appurtenances among other Things to one *Thomas Wright*, by the Name of one Meſſuage otherwiſe called his Farm called *Bowel*'s, lying and being in the Pariſh of *Alveley* in the County of *Salop*, with all Lands arable, Cloſes, Meadows, Leaſows and Paſtures to the ſame Meſſuage or Farm with the Appurtenances in any wiſe appertaining or belonging: To have and to hold the Meſſuage aforeſaid and other the Premiſſes with the Appurtenances whereof, &c. to the aforeſaid *Thomas* for Term of his Life; and if the ſaid *Francis* ſhould happen to die without Heirs of his Body begotten, then the aforeſaid *Francis* by the ſame Deed further granted the aforeſaid Meſſuage or Farm with all its Appurtenances aforeſaid whereof, &c. to the aforeſaid *Thomas Wright* and to his Heirs for ever. By virtue of which ſaid Demiſe the aforeſaid *Thomas Wright* was of the aforeſaid five Acres of Land with the Appurtenances among other Things ſeized in his Demeſn as of Freehold for Term of his Life, the Reverſion thereof to the aforeſaid *Francis* Lord *Lovel* and to his Heirs in Form aforeſaid belonging. And the ſaid *Thomas* being ſo ſeized thereof, the ſame *Francis* afterwards, and before the aforeſaid Time when, &c. viz. the 1ſt Day of *May* in the 2d Year of the Reign of Lord *Henry* late King of *England* the *ſeventh*, at *London* in the Pariſh of the bleſſed *Mary* of the *Arches* in the Ward of *Cheap*, died without Heirs of his Body begotten, in the Life of the ſaid *Thomas Wright*. By Reaſon whereof the aforeſaid *Thomas Wright*, after the Death of the aforeſaid *Francis* Lord *Lovel*, was ſeized of the aforeſaid five Acres of Land with the Appurtenances among other Things in his Demeſn as of Fee. And the ſame *Thomas* being ſo ſeized thereof, afterwards, and before the aforeſaid Time when, &c. of the ſame five Acres of Land with the Apurtenances among other Things enfeoffed one *Thomas Wildicot*; * by virtue whereof the ſame *Thomas* was ſeized of the ſame five Acres of Land with the Appurtenances in his Demeſn as of Fee. And the ſame *Thomas* being ſo ſeized thereof, afterwards, and before the aforeſaid Time when, &c. of the ſame five Acres of Land with the Appurtenances among other Things enfeoffed one *William Nichols*, to have and to hold to the ſame *William* and to his Heirs for ever.

* Note the Manner of pleading the Feoffment here, without ſhewing any Uſe or Conſideration, and it ſhall be intended to the Uſe of the Feoffee, O. Bendl. 183. Rep. *temp.* Holt. 737. Ld. Raym. 801. Strange 107.

By virtue of which Feoffment the ſame *William* was ſeized of the ſame five Acres of Land with the Appurtenances among other Things in his Demeſn as of Fee. And the ſaid *William* being ſo ſeized thereof, the ſame *William* afterwards, and before the aforeſaid Time when, &c. of the ſame five Acres of Land with the Appurtenances among other Things enfeoffed one *William Whorewood* Eſquire, to have and to hold to the ſame *William Whorewood* and to his Heirs for ever. By virtue of which ſaid Feoffment the ſame *William Whorewood* was ſeized of the aforeſaid five Acres of Land with the Appurtenances among other Things in his Demeſn as of Fee. And the ſaid *William Whorewood* being ſo ſeized thereof, the ſame *William* afterwards, and before the aforeſaid Time when, &c. demiſed the aforeſaid five Acres of Land with the Appurtenances among other Things to the aforeſaid *William Nichols* and to his Aſſigns during the Life of the ſaid *William*, the Remainder thereof after his Death to one *Peter Nichols* for and during four Years then next following, and fully to be compleat, the Remainder thereof after the End of the aforeſaid four Years to one *James Nichols* and to his Heirs for ever. By virtue of which Demiſe the ſame *William* was of the aforeſaid five Acres of Land with the Appurtenances among other Things ſeized in his Demeſn as of Freehold for Term of his Life, the Remainder thereof after his Death in Form aforeſaid belonging. And the ſaid *William Nichols* being ſo ſeized thereof, afterwards at *London* aforeſaid in the Pariſh and Ward aforeſaid the ſame *William* of ſuch his Eſtate died thereof ſeized, after whoſe Death, and after the End of the aforeſaid four Years next following after the Death of the ſaid *William Nichols*, the aforeſaid *James Nichols* into the aforeſaid five Acres of Land with the Appurtenances among other Things as in his Remainder entered, and was thereof ſeized in his Demeſn as of Fee. And the ſaid *James* being ſo ſeized thereof, the ſame *James* afterwards, and before the aforeſaid Time when, &c. at *London* in the Pariſh and Ward aforeſaid of ſuch his Eſtate died thereof ſeized, after whoſe Death the aforeſaid five Acres of Land with the Appurtenances among other Things deſcended to the aforeſaid *John Nichols*, as Son and Heir of the aforeſaid *James Nichols*, whereby the ſame *John*, before the aforeſaid Time when, &c. into the aforeſaid five Acres of Land with the Appurtenances among other Things entered, and was thereof poſſeſſed in his Demeſn as of Fee. And the

Colour. aforeſaid *Humphry*, claiming the aforeſaid five Acres of Land with the Appurtenances by Colour of a certain Deed of Demiſe to him thereof made by the aforeſaid *James Nichols* for Term of his Life, long before the aforeſaid Time when, &c. (where nothing of the ſame five Acres of Land with the Appurtenances into the Poſſeſſion of the ſaid *Humphry* by that Deed ever paſſed) into the aforeſaid five Acres of Land with the Appurtenances upon the Poſſeſſion of him the ſaid *John Nichols*, before the aforeſaid Time when, &c. entered, upon the Poſſeſſion thereof of which ſaid *Humphry* he the ſame *John Nichols* afterwards, viz. the aforeſaid Time when, &c. into the aforeſaid five Acres of Land with the Appurtenances re-entered, and the Cloſe aforeſaid broke, and the Graſs aforeſaid in the aforeſaid five Acres of Land growing with the Cattle aforeſaid eat up, trod down, and conſumed, as it was well lawful for him to do. And this he is ready to verify; wherefore he prays Judgment if the aforeſaid *Humphry* his Action aforeſaid againſt him ought to have, &c.

Replication. And the aforeſaid *Humphry* ſays that he by any Thing before alledged ought not to be precluded from having his Action aforeſaid, becauſe he ſays that well and true it is, that the aforeſaid *Francis* Lord *Lovel* before the aforeſaid Time when, &c. was ſeized of the aforeſaid five Acres of Land with the Appurtenances in his Demeſn as of Fee, and being ſo ſeized thereof, the ſame *Francis* before the aforeſaid Time when, &c. viz. the aforeſaid 20th Day of *January* in the aboveſaid 18th Year of the Reign of the aforeſaid late King *Edward* the *fourth*, by his Deed aforeſaid demiſed the ſame five Acres of Land with the Appurtenances among other Things to the aforeſaid *Thomas Wright*, in Manner and Form as the aforeſaid *John Nichols* above has alledged. But the ſame *Humphry* further ſays, that the aforeſaid *Thomas Wright* of the aforeſaid five Acres of Land with the Appurtenances in his Demeſn as of Freehold for Term of his Life in Form aforeſaid being ſeized, and the aforeſaid *Francis* Lord *Lovel* of the Reverſion of the ſame five Acres of Land with the Appurtenances as of Fee and Right in Form aforeſaid being ſeized, by a certain Act made in a Parliament of Lord *Henry* late King of *England* the *ſeventh* after the Conqueſt, at *Weſtminſter* in the County of *Middleſex* the *ſeventh* Day of *November* in the *firſt* Year of his Reign held, among other Things it was enacted, eſtabliſhed, and ordained by the Authority of the ſame Parliament, that the aforeſaid *Francis* Lord *Lovel*, for divers High Treaſons by him againſt the aforeſaid late King *Henry* the *ſeventh* traiterouſly committed and perpetrated, ſhould ſtand and be convicted and attainted of High Treaſon, and abjured of all and every his Honour, Eſtate, and Dignity, and of the Names of the ſame, and ſhould forfeit to the ſame late King and to his Heirs all Caſtles, Manors, Lordſhips, Hundreds, Franchiſes, Liberties, Privileges, Advowſons, Nominations, Preſentations, Lands, Rents, Services, Reverſions, Portions, Annuities, Penſions, Rights, Hereditaments, Goods and Chattles, and Credits of which the ſaid *Francis* Lord *Lovel*, or any other to his Uſe, was ſeized or poſſeſſed the 21ſt Day of *Auguſt* in the aforeſaid *firſt* Year of the Reign of the ſame late King *Henry* the *Seventh*, or at any other Time from thence forwards within the Realm of *England*, *Ireland*, *Wales*, or *Calais*,

or in the Marches of the ſame, in Fee-ſimple, Fee tail, or for Term of Life or Lives, as by the ſame Act among other Things more fully appears. By Virtue of which ſaid Act of Parliament the ſame late King *Henry* the *Seventh* was ſeized of the Reverſion of the ſame five Acres of Land with the Appurtenances among other Things as of Fee and Right, in Right of his Crown of *England*. And he being ſo ſeized thereof, of ſuch his Eſtate died thereof ſeized; after whoſe Death the Reverſion of the aforeſaid five Acres of Land with the Appurtenances among other Things deſcended to Lord *Henry* late King of *England* the *Eighth*, as Son and Heir of the aforeſaid late King *Henry* the *Seventh*, whereby the ſame late King *Henry* the *Eighth* was ſeized of the Reverſion of the aforeſaid five Acres of Land with the Appurtenances as of Fee and Right. And the ſaid late King *Henry* the *Eighth* being ſo ſeized thereof, and the aforeſaid *Thomas Wright* of the ſame five Acres of Land with the Appurtenances in his Demeſn as of Freehold in Form aforeſaid being ſeized, the ſame *Thomas Wright* afterwards at *Alveley* aforeſaid died. And the ſame *Humphry* further ſays, that afterwards by a certain Inquiſition indented, taken at *Harley* in the aforeſaid County of *Salop*, the 13th Day of *June* in the 11th Year of the Reign of the ſaid Lady the Queen now, before *Richard Prince* Eſquire, then Feodary of the ſame Lady the Queen in the ſame County of *Salop*, *Richard Dickens*, *William Wall*, and *William Langley* Gentlemen, by Virtue of a Writ of the ſaid Lady the Queen of Commiſſion to the ſame *Richard Prince*, *Richard Dickens*, *William Wall*, and *William Langley* Gentleman, and to one *Richard Newton* Knight, *William Gatacre* Eſquire, *William Onſlow* Eſquire, *Francis Gatacre* Eſquire, *Adam Lutley* Eſquire, *Roger Harris* Gentleman, *Richard Harris* Gentleman, and *John Hammond* Gentleman, and eleven, ten, nine, eight, ſeven, ſix, five, four, or three of them directed, by the Oath of *Richard Harnage* Gentleman, *Thomas Corbet* Gentleman, *Edward Farmer* Yeoman, *John Hammonds* Yeoman, *Thomas Boocher* Yeoman, *John Weſtwood* Yeoman, *Thomas Fewtrel* Yeoman, *Henry Howel* Yeoman, *Thomas Martin* Yeoman, *John Cook* Yeoman, *Thomas Head* Yeoman, *John Foxhole* Yeoman, and *John Fletcher* Yeoman, good and lawful Men of the County aforeſaid, it was found among other Things, that the aforeſaid late King *Henry* the *Eighth*, by Reaſon of the Conviction, Attainder, Act, and Deſcent aforeſaid, was ſeized of the aforeſaid Meſſuage or Farm and other the Premiſſes aforeſaid with the Appurtenances, whereof the aforeſaid five Acres of Land with the Appurtenances are, and at the aforeſaid Time when, *&c.* were Parcel, in his Demeſn as of Fee, in Right of his Crown of *England*. And being ſo ſeized thereof, the ſame late King *Henry* the *Eighth* of ſuch his Eſtate thereof died ſeized, after whoſe Death the Tenements aforeſaid with the Appurtenances whereof, *&c.* deſcended to Lord *Edward* late King of *England* the *Sixth*, as Son and Heir of the aforeſaid late King *Henry* the *Eighth*; whereby the ſame late King *Edward* the *Sixth* was ſeized of the Tenements aforeſaid with the Appurtenances whereof, *&c.* in his Demeſn as of Fee. And being ſo ſeized thereof, the ſame late King *Edward* the *Sixth* of ſuch his Eſtate died thereof ſeized, without Iſſue of his Body begotten, after whoſe Death the Tenements aforeſaid with the Appurtenances whereof, *&c.* deſcended to Lady *Mary* late Queen of *England*, as Siſter and Heir of the aforeſaid late King *Edward* the *Sixth*, whereby the ſame late Queen was ſeized of the ſame Tenements with the Appurtenances whereof, *&c.* in her Demeſn as of Fee. And being ſo ſeized thereof, the ſame late Queen of ſuch her Eſtate thereof died ſeized, without Iſſue of her Body begotten, after whoſe Death the Tenements aforeſaid with the Appurtenances whereof, *&c.* deſcended to the Lady the Queen now, as Siſter and Heir of the aforeſaid late Queen, as by the Inquiſition aforeſaid among other Things more fully appears. And the ſame *Humphry* further ſays, that the ſame Lady the Queen now, by Reaſon of the Premiſes aforeſaid, was ſeized of the Tenements aforeſaid with the Appurtenances whereof, *&c.* in her Demeſn as of Fee, in Right of her Crown of *England*. And being ſo ſeized thereof, the ſame Lady the Queen now, before the aforeſaid Time when, *&c.* *viz.* the 4th Day of *February* in the 12th Year of her Reign, by her Letters-Patent (which he the ſame *Humphry* here produces in Court) ſealed with her Great Seal of *England*, the Date whereof is at *Weſtminſter* the ſame Day and Year, gave and granted to one *Hugh Counſel* Gentleman, and *Robert Piſtor* Gentleman, the Tenements aforeſaid with the Appurtenances whereof, *&c.* to have and to hold the ſame Tenements with the Appurtenances whereof, *&c.* to the ſame *Hugh* and *Robert* and to their Heirs for ever. By Reaſon of which ſaid Letters-Patent the ſame *Hugh* and *Robert* were of the ſame Tenements with the Appurtenances whereof, *&c.* ſeized in their Demeſn as of Fee. And being ſo ſeized thereof, the ſame *Hugh* and *Robert* before the aforeſaid Time when, *&c.* of the ſame Tenements with the Appurtenances whereof, *&c.* enfeoffed him the ſaid *Humphry Nichols*, to have to him and his Heirs for ever. By Virtue of which he the ſame *Humphry* was thereof ſeized in his Demeſn as of Fee, until the aforeſaid *John Nichols* the aforeſaid 20th Day of *December* in the 15th Year aboveſaid, with Force and Arms the Cloſe of him the ſaid *Humphry* at *Alveley* broke, and the Graſs aforeſaid to the Value, *&c.* there lately growing with the Cattle aforeſaid eat up, trod down, and conſumed, as he above complains againſt him. And this he is ready to verify, wherefore for that the aforeſaid *John Nichols* the Treſpaſs aforeſaid in the aforeſaid five Acres of Land with the Appurtenances above acknowledges, he the ſame *Humphry* prays Judgment and his Damages by Occaſion of the ſaid Treſpaſs to be adjudged to him, *&c.*

And the aforeſaid *John Nichols*, by proteſting that the aforeſaid *Henry* late King of *England* the *Seventh* was not ſeized of the Reverſion of the aforeſaid five Acres of Land with the Appurte- Rejoinder.

nances as of Fee and Right by Virtue of the Act aforeſaid, nor died ſo thereof ſeized, by proteſting alſo that the aforeſaid *Henry* late King of *England* the *Eighth* by Reaſon of the Conviction, Attainder, Act, and Deſcent aforeſaid was not ſeized of the Tenements aforeſaid with the Appurtenances whereof, *&c.* in his Demeſn as of Fee, in Right of his Crown of *England*, nor of ſuch his Eſtate thereof died ſeized, by proteſting alſo that the Tenements aforeſaid with the Appurtenances whereof, *&c.* did not deſcend to Lord *Edward* late King of *England* the *Sixth*, as Son and Heir of the ſaid late King *Henry* the *Eighth*, nor that the ſame late King *Edward* the *Sixth* was thereof ſeized in his Demeſn as of Fee, nor of ſuch his Eſtate thereof died ſeized, by proteſting alſo that the Tenements aforeſaid with the Appurtenances whereof, *&c.* did not deſcend to Lady *Mary* late Queen of *England*, as Siſter and Heir of the ſaid late King *Edward* the *Sixth*, nor that the ſame late Queen was thereof ſeized in her Demeſn as of Fee, nor of ſuch her Eſtate thereof died ſeized, by proteſting alſo that the Tenements aforeſaid with the Appurtenances whereof, *&c.* did not deſcend to the Lady the Queen now, as Siſter and Heir of the ſaid late Queen *Mary*, nor that the ſame Lady the Queen now was thereof ſeized in her Demeſn as of Fee, as the ſame *Humphry Nichols* above has alledged, for Plea ſays that well and true it is, that the aforeſaid *Thomas Wright* of the aforeſaid five Acres of Land with the Appurtenances in his Demeſn as of Freehold for Term of his Life in Form aforeſaid being ſeized, and the aforeſaid *Francis* Lord *Lovel* of the Reverſion of the ſame five Acres of Land with the Appurtenances as of Fee and Right in Form aforeſaid being ſeized, by the aforeſaid Act made in a Parliament of the ſaid Lord *Henry* late King of *England* the *Seventh*, the ſaid *ſeventh* Day of *November* in the *firſt* Year of his Reign held, among other Things it was enacted, eſtabliſhed, and ordained by the authority of the ſame Parliament, that the aforeſaid *Francis* Lord *Lovel*, for divers High Treaſons by him againſt the aforeſaid late King *Henry* the *Seventh* traiterouſly committed and perpetrated, ſhould ſtand and be convicted of High Treaſon, and abjured of all Honour, Eſtate, and Dignity, and of the Names of the ſame, and ſhould forfeit to the ſame late King and to his Heirs all Caſtles, Manors, Lordſhips, Hundreds, Franchiſes, Liberties, Privileges, Advowſons, Nominations, Preſentations, Lands, Tenements, Rents, Services, Reverſions, Portions, Annuities, Penſions, Rights, Hereditaments, Goods and Chattles, and Debts, of which the ſame *Francis* Lord *Lovel*, or any other to his Uſe, was ſeized or poſſeſſed the 21ſt Day of *Auguſt* in the aboveſaid *firſt* Year of the Reign of the ſame late King *Henry* the *Seventh*, or at any Time from thence forwards within the Realm of *England*, *Ireland*, *Wales*, or *Calais*, or in the Marches of the ſame, in Fee-ſimple, Fee-tail, or for Term of Life or Lives, as in the ſame Act among other Things more fully is contained, as the aforeſaid *Humphry* above hath alledged. But the ſame *John Nichols* further ſays, that in the Statute aforeſaid it is contained further in Manner and Form following, *viz.* ſaving to every Perſon and Perſons and their Heirs, other than ſuch as by the ſame Act were attainted, and their Heirs, or any of them, of or in any of the Premiſſes, ſuch Right, Title, Action, or Intereſt in or of the Premiſſes, as they ought to have had, if the Act aforeſaid had never been made. By Reaſon whereof the Right, Title, Action, and Intereſt of the aforeſaid *Thomas Wright* of and in the aforeſaid five Acres of Land with the Appurtenances among other Things were ſaved. And afterwards, and before the aforeſaid Time when, *&c.* the aforeſaid *Francis* at *London* in the Pariſh and Ward aforeſaid died, without Heirs of his Body begotten. By Reaſon whereof, and by Virtue of the aforeſaid Saving in the Statute aforeſaid contained, the aforeſaid *Thomas Wright* after the Death of the aforeſaid *Francis* was ſeized of the aforeſaid five Acres of Land with the Appurtenances among other Things in his Demeſn as of Fee. And the ſaid *Thomas* being ſo ſeized thereof, the ſame *Thomas* afterwards, and before the aforeſaid Time when, *&c.* of the ſame five Acres of Land with the Appurtenances among other Things enfeoffed the aforeſaid *Thomas Wildicot*, to have and to hold to the ſame *Thomas* and to his Heirs for ever. By Virtue of which ſaid Feoffment the ſame *Thomas* was of the ſame five Acres of Land with the Appurtenances among other Things ſeized in his Demeſn as of Fee. And the ſaid *Thomas* being ſo ſeized thereof, the ſame *Thomas* afterwards, and before the aforeſaid Time when, *&c.* of the ſame five Acres of Land with the Appurtenances among other Things enfeoffed the aforeſaid *William Nichols*, to have and to hold to the ſame *William* and to his Heirs for ever. By Virtue of which ſaid Feoffment the ſame *William* was of the aforeſaid five Acres of Land with the Appurtenances among other Things ſeized in his Demeſn as of Fee. And the ſaid *William* being ſo ſeized thereof, the ſame *William* afterwards, and before the aforeſaid Time when, *&c.* of the ſame five Acres of Land with the Appurtenances among other Things enfeoffed the aforeſaid *William Whorewood* Eſquire, to have and to hold to the ſame *William* and to his Heirs for ever. By Virtue of which ſaid Feoffment the ſame *William* was of the aforeſaid five Acres of Land with the Appurtenances among other Things ſeized in his Demeſn as of Fee. And the ſaid *William* being ſo ſeized thereof, the ſame *William* afterwards, and before the aforeſaid Time when, *&c.* demiſed the aforeſaid five Acres of Land with the Appurtenances among other Things to the aforeſaid *William Nichols*, to have and to hold to the ſame *William* and to his Aſſigns during the Life of the ſaid *William*, the Remainder thereof after his Deceaſe to the aforeſaid *Peter Nichols*, for and during the aforeſaid four Years then next following, and fully to be compleat, the Remainder thereof after the End of the aforeſaid four Years to the aforeſaid *James Nichols* and to his Heirs for ever. By Virtue of which ſaid Demiſe the ſame *William Nichols*

was

was of the aforeſaid five Acres of Land with the Appurtenances among other Things ſeized in his Demeſn as of Freehold for Term of his Life. And the ſaid *William Nichols* being ſo ſeized thereof, the ſame *William* afterwards, and before the aforeſaid Time when, *&c.* at *London* in the Pariſh and Ward aforeſaid, of ſuch his Eſtate died thereof ſeized, after whoſe Death, and after the End of the aforeſaid four Years next after the Deceaſe of the ſaid *William Nichols*, the aforeſaid *James Nichols* into the aforeſaid five Acres of Land with the Appurtenances among other Things as in his Remainder entered, and was thereof ſeized in his Demeſn as of Fee. And he being ſo ſeized thereof, the ſame *James* before the aforeſaid Time when, *&c.* at *London* in the Pariſh and Ward aforeſaid of ſuch his Eſtate died thereof by proteſting ſeized, after whoſe Death the aforeſaid five Acres of Land with the Appurtenances among other Things deſcended to the aforeſaid *John Nichols*, as Son and Heir of the aforeſaid *James Nichols*, whereby he the ſame *John* into the aforeſaid five Acres of Land with the Appurtenances among other Things entered, and was thereof ſeized in his Demeſn as of Fee. And being ſo ſeized thereof, he the ſame *John* afterwards, *viz.* at the aforeſaid Time when, *&c.* the Cloſe aforeſaid in the aforeſaid five Acres of Land with the Appurtenances broke, and the Graſs aforeſaid to the Value, *&c.* in the aforeſaid five Acres of Land growing with the Cattle aforeſaid eat up, trod down, and conſumed, as it was lawful for him to do. And this he is ready to verify, wherefore he prays Judgment, and that the aforeſaid *Humphry* from his Action aforeſaid may be precluded.

Upon this Rejoinder the Plaintiff demur'd in Law.

IT appears by the Record, that the Plaintiff has declared of his Cloſe broken at *Alveley* in the County of *Salop* the 20th Day of *December* in the 15th Year of the preſent Queen. And the Defendant has pleaded in Bar, that the Place where, *&c.* is five Acres of Land Parcel of a Grange or Farm called *Bowel's*, whereof *Francis Lovel* Knight Lord *Lovel* was ſeized in his Demeſn as of Fee. And being ſo ſeized, he the 20th Day of *January* in the 18th Year of the Reign of King *Edward* 4. by his Deed bearing the ſame Date leaſed the ſame five Acres among other Things to one *Thomas Wright* for Term of his Life, and if the ſaid *Francis* ſhou'd happen to die without Heir of his Body, then that the ſaid *Thomas Wright* ſhou'd hold the ſame Farm whereof, *&c.* to him and to his Heirs for ever. By Virtue whereof the ſaid *Thomas Wright* was ſeized of the ſaid five Acres in his Demeſn as of Freehold, the Reverſion thereof belonging to the ſaid Sir *Francis Lovel* and to his Heirs in Form aforeſaid. And he being ſo ſeized, the ſaid Sir *Francis* the *firſt* Day of *May* in the 2d Year of the Reign of King *Henry* 7. died without Heir of his Body, living the ſaid *Thomas Wright*, whereby the ſaid *Thomas Wright* after the Death of the ſaid Sir *Francis* was ſeized of the ſaid five Acres of Land in his Demeſn as of Fee. And he being ſo ſeized, thereof enfeoffed one *Thomas Wildicot* in Fee, who enfeoffed *William Nichols* in Fee, who enfeoffed *William Whorewood* in Fee, who leaſed the ſaid five Acres to the ſaid *William Nichols* for his Life, with Remainder to one *Peter Nichols* for four Years, Remainder to one *James Nichols* in Fee. And afterwards the ſaid *William Nichols* being ſo ſeized died, after whoſe Death, and the Expiration of the four Years, the ſaid *James Nichols* entered into the ſaid five Acres as in his Remainder, and was thereof ſeized in Fee. And being ſo ſeized, he died thereof ſeized, after whoſe Death the the ſaid five Acres deſcended to *John Nichols* (the Defendant) as Son and Heir of the ſaid *James*, by Reaſon whereof he entered, and was thereof ſeized in Fee; and ſo he gives Colour to the Plaintiff, and juſtifies. And the Plaintiff by his Replication confeſſing that the ſaid Sir *Francis Lovel* was ſeized in Fee of the ſaid five Acres, and leaſed them to the ſaid *Thomas Wright* in Form aforeſaid, ſays further, that the ſaid *Thomas Wright* being ſo ſeized, and the ſaid Sir *Francis* being ſeized of the Reverſion of the ſaid five Acres as of Fee in Form aforeſaid, the ſaid Sir *Francis* was by Act of Parliament in the *firſt* Year of King *Henry* 7. convicted and attainted of High-Treaſon, and thereby it was enacted that he ſhou'd forfeit to the ſaid King and to his Heirs all Caſtles, Manors, Lands, Reverſions, and Hereditaments, &c. whereof the ſaid Sir *Francis Lovel*, or any other to his Uſe, was ſeized or poſſeſſed the 21ſt Day of *Auguſt* in the *firſt* Year of the Reign of the ſaid King, or at any other Time afterwards, in Fee-ſimple, Fee-tail, or for Life, as by the ſame Act more fully appears. By which Act the ſaid King *Henry* 7. was ſeized of the Reverſion of the ſaid five Acres as of Fee. And afterwards the ſaid *Thomas Wright*, being ſeized of the ſaid five Acres in his Demeſn as of Freehold, died thereof ſeized. And further the Plaintiff ſays, that by an Inquiſition indented taken at *Harley* in the County of *Salop* the 13th Day of *June* in the *eleventh* Year of the preſent Queen *Elizabeth*, before *Richard Prince* and three others, by Virtue of the Queen's Commiſſion to them and eight others, and to any four of them directed, it was found among other Things by the Oath of 12 Men, that King *Henry* 8. by Reaſon of the ſaid Conviction, Attainder, Act, and Deſcent from King *Henry* 7. to himſelf, was ſeized of the ſaid Farm and other the Premiſes, whereof the ſaid five Acres are, and at the ſaid Time were, Parcel, in his Demeſn as of Fee, in Right of his Crown, and that he died ſeized thereof, and that the Premiſes deſcended from him to King *Edward* 6. and from him to Queen *Mary*, and from her to the preſent Queen *Elizabeth*, as by the ſaid Inquiſition appears. And the Plaintiff alledges further, that the preſent Queen *Elizabeth*, by her Letters-Patent bearing Date the 4th Day of *February* in the 12th Year of her Reign, here ſhewn forth to the Court, granted

The CASE:
A Leaſe for Life is made upon Condition that if the Leſſor dies without Iſſue, then the Leſſee to have Fee, the Leſſor is attainted of Treaſon by Act of Parliament in 1 *H.* 7. and thereby all his Lands forfeited, and afterwards he dies without Iſſue, adjudged that the Leſſee ſhall have the Fee, for his Title ſhall not be prejudiced or defeated by any Act which the Leſſor does after the Condition made, but when it is performed, he ſhall have the Fee diſcharged of all Incumbrances made by the Leſſor ſubſequent to the Condition, whether created by the Grant of the Leſſor or by any Act of Treaſon or Felony committed by him. And altho' it was ordained by the Act of Attainder, that the Leſſor ſhou'd forfeit all his Lands, Reverſions, &c. yet before the Statute of 33. *H.* 8. *cap.* 20. that was not ſufficient to veſt any Freehold in Deed or in Law in the King, until an Office finding the Certainty of the Lands whereof the Party attainted was ſeized, (and an Averment thereof was not ſufficient) which was not done here, and therefore the

Reverſion was not veſted in the King at the Time when the Condition was performed. But if it had been actually veſted in the King, then whether the Leſſee ſhou'd have been put to his Petition, or *Monſtrans de droit*, &c. or whether the Fee-ſimple ſhou'd have been immediately deveſted out of the King, by Operation of Law, upon the Performance of the Condition, the Court was divided in Opinion. S. C. N. Bendl. 245. pl. 268. Vin. Abr. tit. Condition T. pl. 26.

the ſaid Tenements to *Hugh Counſel* and *Robert Piſtor* in Fee, who enfeoffed the Plaintiff in Fee, whereby he was ſeized in Fee until the Defendant did the Treſpaſs. And the Defendant by his Rejoinder proteſting that King *Henry* 7. was not ſeized of the Reverſion of the ſaid Tenements, nor that King *Henry* 8. nor King *Edward* 6. nor Queen *Mary* were ſeized of the ſaid Tenements, nor that any of them died ſeized, for Plea ſays that in the ſaid Act there is contained a Saving to every Perſon and Perſons, and to their Heirs, other than ſuch as by the ſame Act were attainted, and their Heirs, or any of them, of or in any of the Premiſes, ſuch Right, Title, Action, or Intereſt of or in the Premiſes, as they ought to have had if the Act aforeſaid had never been made. And afterwards the ſaid Sir *Francis Lovel* died without Heirs of his Body, whereby and by Force of the Saving in the ſaid Act the ſaid *Thomas Wright*, after the Death of the ſaid Sir *Francis Lovel*, was ſeized of the ſaid five Acres in his Demeſn as of Fee. And ſo the Defendant conveys them to himſelf in the ſame Manner as is pleaded in the Bar. Whereupon the Plaintiff has demur'd in Law.

And divers Matters were moved and argued in this Caſe by *Mead*, *Bendloe*, and *Jefferey* Serjeants, who were of Counſel for the Plaintiff, and by *Loveleſs* and *Barham* Serjeants, who were of Counſel for the Defendant. And I heard all their Arguments, as alſo the Arguments of *Harper* Juſtice, and of the Lord *Dyer*, but I did not hear *Mounſon* and *Manwood* Juſtices argue, and therefore what I here report as ſaid by them, I deliver only upon the Relation of others.

A makes a Leaſe for Life to B. upon Condition that if A. dies without Iſſue, then B. to have Fee, in this Caſe the Fee does not remove out of A. until the Inſtant that he dies without Iſſue, for the Condition is precedent, and muſt firſt be performed before the Fee ſhall be removed out of A. S. P. Co. Litt. 217. b. Plowd. Quær. § 202. Ante 25, 26.

And the firſt Thing moved was, when Sir *Francis Lovel* made the Leaſe for Life, with Condition that if he died without Iſſue, then the Leſſee ſhould have the Land in Fee (which Words were ſufficient to make the Leſſee have the Fee-ſimple upon the Condition being performed) whether or no in this Caſe the Fee was out of Sir *Francis Lovel* preſently before the Condition was performed. And as to this, it was agreed by all, *viz.* by the Counſel on both Sides, and by all the Juſtices except the Lord *Dyer* (who argued that the Fee-ſimple paſſed out of Sir *Francis Lovel* preſently, and was in Abeyance and Conſideration of Law, ſo that it was not in Sir *Francis* at the Time of the Act of Attainder, and that it firſt veſted in the Leſſee when Sir *Francis* died without Iſſue, and not before) that the Fee-ſimple was not out of Sir *Francis Lovel* until the Condition was performed, that is, until the Inſtant when he died without Iſſue: For the Performance of the Condition preceded the Removal of the Fee-ſimple out of Sir *Francis Lovel*, for if he died without Iſſue, then he granted the Fee, which Word *(then)* is an Adverb of Time, and that Time ought to come before the Leſſee ſhou'd have the Fee. As if a Man contracts with another, that if he pays him 10*l.* then he ſhall have ſuch a Farm for Years, there (as it appears in [a] *Wheeler*'s Caſe in 14 *H.* 8.) the Leaſe ſhall not commence until the Payment is made, becauſe the Payment precedes the Eſtate, and upon the Payment it ſhall commence. [b] And to this Purpoſe *Mead* cited the Caſe in 10 *Aſſ. pl.* 15. where a Man made a Leaſe for 11 Years, and executed a Deed to the Leſſee upon Condition that if he was diſturbed of his Term, then he ſhould hold the Tenements in Fee, and Livery was made according to the Condition, and afterwards the Leſſee was diſturbed, and thereupon he brought an Aſſize, and it was adjudged that he ſhou'd have the Fee, and he recovered by Award, for he might be diſturbed and ouſted, and when he was diſturbed, then the Fee veſted in him, and not before. [c] And to the like Effect he alſo cited *Pleſington*'s Caſe in 6 *R.* 2. where a Leaſe for Years was made to two, upon Condition that if the Leſſor died within the Term, or granted the Reverſion over, then the Termors ſhou'd have a Freehold, and there it was held that inaſmuch as the Condition preceded the Freehold, the Freehold was not out of the Leſſor preſently; and thereupon one of the Leſſees for Years attorned as Termor for Years, ſaving his Advantage. [d] And upon the ſame Principle *Barham* alſo cited a Caſe which he ſaid was in 12 *Ed.* 2. where a Man made a Leaſe for Years, upon Condition that if the Leſſee did ſuch an Act, he ſhou'd have the Fee, and a Stranger brought a *Præcipe quod reddat* againſt both the Leſſor and the Leſſee, and it was adjudged to be maintenable, and not to abate by Reaſon of any Doubt whether the Condition was performed or not, for if the Condition was performed, then from the Time of the Performance of it the Freehold ſhou'd be in the Leſſee, and out of the Leſſor, which wou'd have abated the Writ if it had been brought againſt the Leſſor only, and if the Fee was out of the Leſſor before the Performance of the Condition, then the *Præcipe quod reddat* might have been brought againſt the Leſſee only, but this the Book does not warrant to be done, and therefore it is to be taken that the Party was forced to bring the *Præcipe* againſt them both. So that when the Condition precedes the Eſtate, the Condition ought to be performed before the Eſtate ſhall veſt. But the Lord *Dyer* cited a Caſe which he ſaid was in *Frowick*'s Reading, and was thus: [e] A Man makes a Leaſe for Years of Land to an Alien, upon Condition that if the Alien pays to the Leſſor ſuch a Sum of Money during the Leaſe, then he ſhall have the Fee, and afterwards the King makes him a Denizen, and after that he pays the Money, and all this Matter is afterwards found by Office, in this Caſe he ſaid that *Frowick* was of Opinion that the King ſhou'd have the Fee.

[f] *But (with Submiſſion) it ſeems to me that the Law is not ſo. For when the Condition was, that upon the Payment he ſhou'd have the Fee, the Fee ſhall not veſt until the Payment, for alho' the Condition ſhall have Relation to the Livery for the avoiding of Incumbrances, yet, as to the veſting of the Fee, it ſhall only have Relation to the Time of the Payment, for the Condition was, that if he paid the Money, then he ſhou'd have the Fee, and he cou'd not have the Fee before; and then when the Fee veſted in him, he was a natural Subject, and had Capacity to take as a Subject. So that the Time when the Condition was made is not ſo much to be regarded as the Time when the Fee veſts, and when it veſted in that Caſe, the Leſſee was capable as a Subject. And*

a H. 14 H. 8. 17. pl. 6. Bro. Condition 67. Ante 30.

b T. 10 Ed. 3. 39. pl. 33. Fitz. Aſſize 161. Bro. Conditions 101. Co. Litt. 217. a.

c 6. R. 2. Fitz. Quid juris clamat 20. Ante 26(a). And ſee the other Books there cited.

d P. 12 Ed. 2. Fitz. Voucher 265. Vin. Abr. tit. Præcipe quod reddat E. pl. 2.

e Vin. Abr. tit. Alien A. pl. 15. tit. Relation A. pl. 4. See L. P. Plowd. Quær. § 283.

Nota bene by the Reporter.

f With this Opinion of *Plowden* agrees 2 Leon. 139 *Per Drew*, arguendo. Plowd. Quær. § 371.

[a] *And if a Feoffment is made with Warranty to a Man and a Feme-ſole, who intermarry, and afterwards they vouch, and recover in Value, there are no Moieties between them, for although they were ſingle when the Warranty was made, yet when they recovered and had Execution, they were Huſband and Wife, at which Time they* [b] *cannot take by Moieties.* [c] *And if a Reverſion is granted to a Man and a Feme-ſole, and afterwards they inter-marry, and then Attornment is had, they have no diſtinct Moieties, for although they were ſingle when the Grant was made, yet when the Reverſion ſettled in them, they were Huſband and Wife, between whom there are no Moieties. Wherefore the Time in which a Thing veſts ought to be regarded. And ſo in the ſaid Caſe put by the Lord* Dyer, *inaſmuch as the Leſſee was a Denizen at the Time when the Fee veſted, in my Opinion he ſhall take it to his own Uſe. But the greater Queſtion in that Caſe ſeems to be, whether or no the veſting of the Fee ſhall be diſturbed by the Relation of the King's Title to the Time of making the Term for Years, for the King was entitled* [d] *to the Term before the Performance of the Condition, and if the King's Title takes away the Term from the Time of the firſt making the Term, then the Condition which is annexed to it ſhall be alſo taken away from the Time of the firſt making the Term, and ſo it was gone before the Performance of the Condition. But it ſeems to me that it ſhall not be ſo, but that the Fee ſhall veſt in the Leſſee, and that he ſhall have it to his own Uſe, becauſe it was in him before the Office found.*

[a] Plowd. Quær. § 183. Co. Litt. 187. b. Dy. 149. pl. 82. in Margine. Wing. Max. reg. 211. pl. 8. Vin. Abr. tit. Baron and Feme S. a. pl. 13.

[b] See Ante 58 (m).

[c] Co. Litt. 187. b. 310. a. 2 Co. 68. a. Wing. Max. reg. 211. pl. 3. Vin. Abr. tit. Baron and Feme S. a. pl. 16. Contra Plowd. Quær. § 180, 183.

[d] Becauſe an Alien cannot purchaſe a Leaſe for Years of Land, but for the King. Co. Litt. 2. b. Plowd. Quær. § 371.

And many other Caſes (which I have here omitted, becauſe it is ſo common a Learning) were put upon this Ground, that where there is a Condition precedent, the Eſtate ſhall not be removed out of the Perſon who had it until the Condition is firſt performed. And ſo in the principal Caſe, inaſmuch as Sir *Francis Lovel* limited the Condition to precede the Removal of the Fee out of himſelf who had it, *viz.* that he himſelf ſhould firſt die without Iſſue, this Condition ought to be performed, and before it was performed the Fee did not veſt in *Wright* the Leſſee, but continued in Sir *Francis Lovel.*

And further they held that, after the Condition was performed, *Wright* the Leſſee ſhould have the Fee-ſimple, if the other Points hereafter moved did not make againſt him. But how he ſhould have the Fee-ſimple, *viz.* whether as a Grant of the Reverſion, (for the Words are, that if Sir *Francis* ſhould die without Iſſue, then he granted the Tenements to *Wright* and to his Heirs) or by Way of Remainder, or how otherwiſe, was touched not only at the Bar, but alſo at the Bench. And (as ſome of them ſaid) *Wright* cannot have it as a Grant of the Reverſion, becauſe a Grant of a Reverſion [e] cannot be made to veſt at a Day to come, nor can he have it as a Remainder, becauſe that cannot properly be called a Remainder which in its veſting merges the firſt Eſtate, and therefore the Fee-ſimple ſhall neceſſarily enure to *Wright* by way of Enlargement of his Eſtate upon the Performance of the Condition; and ſo he ſhall take the Fee-ſimple upon the Performance of the Condition, if the Matters hereafter moved are no Impediment thereto.

A. leaſes for Life to B. upon Condition to have Fee, here the Fee enures to B. by Way of Enlargement of his Eſtate upon the Performance of the Condition, and not as a Reverſion or Remainder.

[e] See Ante 155 (i) and the Books there cited.

For the Plaintiff.

And as to this, it was objected that there are divers Cauſes why the Fee-ſimple ſhall never paſs to *Wright*. One is, the Clauſe in the Act of Attainder, that Sir *Francis Lovel* ſhould forfeit to the King and to his Heirs all Reverſions whereof he was ſeized the 21ſt Day of *Auguſt*. Which Word *(forfeit)*, it was ſaid, veſts the Fee-ſimple in the King without any Office, and is as much as to ſay, that the King ſhall have it by Forfeiture. For the Statute is ſufficient to veſt the Reverſion in the King without Office, and if an Office was neceſſary to veſt the Eſtate of Sir *Francis Lovel* in the King, then the Words of the Statute, which ſay that he ſhall forfeit the Reverſion to the King, are not ſatisfied, for if he ſhall forfeit it by the Act and by Office alſo, then he ſhall not forfeit it by the Act, for if two Things are neceſſary to make the Forfeiture, then the one without the other is not ſufficient. And the Act ſays nothing of any Office or Inquiſition, but only ſays that he ſhall forfeit, which is as much as to ſay, that he ſhall forfeit by the Act only without other Circumſtance, wherein it is implied that the King ſhall be in Poſſeſſion by the Forfeiture by Force of the Act, in which Caſe it lies in Averment that Sir *Francis Lovel* had the Reverſion at the Time of the Act, and then the Act conveys it to the King, and there is no Neceſſity for an Office unleſs to charge the Officers with the true Value of the Reverſion to be anſwered for in the Exchequer, and the Revenue of it may be anſwered to the King by Survey or otherwiſe without Office; ſo that the Act, with the Averment that Sir *Francis Lovel* was ſeized of the Reverſion at the Time of the Act, is ſufficient to remove the Eſtate out of Sir *Francis Lovel*, and to veſt it entirely in the King.

Then if the Reverſion is veſted in the King, there are four Cauſes why it ſhall not veſt in *Wright* upon the Performance of the Condition. One is, becauſe there is no Privity between the Leſſee for Life and the King. For when Sir *Francis Lovel* granted to *Wright* the Leſſee that his Eſtate ſhould be enlarged, this Agreement was a Thing which reſted in Privity between the Leſſee of the one Part, and the Leſſor and his Heirs of the other Part, and if this Privity is broken on either Side, then the Contract is diſſolved. For if the Leſſee had granted his Eſtate to another, and afterwards Sir *Francis Lovel* had died without Iſſue, the Fee-ſimple ſhould never have veſted in the Leſſee nor in his Aſſignee, for his Aſſignee is not privy to the Agreement real, and therefore his Eſtate ſhall not be enlarged. And although *Wright* the Leſſee was privy to the Agreement real, yet when he has granted his Eſtate to another, he has thereby made himſelf a Stranger to the Reverſion, for when his Eſtate is gone over to another, then there is no Privity between him and the Perſon in Reverſion, becauſe without an Eſtate there can be no Privity, and therefore the Privity which exiſted before is by the Grant of his Eſtate diſſolved, in which Caſe *Wright* ſhall never have the Fee upon the Performance of the Condition, for the Fee was appointed to ſettle in *Wright* by

Where an Eſtate is to encreaſe by Force of a Condition, the particular Eſtate muſt continue in the Leſſee or Grantee till the Encreaſe happens. S. P. 8 Co. 75. a. Vin. Abr. tit. Condition T. d. pl. 4.

Way of Enlargement of his Eſtate, and now he has no Eſtate to be enlarged, and the Privity went out of him along with the Eſtate, and the Grantee of the Eſtate is not privy to the Condition, ſo that Privity is wanting on every Side, and therefore the ſaid Condition which is an Agreement real is diſſolved. And as it may be diſſolved by Failure of Privity on the Part of the Leſſee, ſo, it was ſaid, it may be diſſolved by Failure of Privity on the Part of the [a] Leſſor. For if before the Performance of the Condition he had granted the Reverſion in Fee to another, and Attornment had been had, or if he had died without Heir, and the Reverſion had eſcheated, or if there had been any other Removal of the Reverſion to a Stranger by the Act of him who had the Reverſion, or by the Act of the Law, the Performance of the Condition ſhould not have taken away the Reverſion from him to whom it was ſo transferred. And this was reſembled to the Caſes of Privity or Confidence, and many Caſes were put upon theſe Grounds. As the Caſe of a Feoffee to Uſe who is diſſeized, and other like Caſes. And ſo here inaſmuch as by the Word *(forfeit)* in the Act the Reverſion was out of Sir *Francis Lovel*, and veſted in the King, who is a Stranger, and not in the ſame Privity as Sir *Francis Lovel* and his Heirs were before the Performance of the Condition, the ſaid Agreement real is diſſolved, ſo that the Reverſion ſhall by no Means be removed or deveſted out of the King.

[a] Contra 8 Co. 76. a. that the Privity of the Eſtate on the Part of the Leſſor needs not be continued; with which agrees the Rule in the preſent Caſe, Poſt 486. Plowd. Quær. § 305, in fine.

But admitting that the Failure of Privity is no Cauſe to break the ſaid Agreement real, but that the King ſhall be bound by the Condition as well as Sir *Francis Lovel* or his Heirs, yet, it was ſaid, there is another Cauſe which overthrows *Wright*'s Claim to the Fee-ſimple, and that is, becauſe it is not ſaved to him by ſufficient Words in the Saving of the Act of Attainder. For the Saving to Strangers is but of four Things, which are therein comprehended in four Words. [b] The firſt is, Right, and that is, where *A.* has got Poſſeſſion of a Thing which was wrongfully taken from *B.* as by Diſſeizin, Ejectment, and the like, this Claim which *B.* has to the Thing is termed a Right; and this was not the Caſe of *Wright* the Leſſee here, for nothing was wrongfully taken from him. [c] The next Word is, Title, and that is properly where *A.* has a lawful Cauſe to have a Thing which *B.* has, and he has no Action to recover it, as a Title of Entry for Mortmain, or for the Breach of a Condition; and in our Caſe *Wright* the Leſſee had no Cauſe to have the Reverſion at the Time of making the Act of Attainder, but he had only a Condition, which might be termed a Poſſibility to have the Reverſion, ſo that he had no Title in Fact. [d] The third Word is, Action, which is no more than a Suit given by the Law, and in our Caſe there was no Suit given to *Wright* the Leſſee to recover the Reverſion. [e] The fourth Word is, Intereſt, which *Bendloe* ſaid was Part of an Eſtate in the Land, as a Leaſe for Years, or an Eſtate which a Man has by Execution upon a Recognizance, or the like, and ſuch had not *Wright* the Leſſee here in the Reverſion. So that theſe different Words ſhew that it was the Intent of the Makers of the Act to ſave all Things that were comprehended in the Words, and none other, and in our Caſe the Condition is another which does not fall within the Words, and therefore it is not ſaved; ſo that *Wright* the Leſſee is excluded for ever from this Condition, and if the Condition is gone, then the Fee ſhall never come to him, for it is the Condition that muſt bring it, which Condition is taken away by the Act.

[b] See Co. Litt. 345. a. 2 Rol. R. 501.

[c] See Co. Litt. 345. b. 347. b. 8 Co. 153. b. 3 Keb. 244. 1 Mod. 99.

[d] See Bract. fo. 98. b.

[e] See Co. Litt. 345. b. Poſt 487.

But admitting that the Condition is ſaved by the Word *(Intereſt)* or by any of the ſaid other Words in the Act of Attainder, yet the Defendant has not ſhewn that *Wright* the Leſſee was ſuch a Perſon as could take Advantage of the Saving. For there is an Exception in the Saving, *viz. ſaving to every Perſon and Perſons, and to his or their Heirs, other than ſuch Perſons as by the ſaid Act are attainted, and their Heirs*, &c. So that the Saving is not abſolute, but excepts the Perſons attainted and their Heirs, and therefore if the Party would enable himſelf to take Benefit of the Saving, he ought to aver that he was not any of the Perſons attainted, nor Heir to any of them, for the Word *(Perſons)* in the plural Number ſhews that there were others attainted beſides Sir *Francis Lovel*, and *Wright* the Leſſee might be one of them, or Heir to one of them, for which Reaſon the Defendant ought to have averred that *Wright* was none of them, and ſince he has not done ſo, he has not ſhewn that he was fully able to take Benefit of the Saving. [f] And to prove this, the Caſe in 8 *Ed.* 4. was cited, where it was agreed by the Juſtices in the Exchequer-Chamber, that upon a general Pardon granted to all except thoſe who were adherent to *M.* and her Son, if a Man pleads ſuch Pardon he ought to ſhew and ſurmiſe in his Plea that he is none of the Perſons excepted, and that he was not adherent to *M.* and her Son, and ſo of all other Points excepted in the Pardon, for the Party ought to prove [g] that he is ſuch a Perſon as can enjoy the Benefit of the Pardon. And ſo ought it to be done in the principal Caſe. Wherefore inaſmuch as the Defendant has not averred that *Wright* was not any of the Perſons attainted, nor Heir to any of them, he has not ſhewn him to be able to take Benefit of the Saving.

[f] M. 8. Ed. 4. 7. pl. 1. Fitz. Pardon 3. Bro. Charter de &c. 46. Pleading 124. Ante 103 (b). and ſee the other Books there cited.

[g] Carth. 132 *Per Curiam.*

But admitting that the Condition was ſaved by the ſaid Saving in the Act of Attainder, and that *Wright* had been ſhewn to be a Perſon able to take Benefit of the Saving, yet there is another Cauſe why the Fee-ſimple could not veſt in *Wright* preſently by the Death of Sir *Francis Lovel* without Iſſue, (if ſo be it be granted that the Word *(forfeit)* in the Act transferred the Reverſion of the Land to the King's Poſſeſſion) and that is, becauſe the Fee-ſimple which was veſted in the King could not be deveſted out of him, and placed in *Wright* the Leſſee, without *Monſtrans de droit*, or Petition, as the Caſe happens. [h] For as the King's Prerogative requires Matter of Record to bring Land to his Hands, ſo it requires Matter of Record to remove or take it out of him. And upon

[h] Ante 213 (i) and See the Books there cited.

upon the *Monſtrans de droit*, or Petition of Right, the Party ſhall have an *Amoveas manum* directed to the Eſcheator, which is in Lieu of an *Habere facias ſeizinam* upon a Recovery, and until this the Fee ought to remain in the King. Then in the principal Caſe when Sir *Francis Lovel* died without Iſſue, the Fee-ſimple was in the King, being conveyed to him by the Word *(forfeit)* in the Act of Attainder, as is ſaid before, which cannot be deveſted without the ſaid Circumſtance. And from thence it follows, that if the Fee-ſimple could not veſt in *Wright* the Leſſee when the Condition was performed, *viz.* at the very Inſtant when Sir *Francis Lovel* died without Iſſue, it ſhall never veſt in him, for the Words of the Condition are, that if Sir *Francis Lovel* ſhould happen to die without Iſſue, then he granted the Tenements to *Wright* in Fee, which Word *(then)* is an Adverb of Time, and the Fee ought to veſt at the ſame Inſtant in which it was appointed, or it ſhall never veſt. As if a Leaſe is made for Life, and if the Tenant for Life dies, that then the Land ſhall remain to the right Heirs of *J. S.* in this Caſe if *J. S.* is living, his right Heir ſhall never have it, becauſe it cannot veſt when the particular Eſtate is determined, at which Time it ſhall either veſt or never. [a] So if a Man deviſes Land, and is diſſeized, and dies, the Deviſee ſhall never have it, becauſe it could not veſt in him at the Time of the Death of the Deviſor. So here inaſmuch as the Fee-ſimple could not remove out of the King, and veſt in *Wright* the Leſſee at the ſame Inſtant when the Condition was performed, he ſhall never have it, for afterwards he could not have a Petition nor *Monſtrans de droit*, becauſe he had no Right, for the Right which by Poſſibility he might have had was utterly deſtroyed by Reaſon of the King's Seizin, which would not ſuffer the Fee to veſt in *Wright* when it ſhould have done, and thereby the Poſſibility which *Wright* had to the Fee-ſimple was utterly deſtroyed. And thus the Caſe would have ſtood, although the Office had not been found in the 11th Year of the preſent Queen. But that Office, which has Relation to the Time of the Title given to the King, fortifies the Seizin of the King, and tends to deſtroy more effectually the Title or Poſſibility which *Wright* had to the Fee-ſimple. And therefore the Plaintiff, who derives his Title from the preſent Queen, ought to have Judgment to recover. And of this Opinion was *Manwood* Juſtice, who argued that the Word *(forfeit)* in the Act of Attainder veſted the Fee in the King, and that the Condition was not ſaved by the Saving in the ſaid Act.

When an Eſtate is to encreaſe by Force of a Condition, the Encreaſe muſt veſt at the ſame Inſtant when the Condition is performed, or it ſhall never veſt. S. P. 8 Co. 75. a. Poſt 489 (d).

[a] M. 39 H. 6. 18. pl. 23. *Per Yelv. et Markh.* Bro. Deviſe 15.

But all the other Juſtices argued to the contrary. And they took the Caſe in the ſame Light as if no Office had been found, becauſe the Office found in the 11th Year of the preſent Queen was utterly void for two Cauſes. The one was (which *Harper* Juſtice greatly relied upon) becauſe it is not ſhewn in the Replication that the ſaid *Richard Prince* and the others, before whom the Office was found, had Authority by the Commiſſion to enquire of the Matter which was enquired by them. For their Power ought to have been ſhewn in the Plea, as, that it was enquired before them by the Queen's Commiſſion to them directed to enquire what Lands or Tenements Sir *Francis Lovel*, who was attainted by Parliament ſuch a Day for Treaſon by him committed, had the Day of the Treaſon committed, or afterwards, and before the Act of Attainder, or, that the Commiſſion authorized them to enquire of all Lands concealed to which the Queen had Right or Title, or in ſome other Manner their Authority ought to have been ſhewn, as alſo it ſhould have been ſhewn that the Inquiſition was purſuant and agreeable to the Authority given by the Commiſſion. As if a Man would plead that ſuch a one was indicted of Treaſon before ſuch Perſons, he ought to ſhew that the Commiſſioners had Authority by the Commiſſion to enquire of Treaſons. So if a Man would plead that ſuch a one was indicted and arraigned before Juſtices of Peace, he ought to ſay that they were aſſigned to enquire, hear, and determine Felonies and other Miſdemeanors in the ſame County, for Perſons appointed by Commiſſion have no Power but that which is limited to them by the Commiſſion. But if an Inquiſition is pleaded to be taken before the Eſcheator *by Virtue of his Office*, or before the Sheriff, or before the Steward of a Leet, touching any thing whereof they have Authority by the Common Law or Statutes, there the Party ſhall not ſurmiſe that they had Authority over the Thing, becauſe they are Officers at the Common Law, ſo that the Authority which they have by the Law is known to the Juſtices, and appears to the Court judicially, but not in the other Caſe, and ſo is the Diverſity. Wherefore inaſmuch as it is not ſhewn by the Plea that the Commiſſioners had Authority by the Commiſſion to enquire of the Thing here enquired of, the Inquiſition is void.

E contra for the Defendant.

Where an Inquiſition is pleaded to be taken by Virtue of a Commiſſion, the Party ought to ſhew that the Commiſſioners had Authority by the Commiſſion to enquire into the Matter; but where it is pleaded to be taken before the Eſcheator *virtute officii*, or before the Sheriff, touching a Matter which they are empowered by the Common Law or Statutes to enquire into, their Authority needs not be ſhewn, becauſe it appears to the Court judicially. Same Diverſity 2 Mod. Entr. 336. pl. 29.

The other Cauſe why the Inquiſition is void, is, becauſe the Commiſſioners have not enquired whether Sir *Francis Lovel* was ſeized of the Reverſion of the five Acres the ſaid 21ſt Day of *Auguſt*, *Anno* 1 *H.* 7. or afterwards, and before the 7th Day of *November* then next following, at which Day the Act of Attainder was made, for to that Time the Forfeiture only extends. And ſo inaſmuch as the Jury was ſtraitned to that Time, and have not found the Seizin within that Time, the Inquiſition is void, for they have found nothing more than that King *Henry* 8. by Reaſon of the Conviction, Attainder, Act, and Deſcent aforeſaid was ſeized of the ſaid Tenements in his Demeſn as of Fee, in Right of his Crown. Whereas neither the Act nor all that preceded it could make *Henry* 8. to be ſeized, unleſs Sir *Francis Lovel* was ſeized within the Time aforeſaid, which ought to have been found ſpecially and preciſely, and ſeeing it is not, the Inquiſition is void. And ſuch was the Opinion of the Court. So that the Caſe now ſtands as if no Office had ever been found, and the other Points are only to be taken into Conſideration.

Where a Perſon is attainted of Treaſon by Act of Parliament, and all his Lands thereby forfeited from ſuch a Day before the making of the Act, upon an Office to entitle the King the Certainty of the Lands, whereof the Perſon attainted was ſeized within the Time limited, ought to be preciſely found, or elſe the Office is void. in Margine.

And as to theſe, and firſt as to the Word *(forfeit)* in the Act of Attainder, all the Juſtices except *Manwood* argued, that the Word *(forfeit)* did not veſt the Reverſion in the King, and that

Vide 3 Co. 2. a. Dy. 208. b.

it

Before the Statute of 33 *H.* 8. *cap.* 20. if a Man was attainted of High Treaſon by Act of Parliament, and it was thereby enacted that he ſhould forfeit all his Lands, yet that was not ſufficient to veſt any Freehold in Deed or in Law in the King until an Office found, for the Words *(ſhall forfeit)* were only ſufficient to veſt a Right or Title in the King. S. P. 29 H. 8. Bro. Charter de pardon 52. Dy. 325. pl. 38. 1 Co. 42. a. 3 Co. 10. a. 2 Rol. R. 339, 375. 2 And 33. Godb. 312. 2 Leon. 126. Hob. 231. Crompt. J. C. 15. b. Vin. Abr. tit. Statutes E. 7. pl. 4.

it is not a ſufficient Word to veſt in the King any Freehold in Deed or in Law, but is only effectual to veſt a Right or Title in the King, as an Attainder of Treaſon at the Common Law does. And here the Word *(forfeit)* does no more than if it had been totally left out of the Act, (unleſs in the Point of Relation, for the Act ſays that he ſhall forfeit to the King all his Lands which he had the 21ſt Day of *Auguſt* laſt paſt, or at any Time afterwards, in which Point of Time the Word has Effect) for, without the Word *(forfeit)* in the Act, he ſhould have forfeited all his Lands to the King by the Common Law, becauſe he was attainted of Treaſon, for be the Attainder by Statute or by the Common Law, the Forfeiture to the King follows it as the Shadow does the Body (as *Dyer* termed it).

But although the Act ſays that he ſhall forfeit all his Lands, yet it does not appear what Lands or Tenements he had, and that ought to appear by Record, and is not Matter of Averment, which is not ſufficient, for Words without a Record are not allowable to entitle the King, but his Title in Caſes of Treaſon ought always to appear by Record, and where it does not appear by Record what certain Land the Party attainted had, the common Law will never adjudge the Freehold in Deed or in Law of any Land to be in the King until Office found. And for Remedy hereof the Branch of the Act of 33 *H.* 8. *cap.* 20. was made, by which it is enacted, *that the King ſhall be adjudged in the actual or real Poſſeſſion of Lands or Tenements of Perſons attainted of Treaſon, without any Office or Inquiſition to be found*; by which Act this Point is remedied in all Caſes of Treaſon which happen after the ſaid Act of 33 *H.* 8. but not in thoſe which happened before it, as our Caſe did; and if the Forfeiture only had veſted the Poſſeſſion in the King, this Act would have been in vain. [a] And in the Lord *Hungerford*'s Caſe in 4 *Ed.* 4. where he was attainted of High-Treaſon by Act of Parliament, and by the ſame Act it was ordained that all Lands which he had ſuch a Day before the Act ſhould be forfeited to the King, it was there ſaid that the King might enter without Office or Inquiſition found, but *Markham* Chief-Juſtice of the King's Bench ſaid, "we will by no "Means grant that," and ſo ſaid other Juſtices. From whence it appears that the Word *(forfeit)* did not veſt the Poſſeſſion in the King, nor give him Entry without Office firſt found. And to this Purpoſe *Harper* Juſtice cited the Caſe in 27 *H.* 8. *Bro. tit. Office devant Eſcheator, pl.* 17. which is there put thus. "Note by them of the Exchequer, that where a Man is attainted by Parlia- "ment, and it is thereby ordained that all his Lands ſhall be forfeited, and it is not ſaid that they "ſhall be in the King without Office, there they ſhall not be in the Seizin of the King to grant "over without Office, for it does not appear of Record what Lands they are." Theſe are the Words of the Book, which, he ſaid, ſtrongly enforced and confirmed his Opinion, that the Word *(forfeit)* in the Act of Attainder here did not veſt the Reverſion in the King without Office found.

[a] M. 4. Ed. 4. 22. pl. 1. Fitz. Traverſe 5. Bro. 32.

By the Common Law after an Attainder of High-Treaſon, and until Office found, the Freehold ſhall continue in the Perſon attainted as long as he lives, ſo that he ſhall be Tenant to every *Præcipe*; and when he dies, if the Land is held of a common Perſon, the Freehold in Law ſhall be in the Lord of the Fee, before Entry, until Office found for the King, and if the Land is held of the King, then it ſhall be in the King in the Nature of a common Eſcheat, until Office found. S. P. 2 Leon. 126. 5 Co. 52. b. Strange 349.

And it was moved in this Caſe, that if the Poſſeſſion in Deed or in Law of the Lands of a Perſon attainted of Treaſon ſhall not be in the King before Office found, in whom ſhall it be by the Courſe of the common Law in the Life of the Perſon attainted, and in whom after his Death? And *Barham* Serjeant and the Lord *Dyer* held, that after the Attainder, and until Office found, the Freehold and the Fee-ſimple ſhould be in Fact in the Perſon attainted as long as he ſhould live. For as he hath Capacity to take in Deed Lands by a new Purchaſe, ſo hath he Power to retain his antient Poſſeſſions, and he ſhall be Tenant to every *Præcipe*. But when he dies, the Land cannot deſcend to his Heir, becauſe the Blood between him and his Heir is corrupted, and it cannot be in the King, becauſe no Office is found; and therefore *Barham* ſaid, if the Land is held of a common Perſon, [b] it ſhall eſcheat to ſuch common Perſon, and he ſhall be Tenant in Law before Entry to every *Præcipe*, until Office is found for the King: But if the Land is held of the King himſelf, then after the Death of ſuch Perſon attainted of Treaſon, the Freehold in Law ſhall be in the King until Office is found, in the Nature of a common Eſcheat, and not in the Nature of an Eſcheat for Treaſon. From whence it follows, that the Reverſion in Fee in the principal Caſe remained in Sir *Francil Lovel* all his Lifetime after the making the Act of Attainder, and when he died without Iſſue, then the Fee veſted in *Wright* the Leſſee, or elſe it went to the Lord by Eſcheat (as *Barham* ſaid), in either of which Caſes it follows, that the other Points which have been moved, *viz.* whether the Agreement real is diſſolved, and whether the Saving in the Act of Attainder has ſaved the Condition, and whether *Wright* was ſuch a Perſon as could take Benefit of the Saving, are not material, nor at all neceſſary to be conſidered in the Caſe: And from hence it alſo follows, that the Matter of the Bar is not confeſſed and avoided, nor traverſed, and therefore, it was ſaid, Judgment is to be given for the Defendant, and againſt the Plaintiff.

[b] See this Point denied 3 Co. 10. b. *Per Curiam.*

Where an Eſtate is to encreaſe by Force of a Condition, it is not neceſſary for the Privity of the Eſtate on the Part of the Leſſor to continue at the Time when the Encreaſe happens, ſo that although the Reverſion is removed out of the Leſſor, and out of his Blood, by his Grant, Eſcheat, &c. yet the Condition remains, and the Encreaſe ſhall veſt in the Leſſee upon the Performance of the Condition, diſcharged of all Incumbrances ſubſequent to the Condition. S. P. 8 Co. 76. a. Plowd Quær. § 305, in fine. Vin. Abr. tit. Condition T. pl. 26 in Margine. T. d. pl. 4. in Margine.

Nevertheleſs the Juſtices argued to the other Matters which were moved. And as to the Condition, they held that tho' the Reverſion was removed out of the Perſon of the Leſſor, and out of his Blood, by his Grant, or by Eſcheat, or by other Cauſe whatever, yet this ſhall not hurt the Leſſee when the Condition is performed, for the Act of the Leſſor cannot do any Prejudice to the Leſſee, but when the Condition is performed, the Fee ſhall veſt in him, and ſhall be diſcharged of all Rents, Recognizances, Conveyances, or other Incumbrances made by the Leſſor after the Condition was firſt made, or coming under the Leſſor, or under the Condition, or under Felony or Treaſon, or other Matter done by him. So that there is no Privity requiſite in the Caſe on the Part of the Leſſor or his Heirs, but the Condition is an Agreement real with which the Land is charged, into

whatſoever

whatſoever Hands it comes. [a] And to prove this, *Pleſington*'s Caſe in 6 *R.* 2. was cited, where a Leaſe was made for Years, ſo that upon certain Conditions the Leſſees might have a Freehold, and the Reverſion was granted by Fine, and a *Quid juris clamat* was ſued againſt the Leſſees, and there it fully appears by the Book that the Leſſees ſhould be allowed the Benefit of ſuch Conditions as would bring the Fee to them, and which were not repugnant to Law, ſo that upon the Performance of ſuch Conditions the Freehold ſhould accrue to them, and ſhould be removed out of the Grantee of the Reverſion, as well as it ſhould have been out of the Leſſor and his Heirs, if it had remained in the Leſſor. But the Lord *Dyer* ſaid that one of the Leſſees in that Caſe claimed the Fee by a Condition which was [b] repugnant to the Fine, and therefore he could not have the Fee. *And note that* Belknap *Chief Juſtice there put this Caſe*; [c] *if a Leaſe is made for Term of Years, upon Condition that if the Leſſee pays a certain Sum of Money within the Term, then he ſhall have the Fee, and he accordingly pays the Money, there he ſhall have the Fee by the Condition, but yet if before the Day of Payment the Leſſor levies a Fine to another, the Termor ſhall attorn by Proteſtation, and if he pays the Money at the Day limited, the Conuſee ſhall have it, and he who was the Termor ſhall have the Freehold. From which Caſe it appears that by the Condition the Fee ſhall be transferred as well from the Grantee of the Reverſion, who is a Stranger, as from the Leſſor and his Heirs.* And ſo all the Juſtices except *Manwood* held, that the real Agreement, viz. the ſaid Condition, bound all that ſhould come to the Reverſion after the Condition was made, whether they were Strangers or Privies in Blood.

[a] 6 R. 2. Fitz. Quid juris clamat 20. 1 And. 316.

[b] See the Reaſon of the Repugnancy agreeable to Dyer's Opinion, Dy. 209 pl. 21. Co. Litt. 378. b. 1 Co. 84. b. Perk. § 729. Ante 34 at the Bottom.

Nota bene by the Reporter.

[c] S. P. Co. Litt. 217. a.

And alſo the ſaid Juſtices argued to the Matter of the Saving in the Act of Attainder. But *Harper* Juſtice was of Opinion, that tho' it ſhould be confeſſed that the Word *(forfeit)* veſted the Reverſion in the King, yet it was not neceſſary to have any Saving in the Act. For, he ſaid, when the Makers of the Act inſerted the Words, that Sir *Francis Lovel* ſhould forfeit all the Lands and Tenements whereof he was ſeized ſuch a Day, it was not their Intent to make any other forfeit or loſe any Thing but Sir *Francis Lovel* only, who had offended, for it would have been a very unjuſt Thing in them to have inflicted a Puniſhment by the Act upon another who had committed no Offence, which cannot be preſumed to have been the Meaning of the Legiſlature, but their Intent was only to transfer the Poſſeſſions of Sir *Francis Lovel*, who had been guilty of an Offence, to the King, againſt whom the Offence was committed. So that the Act is no more than an Inſtrument of Conveyance, whereby the Poſſeſſions of one Man are transferred over to another, and it is the Office of Judges to expound the Words of an Act of Parliament ſo as that they may agree with Equity and good Conſcience, and do no Wrong or Injury to a third Perſon. And ſuch Conſtruction agrees with the Reaſon of the Common Law, which, altho' it allows many Prerogatives to the King, yet will never ſuffer them to hurt others. [d] And therefore, he ſaid, if a Bridge is repairable by a Subject, and it falls to Decay, and the King pardons him from repairing it, yet this ſhall not excuſe him, but he ſhall repair it notwithſtanding, becauſe others, viz. all the Subjects of the Realm, have an Intereſt in it. [e] So, he ſaid, if a Man has a Jewel in Pledge for 10 l. and he that pledged it is attainted, the King ſhall not have the Jewel unleſs he pays the 10 l. for his Prerogative [f] ſhall never prejudice another. [g] And, he ſaid, in 13 *R.* 2. the Earl of *Kent* had a Return of certain Cattle in Replevin, and the Owner of the Cattle was attainted, and there it was held that the Earl ſhould retain the Cattle againſt the King until he had received Satisfaction for the Thing diſtrained for, and the King's Prerogative could not diſcharge the Cattle from the Return, becauſe it could not prejudice another. And upon this Principle we ought to preſume that the Makers of the Act of Attainder did not intend to do any Prejudice to other Perſons, and therefore that the Condition here ſhould have been ſaved, if there had been no expreſs Saving put in the Act. So that in his Opinion it was ſuperfluous and unneceſſary to conſider the Words of the Saving. But if the Act had veſted the Reverſion in the King by the Word *(forfeit)*, then (it was ſaid) none of the Words in the Saving would have ſaved the Condition here but the Word *(Intereſt)*, and that would have ſaved it, as the Lord *Dyer* ſaid, for it ſeemed to him to be an Intereſt, and an Intereſt of and in the Land. But *Harper* ſaid that a Right and an Intereſt extend to the Thing itſelf, and here *Wright* the Leſſee had no Right to nor Intereſt in the Thing itſelf, viz. the Reverſion, for all that he had was an Agreement or a Contract real to have the Reverſion, which is no Intereſt of or in the Thing, and therefore in his Opinion it was not ſaved by the Words of the Saving, if ſo be that the Reverſion had been veſted in the King.

That where an Act of Parliament attaints a Perſon of High Treaſon, and that he ſhall forfeit all his Lands, it is unneceſſary to put in a Saving of the Rights of Strangers, which are always ſaved in ſuch Caſe by the Intent of the Legiſlature, for the Law will never puniſh thoſe who are innocent. See Godb. 324. 2 Rol. R. 340, 341.

[d] 5 Ed. 3. Itiñ. North. Fitz. Aſſize 445 M. 37 H. 6. 4. b. 12 Co. 30. 3 Inſt. 237. 2 Rol. R. 4. Noy 177. 2 Keb. 792. 3 Keb. 145. Vaugh. 333. 8 Mod. 17. 2 Hawk. P. C. 391. § 33. 1 Finch 45. 2 Finch 63. 3 Bac. Abr. 802. Ante 334 (t).

[e] S. P. Dy. 160. pl. 44. in Margine. 13 R. 2. 13 Bro. Pledges 31. in fine. Bellew's C. 263. Like Point H. 3 H. 6. *per Babing. et Martin*, Fitz. Dette 171.

[f] See Ante 246 (l) Vin. Abr. tit. Prerogative T. 2. pl. 1. Stath. Diſtreſs 3.

[g] 13 R. 2. 13. Bro. Pledges 31. Bellew's C. tit. Diſtreſs fo. 149. T. 12 R. 2.

But it ſeems to me that altho' it ſhould be admitted that the Word (forfeit) veſted the Reverſion in the King, yet the Word (Right) was ſufficient to ſave the Condition. For (Right) is a general Word, which may be largely extended, for there is [h] jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, *and* jus poſſidendi, *and the Word (Right) being joined to (of and in the aforeſaid Tenements) may in a Saving include every one of the aforeſaid Rights, and many others, for he who has Eſtovers in the Tenements has a Right to have them, and he who has Common or a Way has a Right to have it; ſo that the Word (Right) being put in a Saving may be largely taken, becauſe to ſave the Right of a Stranger, who has committed no Offence, ſtands with Reaſon and Juſtice, and to take it away is contrary to Reaſon and Juſtice, for which Cauſe every reaſonable Man will extend the Word (Right) to ſave every Thing which one has or may have of, in, or out of Land. And if this Queſtion had been put to the Makers of the Act of Attainder, Did you intend to ſave the Condition of* Wright *the Leſſee, who was innocent of the Crime of Treaſon, or to take it away? they would certainly have anſwered,*

Nota bene by the Reporter. Whether a Condition to enlarge an Eſtate may in the Saving of an Act of Parliament be comprehended under the Words *(Right)* or *(Intereſt)*.

[h] See Co. Litt. 345. b. 8 Co. 151. b. 2 Rol. R. 322. 401. Godb. 313. Vin. Abr. tit. Right A. pl. 1.

ſwered, God forbid that we ſhould take it away. And if it had been further aſked of them, Did you intend that it ſhould be ſaved in the Word (Right)? they would have anſwered, Yes. Wherefore to reſt upon the ſtrict Definition of the Word, and to refer it to a Right left upon a Diſſeizin or other Wrong, ſeems to me to be manifeſtly injurious, nam qui hæret in litera, hæret in cortice, *he that ſticks to the Letter, ſticks to the Outſide of the Law, and cannot enter into the inward Senſe and Spirit of it, for Want of the Application of Reaſon, and ſuch Perſon is pretty much in the ſame Situation with him who is commanded to enter into a Houſe, and is obliged to ſtand without, knocking at the Door, and can't enter in, becauſe he has not the Key to open the Lock of the Houſe-door, for Reaſon is the Key which pierces and opens the Senſe of obſcure Words. So that it ſeems to me (and under Correction be it ſpoken) that the Word (Right), which is a general Word, and the Word (Intereſt) which is alſo a general Word, may in a Saving be extended to all Conditions, Rents, Profits, and other Things to, in, or out of Land.*

Where a Man will take Benefit of an Act of Pardon with Exceptions, he muſt aver that he is not a Perſon excepted; but where he claims no Benefit by the Act, but only to keep an Eſtate which he had before the Act, in ſuch Caſe he need not make ſuch Averment. S. P. 2 Mod. Entr. 336. pl. 30. Vin. Abr. tit. Statutes E. 3. pl. 17.

And as to the Matter of the Averment, *Harper* ſaid that there was no Neceſſity for ſuch Averment that *Wright* the Leſſee was none of the Perſons attainted, nor Heir to any of them, for it is not expreſly ſhewn in the Pleading that any other Perſon than Sir *Francis Lovel* was attainted by the Act; and altho' from the Words of the Saving, which are, *to all others than to the Perſons attainted, and their Heirs*, it may be collected that others were thereby attainted beſides Sir *Francis Lovel*, yet it is not neceſſary to make ſuch Averment, becauſe *Wright* the Leſſee was not to take any Thing by the Act, but to retain that which he had before. And he ſaid that there was a Difference between the Caſe of [a] 8 *Ed.* 4. before cited and this Caſe here. For when a Man pleads a Pardon, he is to take Benefit by it, becauſe the Treſpaſs, Intruſion, or other Wrong which he has done is pardoned, and if he will have ſuch Benefit, he ought to make himſelf able to take it, for his Ability precedes the Benefit; but here *Wright* the Leſſee claimed nothing by the Act, but claimed to retain that which he had before the Act, in which Caſe if the Act does any Thing, it prejudices him, and defeats his Condition rather than gives him any Benefit, and therefore the Defendant, who derives his Title under that of *Wright*, ſhall not ſhew that which hurts himſelf, but the other Side ought to ſhew it, as to ſay that *Wright* was one of the Perſons attainted, for the Party himſelf ſhall not be forced to ſhew that which defeats his own Eſtate; and it ſhall not be intended that *Wright* was one of the Perſons excepted out of the Saving, unleſs it be preciſely alledged, which Allegation ought to come on the Part of him who is to have Benefit by the Act, and not on the Part of the other. Wherefore *Wright* the Leſſee ſhall be intended ſuch a one to whom the Benefit of the Act extends, and ſo the Lord *Dyer* held.

[a] M. 8 Ed. 4. 7. pl. 1. Ante 484.

Whether an Eſtate veſted in the King ſhall be deveſted out of him by Operation of Law by Force of a Condition, without *Monſtrans de droit*, or other Matter of Record, or not. *Affirmatur* Co. Lit. 354. b. 2 Co. 53 a. 8 Co. 76. b. Cro. E. 640. Pig. on Recov. 86. 1 Rol. R. 214. 2 And. 114. Poſt 553 (h).

Further, admitting that the Word *(forfeit)* in the Act of Attainder veſted the Reverſion in the King, and that the Condition was ſaved to *Wright* the Leſſee by the Saving in the Act, or even allowing this not to be ſo, and that the Office was good, then it was debated how *Wright* ſhould come to the Reverſion, viz. if he ſhould be put to his Petition, or *Monſtrans de droit*, or how otherwiſe he ſhould come to the Fee-ſimple. And as to this, if ſo be it is admitted that the Word *(forfeit)* veſted the Reverſion in Deed in the King, then the King's Poſſeſſion was full and perfect before the Condition performed and the Saving in the Act, and afterwards came the Saving, which would remove the Fee-ſimple out of the Perſon of the King, and convey it to *Wright* the Leſſee, ſo that *Wright* would have the Fee-ſimple by Means of the Saving, for it was in the King when the Condition was performed, and it muſt go out of him to *Wright* by the Condition and by the Saving. But in ſuch Caſe (it was ſaid by the greater Part of thoſe who ſpoke to this Matter) *Wright* ought to be put to his Petition, or *Monſtrans de droit*, or *Amoveas manum*, and ſo the King's Poſſeſſion ſhould be removed by Record. And the Earl of *Northumberland*'s Caſe in 3 *Ed.* 4. was cited, wherein this Caſe is put: [b] If a Diſſeizor of Land held of the King commits Felony, and is attainted, and afterwards the Diſſeizee enters, and then Office is found, which finds the Attainder, and the Seizin of the Perſon attainted at the Time of the Attainder, there it was agreed by thoſe who argued on both Sides, that the Diſſeizee ſhall be put to his Petition, and that he cannot retain the Land, for the Office is true, and the Foundation of the King's Title is Matter of Record, in which Caſe the Diſſeizee ſhall be put to his Petition, and he cannot continue to hold the Land by his Remitter, becauſe the King ſhall be adjudged to be ſeized from the Time of the Attainder, ſo that the Seizin of the King was prior to the Re-entry of the Diſſeizee, and therefore his Seizin ought to be removed by Matter of Record. So in the principal Caſe if the Word *(forfeit)* had been ſufficient to have conveyed the Reverſion to the King, *Wright* the Leſſee, in order to come to the Fee-ſimple, ſhould have been put to his Petition, or *Monſtrans de droit*, and by that Means have diſcharged the Hands of the King, becauſe the King's Poſſeſſion was more ancient than the Poſſeſſion of *Wright*. But in the ſaid Caſe in 3 *Ed.* 4. it is held by the better Opinion, that if the Diſſeizee, after the Felony done, and before the Attainder, had entered, and ſo had been remitted, in ſuch Caſe the Office afterwards found, which found nothing but the Seizin of him who was attainted after the Felony done, and not at the Time of the Attainder, ſhould not have driven the Diſſeizee to his Petition, for the Diſſeizee had re-entered and was remitted before the Attainder by which the King was entitled, [c] and the Office ſhall not have Relation for the Profits beyond the Time of the Attainder, altho' for the avoiding of Incumbrances made by the Party attainted it ſhall have Relation to the Time of the Treaſon committed,

[b] M. 3 Ed. 4. 25. a. Fitz. Office 1. Hob. 347. 2 Rol. R. 342, 497. Godb. 326. Hardr. 25.

[c] Co. Litt. 390. b. 8 Co. 170. a. Moor 630. 2 Rol. R. 421. W. Jones 78. 3 Keb. 653. 2 Hawk. P. C. 454, § 30, 32. 1 H. H. P. C. 360. 3 Bac. Abr. 87. Vin. Abr. tit. Office or Inquiſition K. pl. 5.

committed, but not for any Profits, and therefore it ſeems that in that Caſe he ſhould not have been driven to his Petition, or *Monſtrans de droit*, but ſhould have avoided all Objections and Claims by Anſwer. And this is not like to a Caſe put by Serjeant *Loveleſs*, which was thus: [d] The King's Tenant *in capite* makes a Leaſe for Life, rendring Rent, and for Default of Payment, a Re-entry, and dies, and the Rent is in Arrear, and the Heir enters for Non payment, and afterwards an Office finds the dying ſeized, and the Tenure in *capite*, and that the Heir was within Age, in this Caſe *Loveleſs* ſaid that the Entry for the Condition broken was avoided. And there ſeems to be a good Reaſon why it ſhould be ſo, becauſe after the Office found the Rent ſhall be adjudged to have been always due to the King, and not to the Heir, and therefore the Entry of the Heir for a Thing which was not due to him ſhall, by the Relation of the Office, be adjudged tortious. [a] For in an Action of Treſpaſs brought in 19 *Ed.* 4. for entering into a Cloſe, and taking the Graſs, the Defendant pleaded that it was found by Office that the Tenements eſcheated to the King before the Day of the Treſpaſs, and there it ſeems that, as to ſuch Things as ariſe from the Land, as the Graſs, and the like, the Action which was well given to the Plaintiff was taken away by the Office found afterwards, which by it's Relation entitled the King thereto, but as to the Entry into the Land, or breaking of Fences, which don't ariſe from the Land, nor are any Part of the annual Encreaſe of it, the Action was not taken away by the Office. So that the Caſe put by *Loveleſs* differs from the Caſe where the Diſſeizee enters before the Attainder, becauſe there the King ſhall have none of the Profits.

[d] Godb. 325, 326. 2 Rol. R. 342.

[a] M. 19 Ed. 4. 2. pl. 5. Poſt 546.

[b] But ſome were of Opinion that the Fee-ſimple, which was veſted in *Wright* the Leſſee by a Relation higher than the Relation of the Office, ſhould not be taken out of *Wright*. For altho' it ſhould be adjudged to be in the King, by the Relation of the Office, from the firſt Day of the Parliament which attainted Sir *Francis Lovel*, or altho' the Word *(forfeit)* in the Act of Attainder ſhould be adjudged ſufficient to veſt it in the King the firſt Day of the Parliament, ſo that at the Time of the Death of Sir *Francis Lovel* without Iſſue, which was the Time when the Condition was performed, the King ſhould be adjudged to be ſeized of the Fee-ſimple, chargeable with the ſaid Condition by the Saving in the Act, yet it ſeemed to them that when the Condition was performed, the Fee-ſimple ſhould be immediately [c] deveſted out of the King, without Petition, or *Monſtrans de droit*, or other Circumſtance. For if *Wright* the Leſſee ought to wait in order to have Recourſe to ſuch Circumſtances, then the Fee would not veſt preſently, and if it could not veſt in *Wright* preſently, then it ſhould never veſt in him, [d] for if *Wright*'s Eſtate could not be enlarged at the Time when the Enlargement was appointed to take Place, it ſhould never be enlarged. [e] As if a Man makes a Leaſe for Life, upon Condition that if the Leſſor dies without Iſſue, the Leſſee ſhall have Fee, and the Leſſee enters into Religion, and afterwards the Leſſor dies without Iſſue, and then the Leſſee is deraigned, in this Caſe he ſhall never have the Fee, becauſe it could not veſt in him at the Time when the Condition was performed. And the Law is the ſame if he was diſſeized at the Time. Wherefore to avoid the Inconvenience which would attend the bringing of a Petition, or *Monſtrans de droit*, or ſuch other Circumſtances, it ſhall be adjudged that the Fee-ſimple paſſed out of the King, and veſted in *Wright* the Leſſee at the Inſtant when the Condition was performed. [f] And Land ſhall frequently be deveſted out of the King by the Operation of the Law or of former Agreements, without *Monſtrans de droit*, or ſuch Circumſtances. [g] As if Tenant in Tail diſcontinues in Fee, and the Diſcontinuee enfeoffs the King by Deed inrolled, and the King leaſes the Land to the Tenant in Tail for Life, the Remainder to his Iſſue for Life, and the firſt Tenant for Life dies, the Iſſue is remitted by the Remainder falling upon him, and the Fee-ſimple is deveſted out of the King, and veſted in the Donor, without *Monſtrans de droit*, or other Circumſtance. So in the principal Caſe the Fee ſhall be deveſted out of the King by the Condition, becauſe of the Inconvenience which would otherwiſe ariſe. And if the Law be ſo where the Fee was veſted in Deed in the King, *a fortiore* it ſhall be ſo in the principal Caſe, where the King was not actually [h] ſeized of the Fee at the Time of the Performance of the Condition, but his Seizin was by the Relation of a ſubſequent Matter to that Time; ſo that in the principal Caſe there was an abſolute Neceſſity for it to be adjudged that the Fee ſimple was out of the King, which there was not in the ſaid Caſe put in 3 *Ed.* 4. before cited, where the Diſſeizee entered before Office found: So that, by the Opinion of ſome, there is a Diverſity between the Caſes.

[b] 2 Rol. R. 326.

[c] Herewith agree Co. Litt. 354. b. 2 Co. 53. a. 8 Co. 76. 1 Rol. R. 214. 2 And. 114. Cro. E. 640. Pig. on Recov. 86.

[d] S. P. 8 Co. 75. a. Ante 485.

[e] Kitch. 305.

[f] See the Books cited ſupra (c).

[g] 12 Co. 6. Hob. 348. Poſt. 553 (g). And ſee the ſame Point, viz. that an Eſtate may be deveſted out of the King by a Remitter, which is an Act in Law, 1 Rol. R. 214. Godb. 312. Cro. E. 640. 2 Co. 53. a. Pig. on Recov. 86.

[h] Vide Dy. 325. b. pl. 38. in fine Caſus.

And afterwards, becauſe the Condition to enlarge the Eſtate of *Wright* the Leſſee was good, and when Sir *Francis Lovel* died without Iſſue, the Fee veſted in *Wright* preſently, and there was no Matter of Subſtance to the contrary, the Court gave Judgment for the Defendant, which was entered as follows.

The reſt of the Record.

At which Day here came as well the aforeſaid *Humphry* as the aforeſaid *John* by their Attornies aforeſaid. Whereupon the Premiſſes being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here that the aforeſaid Plea of the aforeſaid *John Nichols*, by rejoining in Manner and Form aforeſaid pleaded, is good and ſufficient in Law to preclude the aforeſaid *Humphry* from having his Action aforeſaid againſt the aforeſaid *John*. Therefore it is conſidered that the aforeſaid *Humphry* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim thereof, and that the aforeſaid *John* go thereof without Day, &c.

Judgment.

A Report

A Report of a Judgment given in the King's Bench *by the Juſtices of the ſame Court with the Aſſent of the Juſtices of the* Common Bench, *in* Michaelmas *Term in the* 18*th and* 19*th Years of the Reign of Queen* Elizabeth, *upon a ſpecial Verdict found in a Bill of* Treſpaſs *exhibited in the* King's Bench *by* Henry Ludford *Plaintiff againſt* Thomas Gretton *Defendant, for a Treſpaſs done in Land and a Houſe at* Poleſworth *in the County of* Warwick. *And the Record thereof is entered among the Records of* Michaelmas *Term* 17 *and* 18 Elizabeth, Rot. 188. *and was as follows.*

Warwick. Declaration. Same Precedent Raſt. Entr. 678. b.

HEnry Ludford complains of *Thomas Gretton* in the Cuſtody of the Marſhal, &c. of this that he the 28th Day of *March* in the 17th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, with Force and Arms, &c. the Cloſe and Houſe of him the ſaid *Henry*, viz. one Cloſe bordering upon a certain Lane called *Hulls-Lane* on the Part of the Weſt, and upon another Lane leading from *Tamworth* towards *Atherſton* on the Part of the Eaſt, and upon a Cloſe called *Brodleys-Croft* on the Part of the South, and upon the Queen's Highway leading towards a certain River called the *Anker* on the Part of the North, and a certain Meſſuage upon the ſame Cloſe firſt recited built, at *Poleſworth* in the County aforeſaid broke and entered, and the Graſs of him the ſaid *Henry* in the Cloſe aforeſaid lately growing to the Value of 20 *s.* with his Feet by walking trod down and conſumed: And other Wrongs to him did, againſt the Peace of the ſaid Lady the Queen now, and to the Damage of him the ſaid *Henry* 20 *l.* and therefore he produces the Suit, &c.

To this the Defendant pleaded, not guilty, and the Jury charged upon the Iſſue gave a ſpecial Verdict, as follows.

Special Verdict. Who to ſay the Truth of the within contained being choſen, tried, and ſworn, ſay upon their Oath, that long before the Time within written when the Treſpaſs within ſpecified is ſuppoſed to be done, Lord *Henry* late King of *England* the *eighth* was ſeized of the Tenements within written with the Appurtenances in which, &c. in his Demeſn as of Fee. And being ſo ſeized thereof, he by his certain Letters-patent ſealed under his Great Seal of *England*, bearing Date the 14th Day of *February* in the 36th Year of his Reign, and to the ſame Jurors ſhewn in Evidence, gave and granted to one *Richard Taverner*, *Roger Taverner*, and *Robert Taverner* the Tenements within written with the Appurtenances in which, &c. among other Things; to have and to hold the ſame Tenements with the Appurtenances among other Things to the ſame *Richard*, *Roger*, and *Robert*, their Heirs and Aſſigns for ever, as by the ſame Letters-patent among other Things more fully appears, the Eſtate and Title of which ſaid *Richard*, *Roger*, and *Robert* of and in the ſame Tenements with the Appurtenances the aforeſaid *Henry Ludford* now has, and at the within written Time when, &c. had in the ſame. And further the ſame Jurors ſay upon their Oath, that by a certain Act made in a Parliament of Lord *Henry* ſometime King of *England* the *ſixth* in the 18th Year of his Reign held, it was enacted by the Authority of the ſame Parliament, that whatſoever Warrant from thence afterwards by the ſame then King *Henry* the *ſixth* or his Heirs to the Chancellor of *England* for the Time being ſhould be directed, the Day of Delivery thereof to the Chancellor ſhould be entered of Record in the Chancery, and that the Chancellor ſhould make Letters-patent upon the ſame Warrant, bearing Date the Day of the Delivery of the ſame into the Chancery, and not before in any Manner, and that if any Letters-patent from thence afterwards ſhould be made to the contrary, then the ſame ſhould be null, void, and of no Effect, as by the ſame Act more fully appears. And the ſame Jurors ſay upon their Oath, that before the making of the aforeſaid Letters-patent of the aforeſaid late King *Henry* the *eighth* to the aforeſaid *Richard Taverner*, *Roger Taverner*, and *Robert Taverner* in Form aforeſaid made, the ſame late King *Henry* the *eighth* directed his certain Warrant to one *Thomas Wroteſley* Knight, then Chancellor of *England*, for the making of thoſe Letters-patent to the ſame *Richard*, *Roger*, and *Robert* to be done, which ſaid Warrant to the ſame then Chancellor, before the making of the aforeſaid Letters-patent, to the aforeſaid then Chancellor was delivered; and that the Day of the Delivery of the ſame Warrant to the ſame then Chancellor was not entered of Record in the Court of Chancery of the ſaid late King *Henry* the *eighth*, according to the Form of the Statute aforeſaid. And if upon the whole Matter aforeſaid in Form aforeſaid found it ſhall ſeem to the Court here that the aforeſaid Letters-patent of the aforeſaid late King *Henry* the *eighth* to the aforeſaid *Richard Taverner*, *Roger Taverner*, and *Robert Taverner* in Form aforeſaid made, are good and valid in Law, then the ſame Jurors ſay upon their Oath, that the aforeſaid *Thomas Gretton* is guilty of the Treſpaſs within written, as the aforeſaid *Henry Ludford* within againſt him complains, and then they aſſeſs the Damages of the ſaid *Henry Ludford* by Occaſion of that Treſpaſs, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to 30 *s.* and for thoſe Coſts and Charges to 40 *s.* And if upon the whole Matter aforeſaid in

in Form aforeſaid found it ſhall ſeem to the Court here that the aforeſaid Letters-Patent of the aforeſaid late King *Henry* the *Eighth* to the aforeſaid *Richard Taverner*, *Roger Taverner*, and *Robert Taverner* in Form aforeſaid made are void in Law and of no Effect, then the ſame Jurors ſay upon their Oath that the aforeſaid *Thomas Gretton* is not guilty of the Treſpaſs within written, as he ſame *Thomas Gretton* within hath alledged. And thereof they pray the Advice and Diſcretion of the Court here in the Premiſſes, *&c.*

The CASE.

IT appears by the Record, that the Plaintiff has declared of his Cloſe and Houſe broken at *Poleſworth* in the County of *Warwick* the 20th Day of *March* in the 17th Year of the preſent Queen *Elizabeth*. To this the Defendant pleaded not guilty. And the Jurors charged upon the Iſſue gave a ſpecial Verdict, *viz.* That King *Henry* 8. was ſeized in Fee of the Tenements in which, *&c.* and being ſo ſeized, by his Letters-patent under the Great Seal, bearing Date the 14th Day of *February* in the 36th Year of his Reign, and to the Jurors ſhewn forth in Evidence, gave and granted to *Richard Taverner*, *Roger Taverner*, and *Robert Taverner*, and to their Heirs, the ſaid Tenements in which, *&c*, whoſe Eſtate the Plaintiff had at the Time of the Treſpaſs done. And further they found, that by a Statute made in 18 *H.* 6. it was enacted, that of every Warrant thereafter to the Chancellor of *England* directed, the Day of the Delivery of the ſame to the Chancellor ſhou'd be entered of Record in the Chancery, and that the Chancellor ſhou'd make Letters-patent upon the ſame Warrants, bearing Date the Day of the Delivery of them into the Chancery, and not before in any Manner; and if any Letters-patent ſhou'd be thereafter made to the contrary, that they ſhould be null, void, and of no effect. And the Jurors found, that before the making of the ſaid Letters-patent, the ſaid King *Henry* 8. directed his Warrant to the Chancellor of *England* for the making of the ſaid Letters patent to the ſaid *Richard*, *Roger*, and *Robert*, which Warrant was delivered to the ſaid Chancellor before the making of the ſaid Letters-patent, and that the Day of the delivery of the ſame Warrant to the Chancellor was not entered of Record in the Court of Chancery of the ſame King, according to the Form of the ſaid Statute. And if upon the whole Matter aforeſaid found it ſhould ſeem to the Court that the ſaid Letters-patent of the ſaid King made to the ſaid *Taverners* in Form aforeſaid were good and effectual in Law, then the ſaid Jurors ſaid that the Defendant was guilty of the Treſpaſs, as the Plaintiff had complained againſt him, and then they aſſeſſed Damages, beſides the Coſts, at 30*s.* and for the Coſts at 40*s.* And if it ſhould ſeem to the Court that the ſaid Letters-patent were void, then the Jurors ſaid that the Defendant was not guilty of the Treſpaſs, as he himſelf had alledged, and thereof they prayed the Advice and Diſeretion of the Court.

Letters-patent are good and out of the Act of 18 *H.* 6. *cap.* 1. although the Day of the Delivery of the Warrant to the Chancellor, whereupon they are made, is never entered of Record in the Chancery: But ſuch Non-entry is a Contempt in the Chancellor, for which he is puniſhable, as being contrary to the expreſs Direction of the Act. S. P. 2 Leon. 90, 91. *Limited.*

And upon this Matter the Court took Advice, and conferred with the Juſtices of the Common Bench, and the laſt Day of *Michaelmas* Term, in which the 18th Year of the Reign of the preſent Queen ended, (*Wray* Chief Juſtice being abſent) the other Juſtices declared openly (as I was afterwards informed by thoſe who were of Counſel in the Caſe, and by others, for I went out of Court before this Matter came on) that it was the Opinions of them, and of the Lord Chief Juſtice who was abſent, and of their Companions in the Common Bench, with whom they had conferred, that the Letters-patent were good, notwithſtanding the Day of the delivery of the Warrant was never entered of Record. For the Act makes void no Letters-patent but thoſe only which vary from the Entry of the Day of the Delivery of the Warrant. For the Miſchief at the Common Law was in antedating the Patent, that is, in dating it before the Time when the Warrant came to the Chancellor to make the Letters-patent, as appears by the Preamble of the Act. As if the King had granted any Thing by his Letters-patent the 10th Day of *May*, and afterwards another Perſon had made Suit to him to have the ſame Thing, and had got a Patent of it made to him the 20th Day of *May*, and ſealed the ſame Day, but had cauſed it to bear Date the 1ſt Day of *May*, by this Patent falſely dated the firſt Patent, which was duly made, would have been avoided, [a] becauſe every Grant by Record hath Relation to the Day of the Date ſpecified in the Record, and not to the Time of the Delivery. And herein there is a Diverſity between a Deed and a Record, for a Deed of the [b] Subject has Relation only to the Time of the Delivery, and not to the Time of the Date, but on the contrary the King's Charter has Relation to the Time of the Date, and not to the Time of the Delivery, becauſe all Matters of Record, in Reſpect of their Highneſs, are [c] preſumed in Law to carry in themſelves abſolute Truth. And therefore none can ſay that the King's Charter was made or delivered at another Time than when it bears Date, no more than a Man may ſay that a Recognizance, or Statute-merchant, or Staple was acknowledged, or any Writ purchaſed, at another Time than when it bears Date. For to aver that it was antedated, or that it was delivered or acknowledged after the Date, tends to the Diſcredit of the Great Seal, or of Juſtice, or of the Officer of Record who recorded the Recognizance, or the Statute-merchant, and the like. But the Deeds of Subjects ſhall take Effect by the Delivery, and as the Party ought to prove the Delivery, ſo there he ought to prove the Time of the Delivery, and the Date is no Concluſion therein as it is in a Record. And becauſe

The Deed of a Subject takes Effect from the Time of the Delivery, and not from the Time of the Date; *vice verſa* of the Charter of the King. See ſame Diverſity P. 37 H. 6. 21. b. *Per Curiam.* Bro. Relation 13. 1 Leon. 183. 4 Bac. Abr. 197. Vin. Abr. tit. Prerogative O. c. 2. pl. 5. 4 Co. 71. a. b.

[a] Dy. 355. a. Lane 40. Vin. Abr. tit. Faits P. 2. pl. 3. 1 Leon. 183. Rep. *temp.* Hardwick 184. 1 Finch 161, 162.

[b] S. P. 2 Co. 5. a. Salk. 76.

[c] Co. Litt. 117. b. 260. a.

the King's Charter takes Effect from the Date, therefore in order to avoid the Inconvenience which might happen if the Patent was antedated, *viz.* if it bore Date before the Day of the Delivery of the Warrant, and that it might not be ſo for the future, the Statute of 18 *H.* 6. *cap.* 1. was made, which remedies the ſaid Miſchief by making the Patent void which varies from the Day of the Entry of the Warrant received. But in the principal Caſe there is no Variance, becauſe there is no Entry made of the Day of the Delivery of the Warrant. But the Juſtices ſaid that the Non-entry of the Day of the Delivery of the Warrant was a Contempt in the Chancellor, and puniſhable in him, becauſe the Act ordains that the Day of the Delivery of the Warrant to the Chancellor ſhall be entered of Record in the Chancery, which the Chancellor ought to ſee done. And in ſuch Manner this Offence ſhall be puniſhed, but nevertheleſs the Patent is not void, becauſe there is no Variance between the Date of the Patent and the Day of the Delivery of the Warrant, as it is ſaid before.

Letters-patent are good and out of the Act of 18 *H.* 6. *cap.* 1. altho' no Warrant at all is ſent to the Chancellor. S. P. ſeems to be intimated Ante 232, at the Top, by the Words *(where there is a Warrant)*.

And the Juſtices ſaid that they had reſolved upon two other Points touching this Act. The firſt was, that the Patent would have been good, although no Warrant had been made or ſent. For the Great Seal without any other Circumſtance is ſufficient for the Party to whom the Patent is made, and the Warrant is the Chancellor's Diſcharge, for thereby he knows the Will of the King. [a] But a Patent under the Great Seal is good enough by the Common Law, and it is the ſureſt Way for the Party to have the Patent without any Warrant, as they ſaid.

[a] Crompt. J. C. 108. b.

Letters-patent are good and out of the Act of 18 *H.* 6. *cap.* 1. which bear Date after the Day of Entry of the Delivery of the Warrant to the Chancellor. S. P. 2 Leon. 91.

The other Point was, that if a Patent bears Date after the Day of the Entry of the Delivery of the Warrant, in ſuch Caſe it ſhall be good, becauſe it is out of the Intent of the Makers of the Act, for at the Common Law there was no Miſchief in ſuch Caſe either as to the King or to any other which needed to be reformed, but the Miſchief lay in dating the Patent before the Time of the Delivery of the Warrant, as it is ſhewn before. And the Act ſeems to ſay as much, for it ordains *that the Chancellor ſhall make Letters-patent upon the ſame Warrants, bearing Date the Day of the Delivery of them into the Chancery, and not before in any Manner*; which Words *(and not before)* are obſervable, for they ſhew that the Miſchief at the Common Law was in dating the Patents before the Day of Delivery of the Warrant, and not after. And the Act ſays that if any Letters-patent are thereafter made to the contrary, they ſhall be void, which Words *(to the contrary)* are to be underſtood contrary to the ſaid Purview, *viz.* where they bear Date before the Day of the Entry of the Delivery of the Warrant, and not after.

[b] Vin. Abr. tit. Prerogative G. b. 3. pl. 6. *Note*, There is another Point obſervable upon this Act, which was agreed by the Court in the Caſe of *Willion v. Berkley*, that where there is a Warrant, and the Day of the Delivery of it is entered, and the Patent has no Day of Date, it is good, and is out of the Words and Intent of the Act, and remains at Common Law. Ante 231, 232. And ſee Dy. 133. pl. 3. where the Warrant iſſued to the Chancellor bearing Date the 31ſt Day of *October*, *Anno* 37 *H.* 8. and there was a Defect or Miſpriſion in the Entry of the Day of the Delivery of it, for it was endorſed to be delivered the 1ſt Day of *December*, *Anno Regni Regis H.* 8. omitting the Year of his Reign, and the Warrant was filed among the Warrants of 37 *H.* 8. and the Letters-patent made thereupon bore Date the 1ſt Day of *December*, *Anno* 37 *H.* 8. in which Caſe (tho' it does not appear by the Book what became of it) it ſeems reaſonable that the Letters-patent ſhould be good, notwithſtanding the Defect in the Entry of the Day of Delivery of the Warrant, which (admitting it not to be aided by the filing of the Warrant) can at moſt be taken as a Non-entry, and ſo it brings it to the Caſe above adjudged. *Quære.*

[b] And ſo the Juſtices reſolved that Letters-patent ſhould be good in theſe three Caſes, *viz.* where there is no Warrant at all made, and where a Warrant is made and delivered, and the Day of Delivery is not entered, and where the Day is entered, and the Letters-patent bear Date after the Day entered. Wherefore here inaſmuch as there was no Entry made of the Day of the Delivery of the Warrant, in which Caſe there was no Variance in the Date of the Letters-patent within the Intention of the Statute, the Patent is good, and conſequently the Eſtate of the Plaintiff is alſo good, and the Defendant is a Treſpaſſer. And therefore the Court gave Judgment for the Plaintiff, which was as follows.

The reſt of the Record.

At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid. Whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the ſaid Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, it is conſidered that the aforeſaid *Henry Ludford* recover againſt the aforeſaid *Thomas Gretton* his Damages aforeſaid by the Jurors aforeſaid in Form aforeſaid aſſeſſed, and alſo 7 *l.* for his Coſts and Charges aforeſaid to the ſame *Henry Ludford* by the Court of the ſaid Lady the Queen here with his Aſſent of Increaſe adjudged. Which ſaid Damages in the whole amount to 10 *l.* 10 *s.* And the aforeſaid *Thomas Gretton* be taken, *&c.*

A brief

A brief Report of the Opinions of the Judges of the Common Bench *upon divers Points of Law ariſing in a* Quare Impedit *brought there by* Roger Grendon *Plaintiff againſt the Biſhop of* Lincoln, *and the Dean and Chapter of the Cathedral-Church of* Chriſt *and* St. Mary *the Virgin in* Worceſter, *Defendants, which were there argued in* Michaelmas *Term in the* eighteenth *and* nineteenth *Years of the Reign of Queen* Elizabeth, *and Judgment was given in* Eaſter *Term in the* nineteenth *Year of Queen* Elizabeth. *And the Record thereof was entered in* Hillary *Term* 17 Eliz. Rot. 952, *and was as follows.*

LONE.

THOMAS Biſhop of *Lincoln*, and the Dean and Chapter of the Cathedral Church of *Chriſt* and the bleſſed *Mary* the Virgin in *Worceſter*, were ſummoned to anſwer *Roger Grendon* Gentleman of a Plea, that they may permit him to preſent a fit Perſon to the Church of *Dean*, which is vacant and belongs to his Donation, *&c.* And whereupon the ſame *Roger* by *Roger Giſſe* his Attorney ſays, that whereas Lord *Edward* late King of *England* the *Sixth* was ſeized of the Advowſon of the Church aforeſaid as of a Groſs by itſelf, as of Fee and Right, in Right of his Crown of *England*, and he being ſo thereof ſeized, to the ſame Church, being vacant, preſented one *William Chamberlain* his Clerk, who on the Preſentation of him the ſaid late King was admitted, inſtituted, and inducted into the ſame, in the Time of Peace, in the Time of him the ſaid late King. And he the ſame late King being ſo ſeized of the Advowſon aforeſaid, died of ſuch his Eſtate thereof ſeized, without Heirs of his Body iſſuing, after whoſe Death the Advowſon aforeſaid deſcended to Lady *Mary* late Queen of *England*, as Siſter and Heir of the ſaid late King, whereby the ſame late Queen was ſeized of the Advowſon aforeſaid as of a Groſs by itſelf, as of Fee and Right, in Right of her Crown of *England*. And ſhe being ſo thereof ſeized, ſhe the ſame late Queen the 30th Day of *June* in the 1ſt Year of her Reign, at the Caſtle of *Farnham* in the County of *Surry*, by her Letters-patent (which the ſame *Roger Grendon* here produces in Court, ſealed under the Great Seal of the ſame late Queen of *England*, the Date whereof is at the aforeſaid Caſtle of *Farnham* the ſame Day and Year) gave and granted to one *George Rotherham* of *Farley* in the Pariſh of *Luton* in the County of *Bedford* Gentleman, and to *Roger Barber* of the ſame Town and County Yeoman, the Advowſon aforeſaid, by the Name of the Advowſon, Donation, free Diſpoſition, and Right of Patronage and Preſentation of the Rectory and parochial Church of *Dean* aforeſaid; to have, hold, and enjoy the aforeſaid Advowſon, Donation, free Diſpoſition, Right of Patronage and Preſentation of the ſaid Rectory and parochial Church of *Dean* aforeſaid to the aforeſaid *George* and *Roger Barber*, their Heirs and Aſſigns for ever. By Reaſon of which ſaid Letters-patent they the ſame *George* and *Roger Barber* were ſeized of the Advowſon of the Church aforeſaid as of a Groſs by itſelf, as of Fee and Right. And the ſaid *George* and *Roger Barber* being ſo ſeized thereof, they the ſame *George* and *Roger Barber* the 28th Day of *September* in the *firſt* and *ſecond* Years of the Reign of Lord *Philip* and the ſaid Lady *Mary* late King and Queen of *England*, at *Dean* in the ſaid County of *Bedford*, by their certain Writing (which the ſame *Roger Grendon* here produces in Court, ſealed with the Seals of the aforeſaid *George* and *Roger Barber*, the Date whereof is the ſame Day and Year) granted to one *Thomas Grendon* the aforeſaid Advowſon of the Church aforeſaid, by the Name of all the Advowſon of their Rectory of *Dean* aforeſaid, and the Advowſon, free Diſpoſition, Right of Patronage and Preſentation of the ſaid parochial Church of *Dean* aforeſaid, with its Rights and Liberties whatſoever; to have, hold, and enjoy the aforeſaid Advowſon, Donation, free Diſpoſition, Right of Patronage and Preſentation of the ſaid Rectory and Church aforeſaid, to the ſame *Thomas Grendon*, his Heirs and Aſſigns for ever, to the proper Uſe and Behoof of the ſaid *Thomas*, his Heirs and Aſſigns for ever. By Reaſon of which ſaid Grant the aforeſaid *Thomas* was ſeized of the aforeſaid Advowſon of the Church aforeſaid as of a Groſs by itſelf, as of Fee and Right, and he being ſo thereof ſeized, he the ſame *Thomas* at *Shefford* in the County of *Bedford* aforeſaid died of ſuch his Eſtate thereof ſeized, after whoſe Death the aforeſaid Advowſon of the Church aforeſaid deſcended to the ſame *Roger Grendon*, as Son and Heir of the aforeſaid *Thomas*, whereby he the ſame *Roger Grendon* was ſeized of the aforeſaid Advowſon of the Church aforeſaid as of a Groſs by itſelf, as of Fee and Right, and afterwards the Church aforeſaid became vacant by the Deprivation of the aforeſaid *William Chamberlain*, and yet is vacant, and on that Account to him the ſaid *Roger Grendon* it at preſent belongs to preſent a fit Perſon to the Church aforeſaid; and the aforeſaid Biſhop and Dean and

Bedf. Same Precedent Raſt. Ent. 497. b. N. Bendl. 293.

Chapter him the ſaid *Roger* do unjuſtly hinder. Wherefore he ſays that he is damnified and has Damage to the Value of 100*l.* and therefore he produces the Suit, *&c.*

And the aforeſaid Biſhop, Dean and Chapter by *William Paine* their Attorney come and defend the Force and Injury when, *&c.* And the ſame Biſhop ſays that he has not nor claims to have any Thing in the Church aforeſaid, nor in the Advowſon of the ſame, unleſs Admiſſion, Inſtitution, and Deſtitution of Perſons to the ſame Church, as Ordinary of the ſaid Church; and this he is ready to verify, wherefore he prays Judgment if the aforeſaid *Roger Grendon*, without a ſpecial Hindrance in the Perſon of him the ſaid Biſhop in this Behalf to be aſſigned, his Action aforeſaid againſt him ought to have, *&c.* And the aforeſaid Dean and Chapter ſay that the aforeſaid *Roger Grendon* his Action aforeſaid againſt them ought not to have, becauſe they ſay that long before the aforeſaid late King *Edward* the *Sixth* had any Thing in the Advowſon aforeſaid, Lord *Henry* late King of *England* the *Eighth* was ſeized of the ſame Advowſon as of a Groſs by itſelf, as of Fee and Right, in Right of his Crown of *England.* And he being ſo ſeized thereof, to the Church aforeſaid, being vacant, preſented one *Edmund Haltman* his Clerk, who on the Preſentation of him the ſaid late King *Henry* the *Eighth* was admitted, inſtituted, and inducted into the ſame in the Time of Peace, in the Time of the ſame late King *Henry* the *Eighth.* And he the ſame late King being ſo ſeized of the Advowſon aforeſaid, died of ſuch his Eſtate thereof ſeized, after whoſe Death the Advowſon aforeſaid deſcended to the aforeſaid late King *Edward* the *Sixth*, as Son and Heir of the ſame late King *Henry* the *Eighth*, whereby the ſame late King *Edward* the *Sixth* was ſeized of the Advowſon aforeſaid as of a Groſs by itſelf, as of Fee and Right, in Right of his Crown of *England.* And being ſo thereof ſeized, he the ſame late King *Edward* the *Sixth* the 22d Day of *May* in the 1ſt Year of his Reign, at *Weſtminſter* in the County of *Middleſex*, by his Letters-patent (which they the ſame Dean and Chapter produce here in Court, ſealed under the Great Seal of the ſame late King *Edward* the *Sixth*, the Date whereof is at *Weſtminſter* aforeſaid the ſame Day and Year) of his certain Knowledge and meer Motion gave and granted to the ſame Dean and Chapter the Advowſon aforeſaid, by the Name of the Advowſon, Donation, Right of Patronage and Preſentation of the aforeſaid Church and Rectory of *Dean* in the County of *Bedford*, among other Things; to have, hold, and enjoy the Advowſon aforeſaid to the ſame Dean and Chapter and to their Succeſſors for ever. And further the ſame late King *Edward* the *Sixth* by his ſame Letters-patent of his ſpecial Grace, and certain Knowledge, and meer Motion, and by his Royal Authority ſupreme and eccleſiaſtical which he then enjoyed, for himſelf his Heirs and Succeſſors granted and gave Licenſe to the ſame Dean and Chapter, and to their Succeſſors, that they the ſame Dean and Chapter, and their Succeſſors, the Rectory of the Church aforeſaid, whenſoever by Death, Reſignation, or Deprivation, or in any other Manner whatever it ſhould happen to be vacant, immediately to their own proper Uſes ſhould and might hold to them and to their Succeſſors for ever, without Moleſtation or Hindrance of the ſame late King, his Heirs or Succeſſors, and this without any Preſentation, Induction, or Admiſſion of any Incumbent to the ſame Rectory from thence forwards to be made. And further the ſame late King by his ſame Letters-patent willed, and of his certain Knowledge and meer Motion, and by his Authority aforeſaid which he then enjoyed, for himſelf, his Heirs and Succeſſors, the aforeſaid Rectory and Church of *Dean* aforeſaid, as from thenceforth it ſhould happen to be vacant, as it is ſaid above, and all and ſingular Manors, Meſſuages, Lands, Tenements, Rents, Reverſions, Services, Glebes, Tithes, Oblations, Penſions, Portions, Fruits, Profits, Commodities, Emoluments, Poſſeſſions, and Hereditaments whatſoever, with all their Appurtenances, as well Spiritual as Temporal, to the ſame Rectory and Church, ſo as is aforeſaid being vacant, in any wiſe belonging or appertaining, to the ſame Dean and Chapter and their Succeſſors, and to their ſaid Cathedral Church appropriated, conſolidated, united, and incorporated: To have, hold, enjoy, and convert the ſame Rectory and Church of *Dean* aforeſaid, and all and ſingular the Premiſſes to the ſame Rectory and Church belonging and appertaining, to the ſame Dean and Chapter and their Succeſſors (as is aforeſaid) to their own proper Uſes, without any Preſentation, Nomination, Induction, or Admiſſion of any Incumbent or Incumbents to the ſame Church from thence forwards to be made, as by the ſame Letters-patent among other Things more fully appears. By Reaſon of which ſaid Letters-patent they the ſame Dean and Chapter were ſeized of the Advowſon aforeſaid as of a Groſs by itſelf, as of Fee and Right, in Right of their Cathedral Church aforeſaid. And they the ſaid Dean and Chapter being ſo ſeized thereof, the aforeſaid *Edmund Haltman* the *ſixth* Day of *November* in the *fourth* Year of the Reign of the aforeſaid King *Edward* the *Sixth* at *Dean* aforeſaid died, after whoſe Death the Church aforeſaid became vacant, whereby they the ſame Dean and Chapter immediately after the Death of the ſame *Edmund Haltman* became Parſons of the ſame Church, and the aforeſaid Rectory and Church of *Dean* aforeſaid to their own proper Uſes held and yet hold, and thereof then immediately and always afterwards

have been and yet are ſeized in their Demeſn as of Fee, in Right of their Cathedral Church aforeſaid. And after the Death of the aforeſaid *Edmund*, the aforeſaid late King *Edward* the *ſixth* preſented the aforeſaid *William Chamberlain* as his Clerk to the Church aforeſaid. Which ſaid Preſentation, Admiſſion, and Inſtitution of the ſame *William* to the ſame in the Declaration aforeſaid above ſpecified were void and of no Effect in Law, becauſe the aforeſaid Church then was full of them the aforeſaid Dean and Chapter. And this they are ready to verify, wherefore they pray Judgment if the aforeſaid *Roger Grendon* his Action aforeſaid againſt them ought to have, *&c.* Vide Hob. 167.

And the aforeſaid *Roger* as to the aforeſaid Plea of the aforeſaid Biſhop above pleaded, for that the ſame Biſhop claims nothing in the Church aforeſaid, nor in the Advowſon of the ſame, unleſs Admiſſion, Inſtitution, and Deſtitution of Perſons to the ſame Church, as Ordinary thereof, prays Judgment, and a Writ to the Biſhop, *&c.* Therefore it is conſidered that the aforeſaid *Roger* recover his Preſentation againſt the aforeſaid Biſhop to the Church aforeſaid, and have a Writ to the ſame Biſhop, that notwithſtanding the Claim of the ſaid Biſhop, he admit a fit Perſon to the Church aforeſaid on the Preſentation of the ſaid *Roger*, &c. And nothing of Mercy of the ſaid Biſhop, becauſe he excuſes himſelf of Hindrance, *&c.* But let Execution thereof ceaſe until the aforeſaid Plea between the ſame *Roger* and the aforeſaid Dean and Chapter be determined, *&c.* And as to the aforeſaid Plea of the aforeſaid Dean and Chapter above in Bar pleaded, he the ſame *Roger* ſays that that Plea is inſufficient in Law to preclude him the ſaid *Roger* from having his Action aforeſaid againſt the ſame Dean and Chapter, and that he to that Plea in Manner and Form aforeſaid pleaded has no Neceſſity, nor is by the Law of the Land bound to anſwer. And this he is ready to verify, wherefore for Want of a ſufficient Plea in this Behalf made, he the ſame *Roger* prays Judgment, and a Writ to the Biſhop.

And the aforeſaid Dean and Chapter, for that they have above alledged ſufficient Matter in Law to preclude the aforeſaid *Roger* from having his Action aforeſaid againſt them, which they are ready to verify, which ſaid Matter the aforeſaid *Roger* does not deny, nor thereunto in any wiſe anſwer, but that Averment wholly refuſes, they the ſame Dean and Chapter pray Judgment, and that the aforeſaid *Roger* may be precluded from having his Action aforeſaid againſt them, *&c.* And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until from the Day of *Eaſter* in *fifteen* Days, to hear their Judgment thereon, becauſe the ſame Juſtices here thereof not yet, *&c.*

The CASE.

IT appears by the Record, that the Plaintiff has declared that King *Edward* 6. was ſeized of the Advowſon of the Church of *Dean* as of a Groſs by itſelf, as of Fee and Right, in Right of his Crown, and the ſame being vacant, he preſented to it one *William Chamberlain* his Clerk, who was admitted, inſtituted, and inducted. And the King died, and the Advowſon deſcended to Queen *Mary*, who in the firſt Year of her Reign granted it to *George Rotherham* and *Roger Barber*, and to their Heirs, who granted it over by Deed in the firſt and ſecond Years of *Philip* and *Mary* to *Thomas Grendon* and to his Heirs, who died thereof ſeized, and the Advowſon deſcended to *Roger Grendon* the Plaintiff, as his Son and Heir; and afterwards the Church became vacant by the Deprivation of the ſaid *Chamberlain*, whereby it belonged to the Plaintiff to preſent, and the Defendants diſturbed him. To this the Biſhop pleaded that he claimed nothing but as Ordinary. And the Dean and Chapter ſaid, that long before the ſaid King *Edward* 6. had any Thing in the Advowſon, King *Henry* 8. was ſeized of the ſaid Advowſon as of a Groſs by itſelf, as of Fee in Right of his Crown, and being ſo ſeized he preſented one *Edmund Haltman* his Clerk, who on his Preſentation was admitted, inſtituted, and inducted; and the King died ſeized, and the Advowſon deſcended to the ſaid King *Edward* 6. and he being ſeized thereof, the 22d Day of *May* in the firſt Year of his Reign, by his Letters-patent ſhewn forth, of his certain Knowledge and mere Motion gave and granted the ſaid Advowſon to the ſaid Dean and Chapter, to have and to hold to them and to their Succeſſors for ever. And further the ſame King of his ſpecial Grace, certain Knowledge, and meer Motion, and by his royal Authority ſupreme and eccleſiaſtical which he then had, for himſelf and his Succeſſors granted and gave Licenſe to the ſame Dean and Chapter and to their Succeſſors, that whenſoever by Death, Reſignation, Deprivation, or in other Manner the ſaid Church ſhould be vacant, the ſame Dean and Chapter and their Succeſſors might immediately hold the Parſonage of the ſaid Church to their own proper Uſe to them and to their Succeſſors for ever, without Moleſtation or Hindrance of the ſame King, his Heirs and Succeſſors, and that without any Preſentation, Induction, or Admiſſion of any Incumbent to the ſame Parſonage from thenceforth. And further the ſame King willed and granted of his certain Knowledge and mere Motion, and by his Authority aforeſaid which he then had, for himſelf his Heirs and Succeſſors to the ſame Dean and Chapter and to their Succeſſors, and to the ſaid Cathedral Church appropriated, conſolidated, united, and incorporated the aforeſaid Parſonage and Church of *Dean*, as it ſhould afterwards happen to be void, as is aforeſaid, and all Meſſuages, Lands, Tenements, Glebes, Tithes, and Hereditaments whatſoever, as well ſpiritual as temporal, to the ſame Parſonage and Church,

The King being ſeized of an Advowſon in Right of his Crown grants it by his Letters-patent to Dean and Chapter, when the Church is full, and that they may hold the Rectory of the ſaid Church, immediately after it becomes void, to their proper Uſe, to them and their Succeſſors for ever, without Preſentation, &c. of any Incumbent to the ſame Rectory at any Time after, and appropriates, conſolidates, unites, and incorporates the ſame Rectory and Church, and all, &c. belonging to it, to them and their Succeſſors, to hold to their proper Uſe; if this is a good Appropriation. S. C. N. Bendl. 293. Watſ. Compl. Incumb. 193. See Aleyn v. Tothill from Coltheu. MSS. Spec. Cas. in 2. Gwill. on Tithes 436.

Church, ſo as is aforeſaid being vacant, in any Manner appertaining; to have, hold, enjoy, and convert the ſame Parſonage and Church of *Dean*, and all other the Premiſſes, to the ſaid Dean and Chapter and to their Succeſſors, as is aforeſaid, to their own proper Uſe, without any Preſentation, Nomination, Induction, or Admiſſion of any Incumbent to the ſame Church from thenceforth, as by the ſame Letters-patent among other Things appears. By Force of which Letters-patent the ſaid Dean and Chapter were ſeized of the ſaid Advowſon as of a Groſs by itſelf, as of Fee, in Right of their Cathedral Church. And they being ſo ſeized, the ſaid *Haltman* died the 6th Day of *November* in the 4th Year of the Reign of the ſaid King *Edward* 6. by whoſe Death the Church became void, whereby the ſaid Dean and Chapter immediately after the Death of the ſaid *Haltman* became Parſons of the ſaid Church, and the ſaid Parſonage and Church of *Dean* to their own proper Uſe held and yet hold, and thereof then immediately and ever ſince have been and yet are ſeized in their Demeſn as of Fee, in Right of their Cathedral Church. And after the Death of the ſaid *Edmund Haltman* the ſaid King *Edward* 6. preſented to the ſaid Church the ſaid *Chamberlain* as his Clerk, which Preſentation, Admiſſion, and Inſtitution of the ſaid *Chamberlain* thereto ſpecified in the Count was void and of no Effect in Law, becauſe the ſaid Church was then full of the ſaid Dean and Chapter. And thereupon they demanded Judgment. And the Plaintiff, as to the Biſhop's Plea, prayed Judgment, and had it, but Execution thereof to ceaſe until the Plea between the Plaintiff and the Defendants was determined. And as to the Plea of the Dean and Chapter, he demurred in Law.

And the Matter was argued at the Bar and alſo at the Bench in *Michaelmas* Term in which the 18th Year of the Reign of Queen *Elizabeth* ended, and the 19th Year of her Reign began. And I heard the whole Argument of *Dyer* Chief Juſtice, and a great Part of the Arguments of each of the other Juſtices. And Exception was taken to the Bar, becauſe the Plaintiff after the Preſentation of King *Edward* 6. has alledged a dying ſeized in the ſame King, and a Deſcent to Queen *Mary*, which, altho' it was a Thing material, is not traverſed by the Plea in Bar, nor fully anſwered, but only by a Matter which amounts to no more than an argumentative Anſwer, *viz.* by the Grant of King *Edward* 6. and the Appropriation, which is an affirmative Plea, and does not confeſs and avoid the dying ſeized, nor traverſe it, but is only an Argument that King *Edward* 6. did not die ſeized, for which Reaſon the Plea in Bar is not ſufficient.

Where a Thing is materially alledged in the Count, and the Defendant in his Bar ſhews Matter of Law, which, when it ſhall be determined by the Court, will prove the Allegation in the Count to be true or falſe, in ſuch Caſe the Defendant ſhall never traverſe the Matter ſo alledged. S. P. H. 5. H. 7. 14. *Per Huſſey.* Litt. R. 15.

But the whole Court was of Opinion againſt this Exception. For whether upon the Matter diſcloſed King *Edward* 6. died ſeized, or not, is Matter of Law. For if his Preſentation of *William Chamberlain* was no Uſurpation, nor gained any Patronage to him, from thence it follows that he did not die ſeized, and if on the other Hand it did gain him any Patronage, then it follows from thence that he did die ſeized. So that this is Matter which is properly to be cleared up by the Court. And if the Defendants had taken a Traverſe in their Plea in Bar, they would have brought the Trial of this Matter to a Jury, who are to try Matters of Fact, and not Matters of Law, as this is here, for that which would come before a Jury to prove the Deſcent in this Caſe is Matter of Law, which is more proper to be tried by the Court than by a Jury. For which Reaſon the Plea in Bar is good. And ſo in all Caſes where a Thing is materially alledged, and the other Party comes in, and ſhews Matter of Law, which, when the Law ſhall come to be known, proves that the Matter before alledged is true or falſe, a Traverſe ſhall never be taken for the Reaſon above given. Wherefore the whole Court held that the Bar was good as to this Point.

The Diviſion of the Matter.

And as to the Matter in Law, it was digeſted into divers Points. Firſt, what Perſon is capable of an Appropriation; ſecondly, what Perſons may make an Appropriation, and how many ought to aſſent to it; thirdly, at what Time an Appropriation may be made, *viz.* if it may be made as well when the Church is full as when it is void; fourthly, if an Uſurpation may be had upon a Parſon Imparſonee, and if by the Uſurpation of a Stranger the Church may be diſappropriated; and laſtly, if all the Things requiſite concur in the Appropriation here pleaded.

1 Point.

By the common Law none but a ſpiritual Body politic or corporate is capable of an Appropriation, and not a natural Perſon, nor a Lay-man. 1 Finch 420.

And as to the firſt Point, the Juſtices were of Opinion that none but a ſpiritual Body politic or corporate, which hath Succeſſion, is capable of an Appropriation. For the Effect of an Appropriation, as to its original Inſtitution, was to make ſomebody perpetual Incumbent, and as ſuch to have the Rectory, and the Houſes, Glebe, and Tithes which are Parcel thereof. And in that he is made Parſon, he has the Cure of the Souls of the Pariſhioners, in which Caſe he ought to be [a] a ſpiritual Perſon: For as a Patron ought to preſent to a Church a ſpiritual and not a temporal Perſon, ſo for the ſame Reaſon an Appropriation ought to be made to a ſpiritual and not to a temporal Perſon, [b] for the one has Cure of Souls as well as the other, and there is no Difference between them but that the one is Parſon for Life, and the other and his Succeſſors are Parſons for ever. And therefore Appropriations were originally made to Abbots, Priors, Deans, Prebendaries, and ſuch others who could miniſter the Sacraments and perform divine Service, and to none elſe. And upon this Principle it was originally taken, that ſuch Parſons Imparſonees could not grant over their Eſtates to any other, for at this Day an Incumbent of a Parſonage preſentable cannot grant over his Incumbency to another, although he may make a Leaſe of the Glebe and Tithes,

[a] W. Jones 184.

[b] 2 Rol. Abr. 341. S. pl. 3. At firſt Appropriations were made to ſole Corporations ſpiritual, who could adminiſter the Sacraments, and perform divine Service, as Abbots, Priors, Deans, Prebendaries, &c. S. P. 1 Rol. R. 475. at the Bottom. 2 Rol. Abr. 348. L. pl. 1.

but

but he ought to [a] reſign, and then the Patron and Biſhop may make a new Incumbent, ſo that the Incumbency, which is a ſpiritual Office, cannot be granted over to another; and by the ſame Reaſon a perpetual Incumbent could not originally grant over to another his Eſtate, which contains the Incumbency and the Rectory itſelf, which was the Revenue of the Incumbent. [b] And upon this Ground is the Saying of *Herle* in 3 *Ed.* 3. where a *Quare Imp. dit* was brought againſt the Prior of *St. John's Jeruſalem* in *England*, (to whom the Poſſeſſions of the diſſolved Order of Templars, who had certain Parſonages appropriated to them, were conveyed) upon a Diſturbance to preſent to a Church which was appropriated by the Earl of *Richmond* to the ſaid Templars, and there *Herle* ſaid, if the Templars after the Appropriation had granted over their Eſtate of the Appropriation to Hoſpitalers, the Hoſpitalers ſhould not thereby have had the Appropriation, for it was granted only to the Templars, who could not by their Deed make an Appropriation to others; and he ſaid further, that that which was appropriated to the Templars was become diſappropriate by the [c] Diſſolution of their Order; wherefore it was thereupon ſaid to the Court, that the ſame Eſtate which the Templars had was conveyed to the Prior of *St. John's* by the Grant of the Pope, and of the King, and by Parliament. So that by the Opinion of *Herle* an Appropriation could not be transferred from one to another. And not without great Reaſon, for it contains a perpetual Incumbency (which is a ſpiritual Function) appropriated to a certain ſpiritual Perſon, which could not by Law be removed from them to whom the Church was firſt appropriated, by any Grant afterwards to be made by them.

Appropriations not grantable over. S. P. Hob. 307. Watſ. Compl Incumb. 191, 202.

a See Watſ. Compl. Incumb. 28.

b P. 3. Ed. 3. 11. b. pl. 1. Fitz. Grant 70. 7 Co. 13. a.

c S. P. Poſt 501 (d) and ſee the Books there cited.

And although originally Appropriations were only made to ſuch ſpiritual Perſons as could miniſter the Sacraments, and perform divine Service, as Abbots, Priors, Deans, and ſuch like, yet in Proceſs of Time they began by Degrees to ſhake of that Reſtraint, and were afterwards made to others, as to Dean and Chapter, (which is a Body corporate conſiſting of many Perſons, which Body together cannot ſay divine Service) and to Nuns, (who were Prioreſſes of any Nunnery, and could not miniſter the Sacraments, nor ſay divine Service to the Pariſhioners) which was *grande nefas*, as *Dyer* termed it; and this was done under the Pretence of maintaining Hoſpitality. And in order to ſupply theſe Defects in the Perſons to whom ſuch Appropriations were made, who could not themſelves perform Divine Service, a [d] Vicar was afterwards deviſed, who was deputed to Priors, or to Dean and Chapter, and at laſt to Abbots themſelves, and to others, to ſay divine Service for them, and he had but a ſmall Portion allotted him, and they to whom the Appropriations were made retained the great Revenue, and did nothing for it, and as the Revenue decayed, ſo did Preaching and Hoſpitality in the Parſonage, and other good Works, which was a great Miſuſe, as it ſeemed to the Judges. And all this was done under Pretence of Hoſpitality, which in Fact was the Ruin of Hoſpitality, and eſpecially in the Pariſh, where it ſhould chiefly be kept up. But yet ſuch Appropriations were never made but to a ſpiritual Body, and which had Succeſſors and not Heirs, in which Succeſſion the Patronage, Incumbency, and the Fruits of the Benefice might for ever remain, and a Marriage was made between them (as the Lord *Dyer* termed it), ſo that the one ſhould not be divorced or ſeparated from the other at any Time. * And in order to perfect ſuch Marriage, it was requiſite that the Patronage, which is another Thing than a ſpiritual Body, ſhould be in ſuch ſpiritual Body politic or corporate which ſhould be perpetual Incumbent, for the Patronage is a Thing temporal, to which the Incumbency which is a Thing ſpiritual ought to be conjoined, and that cannot be if they are in ſeveral Hands, for Separation and Conjunction are directly oppoſite and contrary to each other. Wherefore a ſpiritual Body politic or corporate, being the Patron, is only capable of an Appropriation.

Afterwards Appropriations were made to ſpiritual Corporations aggregate, who cannot all together ſay divine Service, as to Dean and Chapter, and at laſt to Nuns. S. P. 1 Rol. R. 455, at the Bottom. 2 Rol. Abr. 348. pl. 3.

d 2 Rol. R. 98. Palm. 113. 2 Rol. Abr. 348. pl. 3. 1 Mod. 12. Watſ. Compl. Incumb. 195.

* Watſ. Compl. Incumb. 191.

As to the ſecond Point, *viz.* what Perſons may make an Appropriation, and how many in Number ought to aſſent to it; all the Juſtices unanimouſly agreed that the Ordinary, the Patron, and the King ought to agree to it, and theſe are *Actores fabulæ*, as *Dyer* termed them. And firſt the Ordinary inferior or ſupreme ought to agree to it, becauſe he is the principal Agent in it, for he has the ſpiritual Juriſdiction, and the Act of Appropriation is a ſpiritual Thing, and the Ordinary ſays, *appropriamus*, *conſolidamus*, *et unimus*, as principal Actor in the Cauſe (as *Manwood* Juſtice ſaid), becauſe the Cure of the Church principally concerns the Souls of the Pariſhioners, of whom [e] the Biſhop hath the Charge within his Dioceſe, for which Reaſon the Law has attributed to him the principal Part in the Appropriation. [f] And, it was ſaid, it appears in a Caſe in 6 *H.* 7. (which then commenced, but was not adjudged until 11 *H.* 7.) that a Union and an Appropriation belong to the Biſhop to do, and where a Union was there made of a Chappel in one Dioceſe to a College in another Dioceſe, the Aſſent of both [g] the Biſhops was pleaded, and a great Number of Caſes and Precedents in the Book of Entries were cited, where the Biſhop of the Dioceſe had made Appropriations, (which Caſes I will not here recite, my Intent being only to make a brief Report of the Matter, *ſed ſumma ſequor faſtigia rerum*).

2 Point.

Appropriations ought to be with the Aſſent of the Ordinary, the Patron, and the King. S. P. 1 Rol. R. 461. Cro. J. 517. 1 Finch 419, 420.

1ſt of the Ordinary. 1 Rol. Abr. 238. pl. 4. Watſ. Compl. Incumb. 191.

e 1 Mod. 12.

f H. 6. H. 7. 13, 14. 11 H. 7. 8, 26. pl. 10.

g Watſ. Compl. Incumb. 185.

And that which the Ordinary of the Dioceſe might do, the ſame was uſed to be done within the Realm by the Pope, as ſupreme Ordinary, who claimed to himſelf a ſupreme Juriſdiction above all Ordinaries, and was long ſuffered to be done by him, ſo that he uſed to make Viſitations, Corrections, Diſpenſations, and Tolerations within every Dioceſe of this Realm, as the Ordinaries uſe to do (as *Mounſon* ſaid) and he took from the Biſhops of this Realm whatever and as much as he

The Pope uſed to be looked upon as ſupreme Ordinary, and made Appropriations without the Biſhop, who was only deemed

inferior Ordinary. Vide Cro. J. 517. 1 Danv. Abr. 510. pl. 4. in Margine. Watſ. Compl. Incumb. 191.

pleaſed.

pleaſed. In Conſequence of this Cuſtom he uſed to make Appropriations without the Biſhop, which were taken to be good, and the Biſhop, who was only looked upon as inferior Ordinary, never contradicted or oppoſed this Practice, but it was ſubmitted to and accepted as good; for (as *Manwood* ſaid) *in preſentia majoris ceſſat potentia minoris.* And ſo an Appropriation made by the Pope alone, without the Ordinary, was taken to be good. [a] And hereupon *Manwood* cited the Caſe in 29 *Ed.* 3. in a *Quare Impedit* brought by the Earl of *Saliſbury* againſt the Prior of *Mountague*, where an Appropriation was pleaded to be made by the Apoſtle, with the Aſſent of the King, without Mention of the Ordinary, which Appropriation was allowed to be good, and he ſaid that the Pope was called by the Name of Apoſtle. And many other Caſes were cited to the ſame Purpoſe. And the Pope uſed to make Proviſions until he was reſtrained by the Statute of 25 *Ed.* 3. which Proviſion was a Deſignation of the Perſon who ſhould be Incumbent, and an Admiſſion, Inſtitution, and Induction of him without going to the Biſhop. So that his Authority was looked upon as abſolute, and bound the Biſhop as his inferior in all his Acts. And ſo it was agreed by the whole Court.

[a] H. 29. Ed. 3. 7. b. Fitz. Quare Impedit 190.

The Authority which the Pope exerciſed in this Realm being acknowledged by Parliament to be in the King, conſequently he, as ſupreme Ordinary, may make an Appropriation of his own Authority without the Biſhop, where he himſelf is Patron.

And ſuch Authority and Juriſdiction as the Pope uſed to exerciſe within this Realm was acknowledged by the Parliament in 25 *H.* 8. and in other Statutes to be in the ſaid King *Henry* 8. So that he might lawfully exerciſe ſuch Juriſdiction as the Pope uſed or was accuſtomed to exerciſe within this Realm. And from him this Authority deſcended to King *Edward* 6. who made the Appropriation here, ſo that he being ſupreme Ordinary might make an Appropriation of his own Authority and Juriſdiction without the Biſhop, for which Purpoſe he inſerted in his Charter theſe Words, *by our royal Authority ſupreme and eccleſiaſtical which we enjoy.* And other like Acts of Juriſdiction and Authority he might do, which the Biſhop of *Rome* was uſed to do in this Realm. And hereupon *Dyer* ſaid, that in a late Caſe in the Common Bench between [b] Sir *John Pollard* and *Walrond*, he and all his Companions declared the Law to be, that a Reſignation which the Dean of *Wells* had made to the King was good and effectual, inaſmuch as the King was Head of the Church of *England*, and that it was as good as if it had been made to the Biſhop, and thereby the Deanery became void. Wherefore all the Juſtices agreed that an Appropriation made by the King alone without the Biſhop is as good as if the Biſhop had made it, or as it was taken in ancient Time to be when the Pope made it.

S. P. Poph. 145. Watſ. Compl. Incumb. 192.

[b] Mich. 12 & 13 Eliz. Dy. 293. pl. 4. 1 Rol. R. 457. Watſ. Compl. Incumb. 29. 1 Finch 401. Vin. Abr. tit. Preſentation F. b. pl. 2. in notis.

2dly of the Patron.

But although the Ordinary, inferior or ſuperior, is the Perſon who ought to make the Appropriation, yet he cannot do this without the Will of the Patron. For the Patron has a temporal Inheritance in the Advowſon, *viz.* a Fee-ſimple, which neither the Ordinary, nor in ancient Time the Pope, could take away from the Patron, nor alter without his Will and Aſſent. And therefore in all Appropriations the Patron is a Party, for he ought to accept it; and the Ordinary is the Agent, and the Patron is the Patient, and his Aſſent in ſubmitting himſelf to the Will of the Ordinary, and in accepting his Order, and in executing that which he ordains, is a Declaration of his Will, and the whole ſhall be intended to be done at his Requeſt, for the Benefice is his own. So that the Ordinary and the Patron are two Actors in this Drama.

S. P. 29 Ed. 3. 10. a. *Per Skipw.* 1 Rol. Abr. 238. pl. 2. Moor 900. Davis 74. b. 1 Finch 401. Watſ. Compl. Incumb. 191, 192. For by the Appropriation the Patronage is extinct, Kelw. 48. b. *Per Frowick.* 2 Leon 80. Sav. 20.

3dly of the King.

But beſides theſe there is a third who has a Part to act herein, and that is, the King, as King, for he might be hurt by this Marriage or Appropriation, becauſe the Advowſon is held of him mediately or immediately. And if it is held of him immediately, then all Poſſibility of having any Advantage of Wardſhip, Relief, or the like, accruing from the Tenure, is taken away by this Conjunction, for then it cannot be expected that the Patronage will ever come again into Lay-hands, or that the King, who had the Patronage, if he was the Founder of the Abbey, Priory, or other ſpiritual Place, ſhall in any mean Vacation have the Preſentment. And if the Advowſon is held immediately of a Subject, yet it is held mediately of the King, [c] for all Lands within this Realm are held either mediately or immediately of the King, and before the Church was built the Land upon which it ſtands was held of the King, and ſo ſhall the Advowſon be held of him, which is [d] repoſed in the Patron in Lieu of the Land upon which the Church is built, and this Patronage may poſſibly come to the King by Eſcheat or otherwiſe, and if it does not, yet the King may have the Benefit of it by Lapſe. [e] For if the Patron does not preſent within ſix Months, then the Ordinary may preſent within the next ſix Months, becauſe it is his Duty to ſee that the Pariſhioners have divine Service performed, and if he does not preſent within theſe ſix Months, then the Metropolitan may preſent within ſix Months next after, in Reſpect that it lies upon him to ſee that the Pariſhioners have divine Service, if the Ordinary is remiſs in providing it, and if the Metropolitan does not preſent within theſe ſix Months, then the King may preſent when he pleaſes, for in Reſpect that the Land is held of him, the Preſentment accrues to him by Lapſe, for Default of the other three, as [f] ſupreme Patron (as *Dyer* called him, and *Harper* and the other Juſtices called him ſupreme Patron as King, and not in Reſpect of the ſupreme Juriſdiction which the Realm had acknowledged in him by the Statute, with Reference to that which was before exerciſed by the Pope). And all this Benefit which might accrue to the King from the Advowſon is loſt by the Appropriation, becauſe it will never come out of the Hands of the Incumbent again, ſo that the King can never have any Hopes of preſenting an Incumbent by Lapſe or otherwiſe. And therefore in Reſpect of the Loſs which the King ſuſtains by an Appropriation, the Law has given him a Prerogative that he ſhall be privy and ſhall give his Conſent to every Appropriation, as well where the Church

S. P. Poph. 145. 11 Co. 11. a. 1 Danv. Abr. 511. pl. 8. Davis 73. a. Style 156. Watſ. Compl. Incumb. 192.

[c] H. 48 Ed. 3. 9. b. *Per Finch.* 50 Aſſ. pl. 1. *Per Bel.* Co. Litt. 1. a. 2 Inſt. 501. 4 Inſt. 192. 1 Finch 55, 112. 2 Finch 83, 132. Poſt Manxel's Caſe 13 (a).

[d] See 1 Nelſ. Abr. 184.

[e] See Ante 322 (k). and the Books there cited.

[f] Dyer 294. pl. 6. in margine. 1 Rol. R. 457, 460. Watſ. Compl. Incumb. 116. See Ante 322 (k).

is of the Patronage of another, as where it is of his own Patronage. So that the King is the third Actor in this Drama.

But Quære, *if the Appropriation be made without the King's Aſſent, what Damage the Parſon Imparſonee ſhall ſuſtain by it.* [a] *For the Appropriation is not Mortmain, as it appears in* 21 Ed. 3. 5. *in a* Quare Impedit, *where the Lord of whom an Advowſon was held brought a* Quare Impedit *upon an Avoidance, and took his Title upon an Entry for an Appropriation as for Mortmain, and there it was ſaid againſt him, that the Lord had no Damage by the Appropriation, for the Advowſon was held of him afterwards as well as before, and the Appropriator purchaſed no Lay-fee nor Thing temporal, but Tithes, and Oblations, and Things ſpiritual, ſo that the Caſe was not within the Statute of Mortmain; and there the Juſtices were of Opinion to give Judgment againſt the Plaintiff, for which Reaſon he was nonſuited. So that it appears from this Caſe that an Appropriation is not Mortmain.* [b] *But in* P. 19 Ed. 3. *the King brought a* Quare Impedit *againſt the Prior of* Bentſey, *and counted that the Prior held the Advowſon of the King as of his Crown, and preſented, and afterwards without his Licenſe appropriated it, whereby the Right of the Advowſon by the Law of the Land accrued to the King: And the Prior pleaded that the King by his Charter there ſhewn forth gave him Licenſe to appropriate it, and he ſaid that the Advowſon was held of one W. And it was there held by* Stone, *that if the Advowſon was held of the King as of his Crown, or as an Eſcheat, the Charter which did not make Mention* [c] *of the Tenure ſhould be void, and that the King ſhould not be foreclоſed of his Preſentment: And afterwards they were at Iſſue, whether the Advowſon was held of the King, or not. By the Purport of which Caſe, and by the ſaid Words (that the Right of the Advowſon by the Law of the Land accrued to the King), and alſo by the Words of* Stone *(that the King ſhould not be foreclоſed of his Preſentment), it ſeems that they took the Law to be, that for ſuch Offence, viz. for an Appropriation without the King's Licenſe, the King ſhould preſent. But what Eſtate the King ſhall have in the Advowſon is not there expreſſed. And inaſmuch as it is not Mortmain, I don't ſee that the King can have any Eſtate of Inheritance or Freehold, or that he can have more when it is held of him immediately, than when it is held of a Subject, for the Advowſon remains as it was before, and there is no Tranſmutation of the Poſſeſſion, nor any Subtraction of the Services of the Tenure, nor any Damage in the one Caſe more than in the other, but the King ſhall have as great an Eſtate in the one Caſe as he ſhall have in the other, and the Offence to the Prerogative is the ſame in the one Caſe as it is in the other. And it ſeems to me that the Advowſon ſhall not be forfeited to the King either in the one Caſe or in the other, but I am of Opinion with* Shard *in the Caſe of* 21 Ed. 3. *above cited, where, upon* Wilby's *ſaying that if the Advowſon had been held of the King, and it had been appropriated without his Licenſe, although another had been the Founder, the King might have ſeized the Advowſon, and yet it was a Damage to none, to that* Shard *replied,* "*What you ſay is the King's Prerogative, and has always been adjudged* "*as well touching Advowſons which are not held of him, as touching thoſe which are held of him, for* "*he who appropriates a Church ought to have the King's Licenſe; but if the King in ſuch Caſe ſeizes* "*the Advowſon, it is not forfeited, but he ſhall preſent to the Avoidances in the name of Diſtreſs, until* "*a Fine be made to him for making the Appropriation without Licenſe.*" *Theſe are the Words of* Shard, *which I thought proper to cite at large, and the more ſo becauſe I did not hear the Judges ſpeak to this Matter.*

Nota bene by the Reporter: Where an Advowſon (whether held of the King or of a common Perſon) is appropriated without the King's Licenſe; the Advowſon is not thereby forfeited, but the King may ſeize it, and preſent to the Avoidances in the Name of Diſtreſs until a Fine is made to him; and he ſhall not have an Eſtate of Inheritance or Freehold in the Advowſon, for the Appropriation without Licenſe is not Mortmain. S. P. Watſ. Compl. Incumb. 107, 108, 192. 1 Finch 420.

[a] H. 21 Ed. 3. 5, 6. Fitz. Mortmain 11. Bro. Appropriation 6.

[b] P. 19 Ed. 3. Fitz. Grant 58.

[c] S. P. Ante 335 (a), and See the Books there cited.

And ſo all the Juſtices unanimouſly agreed, that the Ordinary inferior or ſuperior, the Patron, and the King, ought to aſſent to every Appropriation.

3 Point. The moſt proper Time for making an Appropriation is when the Church is void, yet it may be made when the Church is full, by ſuch apt Words as will ſerve to appropriate it when it becomes void. S. P. 50 Ed. 3. 27. a. *Per Fulik.* Bro. Appropriation 2. Hob. 150. 11 Co. 11. a. 1 Rol. Abr. 239. D. pl. 1, 2, 3. Watſ. Compl. Incumb. 185, 192, 193. Vin. Abr. tit. Appropriation D. pl. 2. *in Margine.*

As to the third Point, *viz.* at what Time an Appropriation may be made, that is, if it may be made when the Church is full: As to this, all the Juſtices unanimouſly agreed that an Appropriation may be made by apt Words when a Church is full, that is to ſay, by Words which ſerve to appropriate it afterwards when it ſhall be void. For the moſt proper Time to make an Appropriation is, when the Church is void, becauſe then the Appropriation may be executed preſently. But if the Church is full, then if proper Words are uſed, as that the Patron, who is a ſpiritual Perſon, after the Church ſhall be void, ſhall be Parſon, and may retain the Glebe and the Fruits to his own proper Uſe, this ſhall make a good Appropriation when the preſent Incumbent is dead, or an Avoidance happens. [d] So that the Effect of the Words ſhall be there executed afterwards when the Church is void. And the Reaſon whereupon ſome have heretofore doubted of this, is, becauſe the preſent Incumbent has a Fee-ſimple in the Manſion, and in the Glebe, and in the Tithes, and there is no Reverſion or Intereſt in any other beſides the Incumbent, when there is an Incumbent. In which Caſe it has been ſaid that the Ordinary, and the Patron, and the King cannot grant to a Stranger that he ſhall retain in Time to come the Glebe and Tithes, in which they have then no Eſtate or Intereſt, but which another is ſeized of in Fee, and that they cannot unite, annex, or conſolidate to the Patron and his Succeſſors the Rectory in which they have no Eſtate; but as to this, true it is that neither the Patron, nor the Ordinary, nor the King have any Eſtate in the Parſonage, but the whole Eſtate and Inheritance thereof is in the Incumbent, and therefore neither the Patron, nor the Ordinary, nor the King have any Thing to do with it in the Life of the Incumbent: But the Matter reſts upon another Point, for although they have nothing to do with the Parſonage, yet the Ordinary, inferior or ſuperior, may with the Aſſent of the Patron and of the King aſſign the Patron, being a ſpiritual Body, to be Incumbent when the preſent Incumbent ſhall be dead, or an Avoidance happens. And in this Caſe there is a Diverſity between the Preſentation of an Incumbent by the Patron, and this Aſſignation of an Incumbent by the Ordinary. [a] For when the Church is full, the Patron cannot preſent one to the Biſhop to be

[d] Vin. Abr. tit. Appropriation D. pl. 6.

Diverſity between an Appointment of a perpetual Incumbent (by Way of Appropriation) by the Ordinary with the Aſſent of the Patron and of the King, when the Church is full, and the Preſentation of an Incumbent by the Patron when the Church is full.

[a] Watſ. Compl. Incumb. 217.

Incumbent after the Church ſhall be void, but he ought to wait until the Church is void, and before the Avoidance happens, he has no Title to preſent, nor is the Ordinary bound to accept the Perſon preſented to be Parſon at a Time to come, but ſuch Preſentation ſhall be void. But the Ordinary with the Aſſent of the Patron and of the King may aſſign the Patron, being a ſpiritual Body, to be Incumbent when the preſent Incumbent ſhall die, or an Avoidance happen, for this is prejudicial to none, and the Perſon aſſigned may be ſo fit for it that it may be beneficial to the Church and to Religion. [b] And upon this Reaſon the Pope, before he was prohibited by the Act of 25 *Ed.* 3. uſed to make Proviſions to the Benefices of other Patrons, and eſpecially to the Benefices which the Clergy had, which although injurious to the Patrons, yet ſuch Proviſion as to Incumbents was undoubtedly allowed in the Law as good, and ſuch Proviſion was nothing more than a Deſignation of one to be an Incumbent after the preſent Incumbent ſhould be dead, or an Avoidance ſhould happen, and that ſuch Perſon aſſigned might [c] enter into the Rectory, and retain the Profits during his Life without Admiſſion, Inſtitution, and Induction. And if the Pope could do ſo in ſuch Caſe where it was injurious to the Patron, and the Clerk ſo appointed was, after the Death of the Incumbent, adjudged in Law a ſufficient Incumbent, without Admiſſion, Inſtitution, or Induction, *a fortiore* he might have done this to the Patron himſelf, in which Caſe no Injury would have been done to the Patron, and ſuch Patron ſhould have been adjudged Incumbent without any other Admiſſion or Inſtitution, and might have entered without Induction. And if the Pope uſed to do this, then the King, in whom ſuch Power as the Pope exerciſed is acknowledged by Parliament to be, may do it, and then if the ſpiritual Body ſo aſſigned ſhall be adjudged Incumbent without other Admiſſion or Inſtitution, and ſhall thereby have the ſpiritual Function, and be Parſon in deed, then he may enter into the Rectory, becauſe the King, who has ſufficient Authority to enable him ſo to do, has [d] diſpenſed with the Induction. So that when he is appointed to have the ſpiritual Function, and to be Parſon, he is thereby made Owner of the Poſſeſſions of the Parſon, for as he who is made Abbot has thereby the Poſſeſſions of the Abbey, ſo he who is duly made Parſon is implicatively made Poſſeſſor of the Parſonage, for the ſpiritual Office draws with it the Right to have the Poſſeſſions belonging to the Office. Wherefore the making of a ſpiritual Body to be perpetual Parſon when the Church is full is not preciſely a Grant of the Glebe and Tithes, but in that ſuch Body is made Parſon, he may, after the Death of the preſent Incumbent, or when an Avoidance happens, meddle with the Glebe and Tithes as Things annexed to his Office of Parſon. So that the Reaſon before-mentioned, which has inclined ſome to think that an Appropriation cannot be made when the Church is full, is of no Weight, but falls to the Ground. And all the Juſtices agreed that an Appropriation may be made in the Life of the Incumbent, with apt Words which will ſerve to appropriate it at the Time when an Avoidance happens, at which Time it will be a good Appropriation. [e] And *Manwood* Juſtice ſaid that in 6 *H.* 7. *Keble*, who argued that an Appropriation could not be made in the Life of a preſent Incumbent, admitted that an Appropriation might be made after his Death, as well as a Union, but then there muſt be other Words; which Words intended by him (*Manwood* ſaid) are Words [f] *in futuro*, viz. that he ſhall be Parſon from the Time of the Death or Avoidance of the preſent Incumbent.

b Moor 905.

c Davis 82. a.

An Appropriation made when the Church is full is not preciſely a Grant of the Glebe and Tithes, but an Appointment of a ſpiritual Body to be Incumbent when the preſent Incumbent ſhall die, or an Avoidance happen, and in ſuch Caſe the ſpiritual Body being appointed to the Function, and made Parſon, has thereby in him the Right of the Poſſeſſions, and may enter into the Parſonage, after the Death of the preſent Incumbent, or at an Avoidance, without Admiſſion, Inſtitution, or Induction. Watſ. Compl. Incumb. 193.

d Davis 81. b.

e H. 6 H. 7. 13. b. 14. a.

f 1 Rol. Abr. 239. D. pl. 3. Hob. 150. Watſ. Compl. Incumb. 193. 11 Co. 11. a.

Nota bene by the Reporter.

* S. P. held Dy. 244. pl. 60. Co. Litt. 352. b. 1 Co. 155. a. 10 Co. 48. a. Watſ. Compl. Incumb. 424.

* *It ſeems to me in this Caſe, that if the Dean and Chapter, after the Letters-patent made, and in the Life of* Haltman, *had made a Leaſe for Years of the Rectory, the Leaſe ſhould have been void, becauſe in the Life of* Haltman *they had nothing in the Rectory, and the Appropriation was not executed until after the Avoidance, at which Time by their Entry they had an Eſtate in the Rectory, and not before.*

4 Point.

No Diſappropriation of a Church by Uſurpation upon the Parſon Imparſonee. S. P. 1 Rol. Abr. 240. G. pl. 2. Watſ. Compl. Incumb. 122, 200.

As to the fourth Point, *viz.* whether a Uſurpation may be made upon a Parſon Imparſonee, all the Juſtices unanimouſly agreed that it cannot, becauſe the Church has an Incumbent, and is full, for he to whom the Appropriation is made is Incumbent, and as compleat a one as any other Incumbent ſhould be, who came in by Preſentment, Inſtitution, and Induction, and then there cannot be two Incumbents of one and the ſame Church at one and the ſame Time, for to be Incumbent is the Office of one Body, and if there is one Incumbent, and another is preſented, admitted, inſtituted, and inducted, all this is void. [g] As if A. is an Officer of an Office for Life, as Steward of a Manor, or the like, a Patent made to B. of the ſame Office during the Life of A. is void, and if B. is admitted, inſtituted, and inducted, A. ſhall have an Action of Treſpaſs againſt him. So if a Parſon Imparſonee has a Church appropriated to him, and another is preſented, inſtituted, and inducted into the ſame Church, he ſhall have an Action of Treſpaſs againſt him, if he meddles with the Glebe and Tithes, as it is agreed by all the Juſtices in [h] 38 *H.* 6. And the like Caſe was cited in 39 *H.* 6. [i] where a Prior was Parſon Imparſonee, and a Stranger preſented his Clerk, who was admitted, inſtituted, and inducted, and in by ſix Months, and made a Leaſe of the Parſonage, and the Leſſee ouſted the Prior, and the Prior brought an Action of Treſpaſs, and the Matter was there well debated, and it was the Opinion of the whole Court that the Action of the Prior was maintenable, [k] for when the Church was full of the Prior, the Preſentation, Inſtitution, and Induction of the other did not ouſt the Prior, but was void, becauſe the Prior ſhall be adjudged always in Poſſeſſion, and therefore he could not have had a [l] Writ of Right of Advowſon, for none ſhall have that Writ but he who is out of Poſſeſſion, for which

g Hardr. 12.

h H. 38 H. 6. 1 b. Fitz. Conſultation 1.

i M. 39 H. 6. 20, 21. F. N. B. 35. f.

k Watſ. Compl. Incumb. 247.

l P. 21. Ed. 4. 1. a. *Per Collow.* H. 38. H. 6. 20. a. *Per Danby.* Sed Contra 2 Rol. Abr. 383. L.

Reaſon

Reaſon his Action of Treſpaſs or Aſſize ſhould lie. [a] But a Parſon Imparſonee cannot, in a *Quare Impedit* brought againſt him, plead Plenarty (as *Manwood* ſaid), becauſe the Statute of *Weſtminſter* 2. *cap.* 5. gives ſuch Plea to the Patron, *viz.* that the Church is full of his own Preſentation by ſix Months before the Writ purchaſed, which a Parſon Imparſonee cannot ſay; and that Statute deſtroys the Pleading of Plenarty at the Common Law, which was, [b] that the Church was full the Day of the Writ purchaſed, as it is ſaid in the ſaid Caſe of 38 *H.* 6. Wherefore a Uſurpation cannot be made upon a Parſon Imparſonee, nor can the Church be diſappropriated by ſuch Means.

[a] 1 Finch 412. Watſ. Compl. Incumb. 283.

[b] 1 Finch 411. 2 Inſt. 360.

[c] But if a Parſon Imparſonee preſents another, thereby he has diſappropriated the Advowſon, and made it preſentable ever after, as *Manwood* ſaid; for, he ſaid, *volenti non fit injuria*, but againſt his Will no one can tortiouſly diſappropriate it. [d] And if a Corporation, to which a Church is appropriated, is diſſolved, the Church is thereby diſappropriated, (as the Lord *Dyer* ſaid) and the Lord of whom the Advowſon is held may preſent to it.

[c] S. P. 1 Rol. Abr. 240. F. pl. 1. F. N. B. 35. f. Hob. 152. Sav. 21. 2 Leon. 80. 1 Keb. 96. *Per Windham.* Watſ. Compl. Incumb. 199.

[d] P. 3. Ed. 3. 11. *Per Herle.* H. 21. H. 7. 4. b. *Per Frowick* C. J. F. N. B. 33. k. 2 Co. 47. b. Hob. 307. Sav. 21. Watſ. Compl. Incumb. 201. 1 Finch. 11. 2 Finch 14. Ante 497 (c).

[e] Quære *if Dean and Chapter, or other ſpiritual Corporation, is ſeized of a Manor to which an Advowſon is appendant, and the Church is appropriated to them, and afterwards they make a Feoffment or a Leaſe of the Manor* cum pertinentiis, *ſhall this diſappropriate the Church? For it ſeems to ſome, that by the Courſe of the Common Law the Advowſon ſhall paſs as appendant to the Manor, but now by the Statutes, which have made the King and Lay-perſons capable of Parſonages appropriate, the Advowſon is in ſuch Caſe ſevered from the Manor by the Intent of the Acts, and in the Grant of the Parſonage appropriate, which may now be granted and transferred to common Perſons, the Advowſon ſhall paſs.*

Quære by the Reporter.

[e] Watſ. Compl. Incumb. 201.

So it was held by all the Juſtices that no Uſurpation can be made upon a Parſon Imparſonee, as it is ſaid before.

And as to the laſt Point, *viz.* if there are all the neceſſary Ingredients in the Appropriation here pleaded. And the three *puiſne* Judges, viz. *Mounſon*, *Manwood*, and *Harper*, held that there were, and that the Words of the Charter of King *Edward* 6. are ſufficient to convey the Advowſon to the Dean and Chapter, and to make the Appropriation, and that the ſaid King's Charter ſerves for three Purpoſes, *viz.* to convey the Advowſon to the Dean and Chapter, and to make the Appropriation as ſupreme Ordinary with his eccleſiaſtical Juriſdiction, and alſo to give his Aſſent as King of this Realm, and that the Church was full of the Dean and Chapter immediately after the Death of *Haltman*, and that the Preſentation, Inſtitution, and Induction of *Chamberlain* was void, and that upon the whole Matter the Plaintiff ought to be barred. But as to the Lord *Dyer*, altho' he agreed with them in the firſt four Points, yet in this laſt he varied from them, and he took four Exceptions to the Matter and the Form contained in the Bar.

5 Point. If there is every Thing requiſite to make the Appropriation here good.

* The firſt was, becauſe in the Grant of the Advowſon to the Dean and Chapter, and to their Succeſſors, there is not the Clauſe of *non obſtante* the Statutes of Mortmain. For the King's Grant ought not to be taken to two [f] Intents, *viz.* to convey the Advowſon to the Corporation, and alſo to diſpenſe with the Statutes of Mortmain. [g] And hereupon he cited the Caſe in 9 *Ed.* 4. in an Aſſize between *Bagot* and *Swiringdon*, where the King granted an Office for Life to an Alien, and it was there taken that the Grant was not good, becauſe no Mention was made in the Charter that the Grantee was an Alien, and foraſmuch as the Grant could not enure to two Intents, *viz.* to make him a Denizen, and alſo to convey to him the Office, the Charter was held to be void; wherefore the Party, in order to enable himſelf to have the Office, ſhewed the Letters of Naturalization.

Exceptions taken by *Dyer* C. J. to the Matter of the Bar.

* See T. 17 Ed. 3. 39. pl. 12. cited 5 Co. 56. a. 7 Co. 4. b. a. good Caſe upon this Ground.

[f] 1 Co. 52. a. 2 Sid. 81, 142. 1 Finch 90. 2 Finch 101.

Vin. Abr. tit. Prerogative G. c. [g] H. 7 Ed. 4. 30. P. 9 Ed. 4. 11. Bro. Patents 62. 1 Co. 52. a. 5 Co. 56. a. 3 Leon. 243. 1 Finch 90. 2 Finch 101.

The ſecond Exception was, that the Charter is not ſufficient to make an Appropriation, becauſe it has not made the Dean and Chapter Parſons of the Church. And the Charter ought to have granted, that after the Avoidance of the preſent Incumbent they ſhould be Parſons, for the Words of uniting and incorporating the Parſonage to them and to their Succeſſors, and of enabling them to enter into the Parſonage, extend only to the Rectory in which the King and Patron had nothing, and therefore he had no Authority over it, and conſequently the Grant is void for that Reaſon. [h] But the effectual Words to make the Appropriation in this Caſe are Words which conſtitute them Parſons after the Avoidance of the preſent Incumbent, which Words are omitted. For if a Writ of Annuity had been brought by the Dean and Chapter, after the Death of the then preſent Incumbent, for an Annuity due in Reſpect of the Parſonage, or if a Writ of Annuity had been brought againſt them for an Annuity which was payable for the Parſonage, in both theſe Caſes they ought to have been named Parſons. [i] And this appears in the firſt Caſe in 21 *H.* 7. as well as in divers other Books which he cited. [k] And he alſo cited the Caſe in 12 *H.* 4. in an Aſſize, where the Prior of *Burton* brought an Aſſize for certain Wheat taken, *&c.* and the Tenant pleaded *out of his Fee*, &c. and the Plaintiff ſaid that he and all his Predeceſſors Parſons of the Church of *Pederton* had been ſeized from Time immemorial, *&c.* and it was the Opinion of the Juſtices that the Writ ſhould abate, becauſe he was Parſon, and claimed as Parſon, and was not named Parſon. And he cited divers other Caſes to the ſame Effect. So that, he ſaid, to be Parſon is the chief Point of an Appropriation, and therefore the Want of Words to make them ſo here renders the Appropriation inſufficient.

Exception 2.

[h] Hob. 148.

[i] H. 21. H. 7. 1.

[k] P. 12. H. 4. 20. pl. 6. Fitz. Aſſize 49. Bro. Brief 128. Noſme 13.

The third Exception was, for that the Defendants have not alledged that they entered after the Death of *Haltman*. For the Words of the Charter are, that after the Avoidance *they ſhould and might*

Exception 3.

might hold, &c. in which Caſe Power and Liberty is given them to hold, and they have not ſhewn that they did enter or hold, for in Things of Election the Party ought to ſhew that he has done it. And becauſe the Defendants have not alledged an Entry, the Appropriation is not ſhewn to be executed, and therefore the Plea in Bar is inſufficient.

Exception 4. The fourth Exception was, for that the Defendants have pleaded that after the Death of *Haltman* they were Parſons, and held and yet do hold the aforeſaid Rectory and Church to their own proper Uſes, and thereof then and always afterwards have been ſeized in Right of their Cathedral Church aforeſaid, whereas they ought to have ſaid, *in Right of the Church of Dean*, for they hold the Parſonage in Right of the Church of *Dean*, and not in Right of the Cathedral Church of *Worceſter*, as it is ſhewn before, ſo that this is not well pleaded, but vitiates the Plea.

* See 1 Bulſt. 81. * But the Lord *Dyer* was the laſt who argued, and there was none to reply to him as to theſe Exceptions, and therefore one of the Defendant's Counſel, who heard the Exceptions, put in Writing ſuch Anſwer to them as occured to him, and delivered it to the Lord *Dyer*, which was alſo ſeen by the other Juſtices. And the Anſwer was thus, *viz.* as to the firſt Exception, touching a *non obſtante* the Statutes of Mortmain, [a] the Grant is good notwithſtanding there is not any Licenſe to alien in Mortmain, nor any Clauſe of *non obſtante* in the Patent, and that as well in the Caſe of a Grant by the King as by a common Perſon, and it ſhall veſt in the Grantees, or elſe it would not be Mortmain. [b] But the Penalty is, that the Lord immediate may enter within the Year, and the other Lords within half a Year after the Time devolves to them, and (if the Thing does not lie in Tenure) the King ſhall have it after Office found, and until Office is found it is in the Corporation. And ſo in this Caſe if the Clauſe of *non obſtante* was neceſſary, the King might have a *Scire facias* after Office found, and by that Means he might reſeize the Advowſon. But the Grant was a Grant and paſſed at one Time, ſo that the Patent is not void. And if in fact the Dean and Chapter had a ſealed Licenſe of the King to purchaſe this Advowſon of the King, this Licenſe and the Grant afterwards by another Charter were good, notwithſtanding there was no Clauſe of *non obſtante* in the Charter of the Grant of the Advowſon; and there might be ſuch Licenſe in this Caſe, and it is not neceſſary to plead the Licenſe upon the Grant, but when the Party is impleaded by *Scire facias* after Office finding the Mortmain, then is the Time to ſhew it. And in *Fitzherbert Tit. Fines* we may frequently ſee Fines levied to Corporations without ſhewing any Licenſe; but if after the Fine the Corporation is impeached for the Mortmain, then it is the Time to ſhew the Licenſe, and not in pleading or in ſetting forth the Title. And *in rei veritate* there is a Clauſe of *non obſtante* in the Patent here, although it is not pleaded.

Anſwer to the firſt Exception taken by *Dyer* C. J.

[a] See S. P. viz. that the King may diſpenſe with the Statutes of Mortmain without any Clauſe of *non obſtante*, Co. Litt. 99. a. 2 Hawk. P. C. 391, § 30.

[b] Co. Litt. 2. b.

And it ſeems that though the Dean and Chapter had not had any Licenſe to purchaſe this in Mortmain, nor any Clauſe of *non obſtante* in the Patent, yet the Patent ſhould have been good,

[c] Co. Litt. 99. a. [c] for it cannot be preſumed that the King is ignorant of his Law, becauſe he is the Head of it, and therefore when he granted the Advowſon here, and ſaid, *of his certain Knowledge*, &c. it is to be ſuppoſed that he was deſirous that the Defendants ſhould have the Advowſon, notwithſtanding his Statute of Mortmain, whereof it is to be intended that he takes Cogniſance by the Words, *of his certain Knowledge*, &c, ſo that the Grant countervails in itſelf a Grant and a Clauſe of *non obſtante*.

And where it is ſaid by the Lord *Dyer*, that the King's Grant cannot enure to two Intents, true

[d] 1 Co. 52. a. 5 Co. 56. a. 2 Sid. 81. Gouldſb. 20. 1 Finch 90. 2 Finch 101. it is, where the one Intent is to be taken of a foreign Matter, [d] as if the King grants Land to A. and his Heirs, and A. is his Villain, this Grant ſhall not enure to give the Land to the Villain, and alſo to manumiſe him, becauſe his being the King's Villain was a foreign Matter, and in fact not apparent to the King; but yet the Patent is good to the Villain, and the Land is veſted in him, though upon an Office finding that he is a Villain, the King may enter into the Land as well as if

[e] Ante 501 (8). any other had given it to his Villain, and in this Caſe the Land paſſed from the King, although the Patent did not manumiſe the Villain. But in the principal Caſe there is no ſuch foreign Matter in

[f] M. 2. H. 7. 6. b. Bro. Patents 109. 7 Co. 14. a, *Calvin's* Caſe. 12 Co. 18. 2 Hawk P. C. 390. 1 Finch 59. 2 Finch 235. Deed not apparent to the King, which the King might be ſaid not to have Cogniſance of, for the King was well appriſed that the Dean and Chapter were a Corporation, and that his Statute of Mortmain extended to them, which Statute he could not be ignorant of, but on the contrary he had Knowledge of it, as his Words, *of his certain Knowledge*, teſtify. So that here there is no Ignorance in Fact, as in the Caſes of a Villain, and of an [e] Alien, but if there is any Ignorance at all, it is an Ignorance in Law, which cannot be allowed in the King in this Caſe.

Yet in ſome Caſes it is neceſſary to have the Clauſe of *non obſtante* in the King's Grants. [f] As in the Caſe of 2 *H.* 7. *Fitz. Tit. Grant pl.* 33. it was ordained by Statute that the Grant of the King to any one to be Sheriff of any County for a greater Time than one Year ſhould be void, notwithſtanding the Clauſe of *non obſtante* ſhould be in the Patent, and there it was taken that the Grant of the King made to the Earl of *Northumberland* to be Sheriff during his Life ought to have a Clauſe of *non obſtante*, &c. becauſe the Statute is ſtrictly penned *ut ſupra*, and the Patent made to the Earl in that Caſe was good with the Clauſe of *non obſtante*, &c. So if the King will grant to one to be Eſcheator for Life, there ought to be the Clauſe of *non obſtante*, becauſe the Statute has preciſe Words to make void ſuch Grants. [g] And in a Pardon of Murder, if the King expreſſes that the Party ſhall not find Surety for his good Behaviour, as the Statute of 10 *Ed.* 3. requires, there ought to be a Clauſe of *non obſtante*, &c. in the Charter, becauſe the Statute expreſsly makes ſuch Pardon void, if ſuch Surety is not found afterwards. So that to avoid the preciſe Words of the Act, it is neceſſary to have the Clauſe of *non obſtante*, &c. But in the Statute of Mortmain there are no preciſe Words to make the Grant void, but the Act gives an Entry or Seizure, as the Caſe requires, always admitting the Grant to be good. And here it appears

[g] See 1 Sid. 41. Carth. 121. 2 Hawk. P. C. 398, § 70. But the Statute of 10 *Ed.* 3. is repealed by that of 5 & 6 *W.* & *M. cap.* 13. And *Note* that the diſpenſing Power is now taken away by the Statute of 1 *W.* & *M. Seſs.* 2. *cap.* 2. whereby no *non obſtante* of any Statute ſhall be allowed, without a Diſpenſation in ſuch Statute.

appears to be the Intent of the King that the Dean and Chapter ſhould enjoy this without Seizure, as it is ſaid before; and the Words, *of his certain Knowledge*, ſhew that he took upon himſelf Cogniſance of all Things requiſite, and conſequently of the Statute of Mortmain.

As to the ſecond Exception, viz. that the Charter has not expreſly made them Parſons; to this the ſaid Counſel wrote in Anſwer, that the Words which enable the Dean and Chapter to [a] hold to their own proper Uſe, without Preſentation, Admiſſion, or Induction, and the Words of the Grant by which the King appropriates, conſolidates, unites, and incorporates the Church and the Rectory to the Dean and Chapter and to their Succeſſors, import that they ſhall be perpetual Parſons, and in a Manner make them Parſons, and are equivalent to Words which make them Parſons, and are uſual in Appropriations without other Words to make them Parſons, as appeared by the Precedents ſhewn to the Lord *Dyer* with that which is here written. And theſe Words together with the Words, *of his ſpecial Grace, and meer Motion, &c.* are to be ſo applied that ſomething ſhall be made of them rather than they ſhall be void. And the King's Intent ought not to be utterly ſubverted.

Anſwer to the 2d Exception.

[a] See Hob. 307, that theſe Words by *Periphraſis* amount to the ſame as if they were expreſly made Parſons.

As to the third Exception, viz. that the Defendants have not ſhewn that they entered after the Death of the Incumbent; to this the ſaid Counſel wrote in Anſwer, that the Patent made the Dean and Chapter Parſons immediately after the Death of *Haltman*, without Preſentation, Admiſſion, and Inſtitution, and then if the Words ſhall take ſuch Effect, the Grant is as fully executed as if all theſe three Things were executed in a common Incumbent, and eſpecially as to the Admiſſion and Inſtitution, by which Words they were made fully Parſons, and had the Spiritual Function at the Inſtant of the Incumbent's Death, and the Cure of Souls, and as to the Induction which gives Seizin of the Poſſeſſions, that was diſpenſed with by the Patent, wherefore the Dean and Chapter are in the ſame Caſe as they ſhould be by Admiſſion, Inſtitution, and Induction. And tho' it ſhould be admitted that the Words of diſpenſing with Induction are not equivalent to an Induction which gains the Seizin, yet the Words of the Plea in Bar are, that after the Death of the Incumbent *the aforeſaid Dean and Chapter were Parſons of the ſame Church, and the aforeſaid Rectory and Church to their own proper Uſes held and yet hold, and thereof then immediately and always afterwards have been and yet are ſeized in their Demeſn as of Fee*; which Words *(that they were ſeized)* imply an Entry, for without Entry they could not be ſeized, and it is not the Practice in the Common Bench in like Caſes of Poſſeſſions executory to alledge an Entry. [b] For upon a Fine *ſur grant et render* the Pleading is, *by Force whereof he* (the Party to whom the Render was made) *was ſeized*, without ſaying that he entered and was ſeized. And in an *Ejectione firmæ* the Plaintiff uſually ſhews the Leaſe made, and ſays, *by Force whereof he was poſſeſſed*, and does not ſhew any Entry, and it is good, becauſe a Man cannot be ſeized or poſſeſſed of Land unleſs he firſt enters, and therefore when he ſhews the Seizin, it is as much as if he had ſaid, that he entered and was poſſeſſed or ſeized. And ſo it ſhall be in the principal Caſe here.

Anſwer to the 3d Exception.

[b] S. P. Cro. E. 917. pl. 9. *per Curiam.* 2 Mod. Entr. 325. b. pl. 6. Vin. Abr. tit. Fine L. b. 4. pl. 7. Vide Co. Litt. 201. a.

As to the fourth Exception, viz. that the Defendants have ſaid that they were ſeized in Right of their Cathedral Church; to this the ſaid Counſel wrote in Anſwer, that the Plea is, that after the Death of *Haltman* they were ſeized of the Rectory and Church of *Dean* in their Demeſn as of Fee, *in Right of their Cathedral Church aforeſaid, &c.* which is true, and well pleaded. [c] For there is a Difference when the Plea is of the whole, and when of Parcel. For if they were diſſeized of an Acre parcel of the Parſonage, there if they ſaid that they entered and were thereof ſeized, they ought to ſay, *in Right of their Church of Dean.* [d] And ſo in the *Regiſter* in a *Juris utrum* brought by L. Biſhop of *Lincoln* Parſon of the Church of E. the Words of the Writ are, *whether* 20 *Acres of Land with the Appurtenances in E. are Frank-almoign belonging to the Church of the ſaid L. or Lay fee, &c.* [e] So in 49 *H.* 6. 16, where the Abbot of *Colcheſter* Parſon of a Church claimed an Annuity which was belonging to the ſaid Rectory, it was taken that he ought to preſcribe in Right of the Rectory, and not that he and his Predeceſſors Abbots have had it from Time immemorial, for of Parcels and Things belonging to the Rectory they ought to be claimed in Right of the Rectory. But here the Parſonage and Church of *Dean* is an entire Thing, of which entirely the Dean and Chapter have alledged that they were ſeized in Right of their Cathedral Church, and ſo in Truth they are, and it would be very abſurd for them to ſay that they were ſeized of the Church of *Dean* in Right of the Church of *Dean*, or of the Rectory and Church of *Dean* in Right of the Church of *Dean*. Wherefore there is an apparent Diverſity between the Caſes.

Anſwer to the 4th Exception.

[c] 2 Danv. Abr. 219. pl. 2. in notis. Vin. Abr. tit. Corporations C. a. pl. 37. tit. Seizin K. pl. 22.

[d] Regiſt. F. N. B. 49. n.

[e] M. 49 H. 6. 16. b. Fitz. Fauxer de recov. 18.

Beſides, if the Words *in Right of their Cathedral Church aforeſaid, &c.* had been totally omitted, the Plea would not have been bad, [f] and then the Miſ-recital of that which might have been wholly omitted cannot vitiate the Plea.

[f] S. P. 6 Mod. 41. 8 Mod. 377 *Turner v. Moſs.* 4 Bac. Abr. 94. Ante 30 (c) *per Harris.* 32 (m) *per Hinde* J. 81 (b) *per Whidon.*

* And afterwards Judgment was given for the Defendants, and againſt the Plaintiff; which Judgment here follows.

* See N. Bendl. 296. S. C. ſays that no Judgment was here given, but that the Parties compromiſed the Matter upon the Payment of a Sum of Money awarded to the Plaintiff.

The reſt of the Record.

At which Day here came as well the aforeſaid *Roger* as the aforeſaid Dean and Chapter by their Attornies aforeſaid. And thereupon the Plea aforeſaid of the aforeſaid Dean and Chapter above in Bar pleaded being ſeen and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here that the ſaid Plea is ſufficient to preclude the aforeſaid *Roger* from having his Action aforeſaid againſt the aforeſaid Dean and Chapter. Therefore it is conſidered that the aforeſaid *Roger* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim, and that the aforeſaid Dean and Chapter go thereof without Day, &c.

Judgment.

A brief Report of a Judgment given in the King's Bench *in* Hillary *Term in the* 20th *Year of the Reign of Queen* Elizabeth, *upon a ſpecial Verdict found in the County of* Somerſet *upon the general Iſſue in a Bill of* Ejectione firmæ *brought by* Nicholas Eare *(Leſſee for Years of* Hugh Trevilian, *Son of* Thomas Trevilian *youngeſt Son of* John Trevilian, *Son and Heir of Sir* John Trevilian *Knight, of Tenements in* Lucomb, Minhead, Dunſter, *and* Timberſcomb *in the County of* Somerſet) *againſt* Nicholas Snow *and two others, who ejected the Leſſee as Servants and by the Command of* John Trevilian, *Son and Heir of* John Trevilian, *eldeſt Son and Heir of the ſaid* John Trevilian, *Son and Heir of the ſaid Sir* John Trevilian *Knight. And the ſaid Leaſe was made the* 8th *Day of* May *in the* 18th *Year of the Reign of Queen* Elizabeth, *and the Ejectment was done the* 12th *Day of the ſame Month in the ſame Year. And the Record thereof is entered among the Records of* Trinity *Term* 18 Elizabeth, Rot. 495, *and was as follows.*

Somerſet. Declaration. Same Precedent Raſt. Entr. 258. a. pl. 15.

BE it remembered, that otherwiſe, viz. in the Term of *Eaſter* laſt paſt, before the Lady the Queen at *Weſtminſter* came *Nicholas Eare* by *Thomas Stranſham* his Attorney, and brought here into the Court of the ſaid Lady the Queen then there his certain Bill againſt *Nicholas Snow* otherwiſe *Jacob*, *Agnes Elſworthy* Widow, and *Thomas Elſworthy*, in the Cuſtody of the Marſhal &c. of a Plea of Treſpaſs and Ejectment of a Farm. And there are Pledges of proſecuting, viz. *John Doe* and *Richard Roe*. Which ſaid Bill follows in theſe Words, viz. *Somers.* viz. *Nicholas Eare* complains of *Nicholas Snow* otherwiſe *Jacob*, *Agnes Elſworthy* Widow, and *Thomas Elſworthy*, in the Cuſtody of the Marſhal of the Marſhalſea of the Lady the Queen before the Queen herſelf, for this, viz. that whereas *Hugh Trevilian* Gentleman the 8th Day of *May* in the 18th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, at *Lucomb* in the County aforeſaid, demiſed, granted, and to Farm let to the aforeſaid *Nicholas Eare* 4 Meſſuages, 200 Acres of Land, 30 Acres of Meadow, 100 Acres of Paſture, 20 Acres of Wood, and 60 Acres of Furze and Heath with the Appurtenances, ſituate, lying, and being in *Lucomb*, *Minhead*, *Dunſter*, and *Timberſcomb* in the County aforeſaid; to have and to hold the Tenements aforeſaid with the Ap-

purtenances to the aforeſaid *Nicholas Eare* from the Feaſt of the Annunciation of the bleſſed *Mary* the Virgin then laſt paſt, for and during the full End and Term of ſeven Years from thence next following, and fully to be compleat and ended. By virtue of which ſaid Demiſe he the ſame *Nicholas Eare* into the Tenements aforeſaid with the Appurtenances entered, and was thereof poſſeſſed, until the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas* afterwards, viz. the 12th Day of *May* in the Year aforeſaid, with Force and Arms, &c. into the Tenements aforeſaid with the Appurtenances entered, and him the ſaid *Nicholas Eare* from his Farm aforeſaid thereof, his Term aforeſaid not yet ended, ejected, expelled, and amoved, and him the ſaid *Nicholas Eare* from his Poſſeſſion thereof held out, and yet hold out, and other Wrongs to him did, to the Damage of him the ſaid *Nicholas Eare* 20 *l.* and againſt the Peace of the ſaid Lady the Queen now, &c. And therefore he produces the Suit, &c.

And now at this Day, viz. *Friday* next after the Morrow of the *Holy Trinity* in this ſame Term, until which Day the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas* had Leave to imparl to the Bill aforeſaid, and then to anſwer, &c. before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Nicholas Eare* by his Attorney aforeſaid, as the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas* by *William Pordage* their Attorney. And they the ſame *Nicholas Snow*, *Agnes*, and *Thomas* defend the Force and Injury when, &c. and ſay that they are not guilty thereof, and of this they put themſelves upon the Country, and the aforeſaid *Nicholas Eare* likewiſe, &c. Therefore let Jurors come thereon before the Lady the Queen at *Weſtminſter* on *Tueſday* next after 18 Days of the *Holy Trinity*, and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame Day is given to the Parties aforeſaid there, &c. Afterwards the Proceſs thereof between the Parties aforeſaid in the Plea aforeſaid being continued by the Jury thereof between them being reſpited before the Lady the Queen at *Weſtminſter* until *Tueſday* next after the Octave of *St. Michael* then next following, unleſs the Juſtices of the Lady the Queen aſſigned to take Aſſizes in the County aforeſaid ſhould firſt come on *Wedneſday* the 5th Day of *September* at *Chard* in the County aforeſaid by the Form of the Statute, &c. for Default of Jurors, &c. Before which Day the Plaint aforeſaid by the Writ of the ſaid Lady the Queen of common Adjournment was adjourned before the ſaid Lady the Queen until from the Day of *St. Michael* in one Month then next following, whereſoever, &c. At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid. And the aforeſaid Juſtices before whom &c. have ſent here their Record before them had in theſe Words: Afterwards the Day and Place within contained, before *Roger Manwood* one of the Juſtices of the ſaid Lady the Queen of the Bench, and *John Jefferey* one of the Juſtices of the ſaid Lady the Queen aſſigned to hold Pleas before the Queen herſelf, Juſtices of the ſame Lady the Queen aſſigned to take Aſſizes in the County of *Somerſet*, by the Form of the Statute, &c. came as well the within named *Nicholas Eare* as the within written *Nicholas Snow* otherwiſe *Jacob*, *Agnes Elſworthy* Widow, and *Thomas Elſworthy* in their proper Perſons. And the Jurors of the Jury within ſpecified being called, ſome of them came, and ſome of them did not come, as appears in the Panel, &c. Therefore the Jury aforeſaid is further reſpited before the Lady the Queen at *Weſtminſter* until *Tueſday* next after 18 Days of *St. Hillary*, for Default of Jurors, &c. Therefore let the Sheriff have the Bodies, &c. And that he put ten ſuch, &c. The ſame Day is given to the Parties aforeſaid there, &c. Afterwards the Proceſs thereof between the Parties aforeſaid in the Plea aforeſaid being continued by the Jury thereof between them being reſpited before the Lady the Queen at *Weſtminſter* until *Monday* next after one Month of *Eaſter* then next following, for Default of Jurors, &c. At which ſaid *Monday* before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Nicholas Eare* as the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas* by their Attornies aforeſaid. And the Jurors of the Jury aforeſaid being called likewiſe came. Who to ſay the Truth of the Premiſſes being choſen, tried, and ſworn, ſay upon their Oath, that long before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid above ſuppoſed to be done, one *William Butler* Serjeant at Arms, and *John Cavel* were of the Tenements aforeſaid with the Appurtenances in which, &c. among other Things ſeized in their Demeſn as of Fee. And the ſaid *William Butler* and *John Cavel* being ſo ſeized thereof, before the aforeſaid Time when, &c. viz. the 16th Day of *April* in the 21ſt Year of the Reign of Lord *Henry* late King of *England* the *eighth*, by their certain Writing indented, ſealed with the Seals of them the ſaid *William Butler* and *John Cavel*, bearing Date the ſame 16th Day of *April* in the 21ſt Year aboveſaid, demiſed, delivered, granted, and confirmed to *John Trevilian* Eſquire, Son and Heir of *John Trevilian* Knight, the Tenements aforeſaid with the Appurtenances in which, &c. among other Things, by the Names of the Manor of *Oldknoll* with its Appurtenances, and of all the Meſſuages, Lands, Tenements, Rents, Reverſions, and Hereditaments, with their Appurtenances whatſoever, which the aforeſaid *William Butler* and *John Cavel* together with one *George Trevilian* Clerk deceaſed lately had to them, their Heirs and Aſſigns, of the Gift and Feoffment

Imparlance.

Not guilty.

Venire awarded.

The Jury continued to the Aſſizes.

Poſtea.

Jury reſpited.

Habeas corpora.
Decem tales.

Jury further continued.

Special Verdict.

Feoffment of the aforeſaid *John Trevilian* Knight, in *Oldknoll*, *Slocomb*, *Cobridge*, *Timberſcomb*, *Weſtharewood*, *Elliſworth*, *Overholt*, *Lynch*, *Vaneford*, *Tortiſlinch*, *Mean*, *Woodcockſlegh* otherwiſe *Legh*, *Raduiſh*, *Lucomb*, *Dunſter*, *Stintwell*, and *Carhampton* in the aforeſaid County of *Somerſet*; to have and to hold the Manor and Tenements aforeſaid with the Appurtenances whereof, &c. to the aforeſaid *John Trevilian* the Son, and to his Heirs of his Body lawfully begotten; and if the aforeſaid *John Trevilian* the Son ſhould happen to die without Heirs of his Body lawfully begotten, the Remainder thereof to *Humphry Trevilian* Brother of the aforeſaid *John Trevilian* Knight, and to the Heirs of the Body of the ſaid *Humphry* lawfully begotten for ever; and if the aforeſaid *Humphry Trevilian* ſhould happen to die without Heirs of his Body lawfully begotten, the Remainder thereof to the right Heirs of the aforeſaid *John Trevilian* Knight for ever. By virtue whereof the aforeſaid *John Trevilian* the Son into the Tenements aforeſaid with the Appurtenances in which, &c. entered, and was thereof ſeized in his Demeſn as of Fee-tail. And he being ſo ſeized thereof, one *Anthony Pollard* Eſquire, *Alexander Wood*, *John Pollard* of *Plymouth*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander Wollacomb*, the Day of in the 23d Year of the Reign of the ſaid late King of *England Henry* the *eighth*, out of the Court of Chancery of the ſame late King, the ſame Chancery then being at *Weſtminſter* in the County of *Middleſex*, ſued forth a certain Writ of the ſame late King of Entry upon a Diſſeizin in the *Poſt*, againſt the aforeſaid *John Trevilian* the Son, and *Avice* then his Wife, concerning the Tenements aforeſaid with the Appurtenances in which, &c. among other Things, by the Names of the Manor of *Knoll* with the Appurtenances, and of 30 Meſſuages, 4 Burgages, 2 Mills, 1000 Acres of Land, 200 Acres of Meadow, 600 Acres of Paſture, 60 Acres of Wood, 2000 Acres of Furze and Heath, and 1d. Rent with the Appurtenances in *Oldknoll*, *Slocomb*, *Cobridge*, *Timbercomb*, *Weſtharewood*, *Elliſworth*, *Overholt*, *Vaneford*, *Tortiſlinch*, *Mean*, *Woodcockſlegh* otherwiſe *Legh*, *Raduiſh*, *Lucomb*, *Dunſter*, *Stintwell*, and *Carhampton*, to the then Sheriff of the aforeſaid County of *Somerſet* directed. By which ſaid Writ the aforeſaid late King commanded the ſame then Sheriff, that the ſame then Sheriff ſhould command the aforeſaid *John Trevilian* and *Avice*, that juſtly and without Delay they ſhould render to the aforeſaid *Anthony*, *Alexander Wood*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander Wollacomb* the Tenements aforeſaid with the Appurtenances, which they then claimed to be their Right and Inheritance, and into which the ſame *John Trevilian* and *Avice* had not Entry but after the Diſſeizin which *Hugh Hunt* thereof unjuſtly and without Judgment then had done to the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander*, after the firſt Voyage of Lord *Henry* the Son of King *John* into *Gaſcoign*, as they then ſaid; and unleſs they ſhould ſo do, and the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* ſhould make him the then Sheriff ſecure of proſecuting their Claim, then that the ſame then Sheriff ſhould ſummon by good Summoners the aforeſaid *John Trevilian* and *Avice* that they might be at *Weſtminſter* aforeſaid on then next following, to ſhew why they had not done it; and that the ſame then Sheriff ſhould have then the ſaid Summoners and that Writ. At which ſaid at *Weſtminſter* aforeſaid, before *Robert Norwich* Knight and his Companions Juſtices of the aforeſaid late King of the Bench, came as well the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* by *Richard Buckland* their Attorney, as the aforeſaid *John Trevilian* and *Avice* by *John Roſs* then their Attorney. And the Sheriff of the County aforeſaid, viz. then ſent the Writ aforeſaid in all Things ſerved and executed, viz. that the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* had ſound to the ſame then Sheriff Pledges of proſecuting the Writ aforeſaid, viz. *John Den* and *Richard Fen*, and that the aforeſaid *John Trevilian* and *Avice* had been ſummoned by *John Doe* and *Richard Roe*. Whereupon the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander*, by declaring upon their Writ aforeſaid by their Attorney aforeſaid, demanded againſt the aforeſaid *John Trevilian* and *Avice* the Tenements aforeſaid with the Appurtenances, as their Right and Inheritance, and into which the ſame *John Trevilian* and *Avice* had not Entry but after the Diſſeizin which the aforeſaid *Hugh Hunt* thereof unjuſtly and without Judgment did to the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* after the firſt, &c. and whereupon they then ſaid that they themſelves were ſeized of the Tenements aforeſaid with the Appurtenances in their Demeſn as of Fee and Right, in Time of Peace, in the Time of the aforeſaid late King, by taking thereof Explees to the Value, &c. and into which, &c. And therefore they then produced the Suit, &c. And the aforeſaid *John Trevilian* and *Avice* by the aforeſaid *John Roſs* then their Attorney defended their Right when, &c. and they then vouched thereof to Warranty *Thomas Chapman* who was then preſent in the ſame Court in his proper Perſon, and freely the Tenements aforeſaid with the Appurtenances then to them warranted, &c. And thereupon the aforeſaid *Anthony*,

Alexander, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* then demanded againſt him the ſaid *Thomas Chapman* then Tenant by his Warranty the Tenements aforeſaid with the Appurtenances in Form aforeſaid, *&c.* And whereupon they ſaid that they themſelves were ſeized of the Tenements aforeſaid with the Appurtenances in their Demeſn as of Fee and Right, in Time of Peace, in the Time of the aforeſaid late King, by taking thereof Explees to the Value, *&c.* and into which, *&c.* And therefore they then produced the Suit, *&c.* And the aforeſaid *Thomas Chapman* then Tenant by his Warranty aforeſaid defended his Right when, *&c.* and then ſaid that the aforeſaid *Hugh* did not diſſeize the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander*, of the Tenements aforeſaid with the Appurtenances, as they the ſame *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* by their Writ and Declaration aforeſaid above ſuppoſed, and thereof he put himſelf upon the Country. And the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* then prayed Leave to imparl thereon, *&c.* and they had, *&c.* And afterwards the ſame *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* then came again into the aforeſaid Court that ſame Term by their Attorney aforeſaid. And the aforeſaid *Thomas* although then ſolemnly called did not come, but in Contempt of the Court departed and made Default. Therefore it was then conſidered, that the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* ſhould recover their Seizin againſt the aforeſaid *John Trevilian* and *Avice* of the Tenements aforeſaid with the Appurtenances, and that the ſame *John Trevilian* and *Avice* ſhould then have of the Land of the aforeſaid *Thomas Chapman* to the Value, *&c.* and that the ſame *Thomas Chapman* then ſhould be in Mercy, *&c.* By Virtue of which ſaid Recovery in Form aforeſaid had, the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* into the Tenements aforeſaid with the Appurtenances entered, and were thereof ſeized in their Demeſn as of Fee. Which ſaid Recovery in Form aforeſaid had and executed was to the Uſe of the aforeſaid *John Trevilian* and his Heirs for ever, and to fulfil the laſt Will of the ſame *John Trevilian.* And the ſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* being ſo ſeized thereof to the ſaid Uſe, the aforeſaid *John Trevilian*, before the aforeſaid Time when, *&c. viz.* the 21ſt Day of *December* in the aboveſaid 23d Year of the Reign of the aforeſaid late King *Henry* the *eighth*, at *Yarnſcomb* in the County of *Devon*, made his Teſtament and laſt Will in Writing in theſe Words.

" In the Name of *God*, Amen. Whereas nothing is more certain than Death, nor any Thing " more incertain than the Hour of Death, therefore the 21ſt Day of *December* in the Year of our " Lord God 1531, and the 23d Year of the Reign of King *Henry* 8. I *John Trevilian* Eſquire " Son and Heir of Sir *John Trevilian* Knight deceaſed, of whole Mind and perfect Remembrance, " (Thanks be unto Almighty *God*) ordain and make this my laſt Will concerning the Diſpoſition " of all my Manors, Lands, Tenements, and other Hereditaments, as hereafter enſueth. That " is to ſay, where *Anthony Pollard* of *Horewood*, by the Name of *Anthony Pollard* Eſquire, *Alex-* " *ander Wood*, *John Pollard* of *Plymouth*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alex-* " *ander Wollacomb* have recovered before the Juſtices of our ſaid Sovereign Lord the King of his " Common Pleas at *Weſtminſter* 21 Meſſuages, 2000 Acres of Land, 80 Acres of Meadow, 500 " Acres of Paſture, 100 Acres of Wood, and 500 Acres of Furze and Heath, with their Ap- " purtenances in *Woodby*, *Checkſton*, and *Berinarver*, in the County of *Devon*, againſt me the afore- " ſaid *John Trevilian* Eſquire and *Avice* my Wife, by a Writ of our ſaid Sovereign Lord the King " of Entry upon Diſſeizin in the *Poſt*, as by Record made in the Term of *St. Michael* in the 23d " Year of the Reign of King *Henry* 8. in the Number-Roll thereof 528 plainly doth appear. " And alſo where the ſaid *Anthony Pollard*, *Alexander Wood*, *John Pollard* of *Plymouth*, *John* " *Blackdon*, *John Davy*, *John Loveland*, and *Alexander Wollacomb* have alſo recovered before the " ſaid Juſtices of our ſaid Sovereign Lord the King aforeſaid at *Weſtminſter* aforeſpecified, 13 " Meſſuages, 1 Mill, 600 Acres of Land, 60 Acres of Meadow, 300 Acres of Paſture, 120 " Acres of Wood, and 200 Acres of Furze and Heath with their Appurtenances in *Wolmerſheys*, " and *Champerneheys* in the County of *Dorſet* againſt me the ſaid *John Trevilian* and *Avice* my Wife, " by another Writ of our Sovereign Lord the King of Entry upon Diſſeizin in the *Poſt*, as by " Record alſo made in the ſaid Term of *St. Michael* in the 23d Year of the Reign of our Sove- " reign Lord the King *Henry* 8. in the Roll of the Number there 446 alſo more at large appear- " eth. And alſo where the ſaid *Anthony Pollard*, *Alexander Wood*, *John Pollard* of *Plymouth*, " *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander Wollacomb* have alſo recovered before " the ſaid Juſtices of our ſaid Sovereign Lord the King aforeſaid at *Weſtminſter* afore rehearſed, the " Manor of *Knoll* with the Appurtenances, and 30 Meſſuages, 4 Burgages, 2 Mills, 1000 Acres of Land, " 200 Acres of Meadow, 600 Acres of Paſture, 60 Acres of Wood, 2000 Acres of Furze and Heath, " and one Penny of Rent with their Appurtenances in *Oldknoll*, *Slocomb*, *Cobridge*, *Timberſcomb*,

" *Weſtharewood*, *Elliſworth*, *Overholt*, *Lynch*, *Vaneford*, *Tortiſlinch*, *Mean*, *Woodcockslegh* other-
" wiſe *Legh*, *Raduiſh*, *Lucomb*, *Dunſter*, *Stintwell*, and *Carhampton* in the County of *Somerſet*,
" againſt me alſo the aforeſaid *John Trevilian* Eſquire, and the ſaid *Avice* my Wife, by another
" Writ of our ſaid Sovereign Lord the King of Entry upon Diſſeizin in the *Poſt*, as by another
" Record alſo made in the ſaid Term of *St. Michael* in the ſaid 23d Year of the Reign of our So-
" vereign Lord King *Henry* 8. in the Roll of Number there 529 more apparently doth appear.
" And whereas I the ſaid *John Trevilian* Eſquire, by the Name of *John Trevilian* Eſquire, Son
" and Heir of *John Trevilian* Knight deceaſed, by my Deed of four Parts indented, bearing Date
" the 10th Day of *December* in the ſaid 23d Year of the Reign of King *Henry* 8. have enfeoffed
" *Edmund Bray* Knight Lord *Bray*, *Edward Bray* Knight, *John Chamond* Knight, *Anthony Pol-*
" *lard* of *Horewood*, *Alexander Wood* Eſquire, *John Moleſworth* Clerk, *John Barry*, *John Bedewell*,
" *John Pollard* of *Plymouth*, *Edward Siddenham* of *Culmſtock*, and *John Siddenham* his Son and
" Heir, *John Blackdon*, *John Davy*, *John Loveland*, and *Humphry Cleverden*, of and in all my
" Manors, Meaſes, Lands, Tenements, Rents, Reverſions, and Services, with all the Ad-
" vowſances of Churches, Chauntries, and Chappels, and all other Hereditaments mine whatſo-
" ever they be, with all their Appurtenances, that late were the aforeſaid *John Trevilian* Knight,
" in the County of *Cornwal*. And alſo by the ſame my Deed of four Parts indented have enfeoffed
" the ſaid *Edmund Bray* Knight Lord *Bray*, *Edward Bray* Knight, *John Chamond* Knight, *An-*
" *thony Pollard*, and the others abovenamed, of and in my Manors of *Nettlecomb*, *Rowdon*,
" *Woodavenant*, together and with the Advowſances of Churches and Chauntries of *Nettlecomb*
" aforeſaid, and all other Hereditaments mine whatſoever they be, with all their Appurtenances,
" that late were the aforeſaid *John Trevilian* Knight in the County of *Somerſet*, (except the afore-
" ſaid Manor of *Knoll*, with its Appurtenances, and alſo except all thoſe Meaſes, Burgages,
" Mills, Lands, Meadow, Paſture, Wood, Furze and Heath, and a Penny of Rent, with all
" the Appurtenances, in *Oldknoll*, *Slocomb*, *Cobridge*, *Timberſcomb*, *Weſtharewood*, *Elliſworth*,
" *Overholt*, *Lynch*, *Vaneford*, *Tortiſlinch*, *Mean*, *Woodcockslegh*, otherwiſe *Legh*, *Raduiſh*, *Lu-*
" *comb*, *Dunſter*, *Stintwell*, and *Carhampton* in the aforeſaid County of *Somerſet*) to the Perform-
" ance following, and fulfilling my laſt Will in Manner and Form as in Writing or otherwiſe be-
" fore faithful People thereof and upon I ſhall make and declare, at ſuch Time as it ſhall ſeem me
" neceſſary and behovable. I the ſaid *John Trevilian* Eſquire, Son and Heir of the ſaid *John*
" *Trevilian* Knight, therefore declare by this my Writing my laſt Will and full whole Will of and
" upon all and ſingular of every of the Premiſſes afore ſpecified, in Manner and Form following.
" That is to ſay, firſt, I the ſaid *John Trevilian* the Son will that the ſaid *Anthony Pollard*, and all
" the other aforenamed in the ſaid ſeveral Recoveries, that now be ſeized of all the ſaid Manors,
" Meaſes, Lands, and Tenements, and other the Premiſſes compriſed in the ſaid ſeveral Reco-
" veries, and in every of them, their Heirs and Aſſigns, and alſo the ſaid *Edmund Bray* Knight
" Lord *Bray*, and other his Co-Feoffees named in the ſaid Feoffment, their Heirs and Aſſigns,
" of all and every of the ſaid Manors, Meaſes, Lands, Tenements, Rents, Reverſions, and
" Services, with all the Advowſances of Churches, and all other Hereditaments whatſoever they
" be, with their Appurtenances in the County of *Cornwal*, and alſo of all and every of the ſaid
" Manors, Meaſes, Lands, Tenements, Rents, Reverſions, and Services of and in *Nettlecomb*,
" *Rowdon*, *Woodavenant*, with the Advowſances of Churches and Chauntries of *Nettlecomb* afore-
" ſaid, and all other Hereditaments whatſoever they be, with their Appurtenances, in the ſaid
" County of *Somerſet*, and of every Parcel of all and ſingular the Premiſſes compriſed and ſpeci-
" fied in the ſaid my Deed of Feoffment, ſhall ſtand and be ſeized thereof to the Uſe of me the ſaid
" *John Trevilian* the Son of the ſaid *John Trevilian* Knight, for Term of my Life, without any
" Impeachment of Waſt, and to ſuffer me the ſaid *John Trevilian* and my Aſſigns to take thereof
" and of every Parcel of all and ſingular the Premiſſes all the Rents, Revenues, Caſualties, Iſſues and
" Profits, as well of Wood-Sales as of all other Things, during my Life, without Let, Trouble, or In-
" terruption of my ſaid Recoverees and Feoffees, or of any of them their Heirs or Aſſigns, or of
" any other Manner of Perſon or Perſons in their Name, or in the Names of any of them, or by
" the Commandment or Procurement of any of them. Alſo I will that all ſuch Leaſes and Eſtates
" as have been made, or that at any Time hereafter ſhall be made by me the ſaid *John*, or by any of
" my Officers or Aſſigns, of the Premiſſes, or of any Parcel thereof, to any Manner of Perſon or Per-
" ſons, by Deed, Deeds, Copy of Court-Roll, or otherwiſe, for Term of Life or Lives, Years,
" or at Will, whereupon the moſt uſual and accuſtomable old ancient Rents and Services or more
" be and ſhall be reſerved and yielded to me the ſaid *John Trevilian* the Son, my Heirs, Reco-
" verees, Feoffees, their Heirs or Aſſigns, the which before this Time have been uſed to be re-
" ſerved and paid out of the Premiſſes, or more, and alſo all Wood-ſales and Bargains for Wood

" by

" by me or by mine Officers made or to be made and bargained, ſtanding, growing, or lying " upon the Premiſſes, or upon any Part thereof, and all Grants of Advowſances, and Benefices, " Churches, Chauntries, and free Chappels, whatſoever they be, made or to be made by me the " ſaid *John Trevilian* the Son at any Time by my Lifetime, ſhall be good and effectual to all ſuch " Leſſees and Grantees, and to every of them, againſt me, my Heirs, Aſſigns, Recoverees, and " Feoffees, their Heirs and Aſſigns, and every of them, according to the Purport, Tenor, and " Effect of the ſame Leaſes and Grants thereof or of any Parcel thereof by me, mine Officers or " Aſſigns, made or to be made in Form aforeſaid, any Clauſe, Article, or other Thing in this " preſent laſt Will of and in the Premiſſes rehearſed or ſpecified or to be rehearſed to the contrary " in any wiſe notwithſtanding. And after my Deceaſe, I the ſaid *John Trevilian* the Son will that " the ſaid *John Chamond* Knight, *John Barry*, *John Cavel*, and *Conand Engliſh*, or one of them " between them agreed, appointed, and aſſigned, or their ſufficient Bailiff by them appointed and " aſſigned, ſhall yearly receive, perceive, levy, and take all the Rents, Revenues, Iſſues, and " Profits yearly growing and coming of and in the aforeſaid Manor of *Knoll* with the Appurte- " nances, and of the ſaid Meaſes, Burgages, Mills, Lands, Meadow, Paſture, Wood, Furze " and Heath, and the ſaid Rent, with the Appurtenances in *Oldknoll*, *Slocomb*, *Cobridge*, *Timber-* " *ſcomb*, *Weſtharewood*, *Elliſworth*, *Overholt*, *Lynch*, *Vaneford*, *Tortiſlinch*, *Mean*, *Woodcockſlegh* " otherwiſe *Legh*, *Raduiſh*, *Lucomb*, *Dunſter*, *Stintwell*, and *Carhampton* in the ſaid County of " *Somerſet*, and alſo the Rents, Iſſues, and Profits yearly growing and coming of and in the aforeſaid " Meaſes, Lands, Meadow, Paſture, Wood, Furze and Heath, with the Appurtenances, in *Woodby*, " *Checkſtone*, and *Berinarver* in the aforeſaid County of *Devon*, and all the Rents, Iſſues, and " Profits yearly growing and coming of and in the aforeſaid Meaſes, Mills, Lands, Meadow, " Paſture, Wood, Furze and Heath, with their Appurtenances, in *Wolmerſheys*, and *Champerne-* " *heys* in the ſaid County of *Dorſet*, and of all the Reſidue of my Manors, Lands, and Tene- " ments in the ſaid Recoveries and Feoffment mine ſpecified, in the aforeſaid Counties of *Somer-* " *ſet*, *Dorſet*, *Devon*, and *Cornwal*, (except the aforeſaid Manors of *Nettlecomb*, *Rowdon*, and " *Woodavenant)* and therewith to content and pay all ſuch Charges and Funerals as ſhall be ſpent, " beſtowed, and laid out in and about the Burial and Interment of my Body after it is dead, my " Month's Mind, and Twelvemonth's Mind. And alſo with the Iſſues and Profits coming of the " Premiſſes in the ſaid Counties of *Somerſet* and *Dorſet* (except before excepted) to content and " pay all ſuch Manner of Perſon or Perſons all ſuch Debts as ſhall fortune me the ſaid *John Tre-* " *vilian* the Son to owe or to be indebted unto at the Time of my Deceaſe, the ſame Debts duly " proved by Specialties or otherwiſe before my ſaid Recoverees or Feoffees, or before two of them, " and the aforeſaid *John Cavel* and *Conand Engliſh*, with the ſaid *John Chamond* and *John Barry*. " Alſo truſting that *Avice* my Wife will live ſole and chaſte, and not marry, and alſo be loving " and kind to our Children, and to ſee them brought up in Virtue, and after the ſaid my Debts " and other the ſaid Premiſſes contented and paid, then I will, as long as ſhe liveth unmarried, " that ſhe ſhall have all the Rents, Iſſues, and Profits yearly growing and coming of all the ſaid " Manors, Meaſes, Lands, and Rents, and other the Premiſſes ſpecified in the ſaid ſeveral Re- " coveries, and of every Parcel thereof, with the Appurtenances, in the aforeſaid Counties of *So-* " *merſet*, *Dorſet*, and *Devon*. And if ſhe marry or die, then I will that my Son *George Tre-* " *vilian* have all the Meaſes, Lands, Meadow, Paſture, Wood, Furze and Heath, with all their " Appurtenances, in *Woodby*, *Checkſtone*, and *Berinarver* in the County of *Devon* aforeſaid, and alſo " all the ſaid Meaſes, Mills, Lands, Meadow, Paſture, Wood, Furze and Heath, with the " Appurtenances, in *Wolmerſheys*, and *Champerneheys* in the County of *Dorſet* aforeſaid, and to " the Heirs of his Body lawfully begotten; and for Default of ſuch Iſſue, to remain to *Thomas* " *Trevilian* my Son, and to the Heirs of his Body lawfully begotten; and for Default of ſuch " Iſſue, to remain to *Hugh Trevilian* my Son, and to the Heirs of his Body lawfully begotten; and for " Default of ſuch Iſſue, to remain to *John Trevilian* the younger my Son, and to the Heirs of his Body " lawfully begotten; and for Default of ſuch Iſſue, to remain to *John Trevilian* the elder my Son, and " to the Heirs of his Body lawfully begotten; and for Default of ſuch Iſſue, to remain to my Daugh- " ters *Johan*, *Iſabel*, and *Dorothy*, and to the Heirs of their Bodies lawfully begotten, equally to " be divided; and for Default of ſuch Iſſue of any of my ſaid Daughters, to remain to the Over- " livers or Overliver of the ſaid Daughters, and to every of them one after another, of like Eſtate " as is before limited to them of the Premiſſes, and for Default of ſuch Iſſue, to remain to me the " ſaid *John Trevilian* Eſquire, and to the Heirs of my Body lawfully begotten; and for Default " of ſuch Iſſue, to remain to *Humphry Trevilian* my Uncle, and to the Heirs of his Body lawfully " begotten; and for Default of ſuch Iſſue, to remain to the right Heirs of me the ſaid *John Tre-* " *vilian*, Son to the ſaid *John Trevilian* Knight, for ever. And over this, my ſaid Son *Thomas* " *Trevilian* to have all the aforeſaid Manor of *Knoll* with the Appurtenances, and alſo all the ſaid " Meaſes,

" Meaſes, Burgages, Mills, Lands, Meadow, Paſture, Wood, Furze, Heath, and Rent, with " all the Appurtenances, in *Oldknoll*, *Slocomb*, *Cobridge*, *Timberſtomb*, *Weſtharewood*, *Elliſworth*, " *Overholt*, *Lynch*, *Vaneford*, *Tortiſlinch*, *Mean*, *Woodcockſlegh* otherwiſe *Legh*, *Raduiſh*, *Lucomb*, " *Dunſter*, *Stintwell*, and *Carhampton* aforeſaid in the aforeſaid County of *Somerſet*, and to the " Heirs of his Body lawfully begotten; and for Default of ſuch Iſſue, to remain to the aforeſaid " *Hugh Trevilian* my Son, and to the Heirs of his Body lawfully begotten; and for Default of " ſuch Iſſue, to remain to *John Trevilian* the younger my Son, and to the Heirs of his Body law- " fully begotten; and for Default of ſuch Iſſue, to remain to the ſaid *George Trevilian* my Son, " and to the Heirs of his Body lawfully begotten; and for Default of ſuch Iſſue, to remain to the " aforeſaid *John Trevilian* the elder, and to the Heirs of his Body lawfully begotten; and for De- " fault of ſuch Iſſue, to remain to the aforeſaid *Johan*, *Iſabel*, and *Dorothy* my Daughters, and to " the Heirs of their Bodies lawfully begotten, equally to be divided; and for Default of ſuch " Iſſue of any of the ſaid Daughters, to remain to the Overlivers or Overliver of the ſaid Daugh- " ters, and every of them one after another, of like Eſtate as is afore limited to them of the Pre- " miſſes; and for Default of ſuch Iſſue, to remain to me the ſaid *John Trevilian* Eſquire, and to " the Heirs of my Body lawfully begotten; and for Default of ſuch Iſſue, to remain to *Humphry* " *Trevilian* my Uncle, and to the Heirs of his Body lawfully begotten; and for Default of ſuch " Iſſue, to remain to the right Heirs of me the ſaid *John Trevilian* Eſquire, Son of the ſaid *John* " *Trevilian* Knight, for ever. *Item*, I will that the aforeſaid *Avice* my Wife have my Manors of " *Nettlecomb* and *Woodavenant* in the County of *Somerſet* aforeſaid, and all my Meaſes, Lands and " Tenements in the Pariſh of *Nettlecomb* and *Woodavenant* aforeſaid, with all Advowſances of " Churches, Chauntries, and Free Chappels in the County of *Somerſet*, *Devon*, and *Cornwal*, " with all their Appurtenances in the aforeſaid Feoffment compriſed, during her Life, upon Con- " dition that ſhe ſuffer all ſuch Perſon or Perſons as be ſeized or poſſeſſed or have any Eſtate in " any Parcel of the ſaid Manors of *Nettlecomb* and *Woodavenant* aforeſaid for Term of Life, Lives, " Years, or at Will, of my Demiſe or Leaſe, or of the Demiſe of my Father or any of his Aſſigns, " peaceably to enjoy the ſame, and alſo peaceably to ſuffer all ſuch Perſon and Perſons as now " have or hereafter ſhall have of the Demiſe and Leaſe of me the ſaid *John Trevilian* Eſquire, or " of me and *Avice* my Wife, or of my Officers for the Time being, having Authority of me the " ſaid *John Trevilian* Eſquire to make Leaſes in Form aforeſaid, any Intereſt, Title, or Poſſeſſion " of and in any Meaſes, Lands, Tenements, Reverſions, and Services, with their Appurtenances, " or any Part or Parcel of the Inheritance of the ſaid *Avice* to her deſcended, coming, or growing " by Courſe of Deſcent, Remainder, Reverter, or otherwiſe, or that hereafter ſhall deſcend, re- " main, revert, eſcheat, or otherwiſe come to the ſaid *Avice* as Heir from any of her Anceſtors or " otherwiſe, peaceably to have, hold, and enjoy all ſuch Meaſes, Lands, and Tenements ſo to " them or any of them let or demiſed, or to be ſet, let, and demiſed by me the ſaid *John* and the " ſaid *Avice*, or my Officers by mine Aſſent and Agreement, for Term of Life, Lives, Years, or " at Will, ſo that the ſame Leſſees and every of them to occupy, have, hold, and enjoy the ſame, " according to the Purport, Tenor, and Effect of the ſame Demiſes and Leaſes, ſo that the old " and moſt accuſtomable Rents and Services or more be thereupon reſerved and yearly yielded to " be paid during the Term and Terms, without any Vexation, Trouble, Let, Compulſion, " or Suit of the ſaid *Avice* or any other in her Name, for her, or by her Commandment, by Rea- " ſon of any Title, Right, Entry, or Action to her given from any of her Anceſtors upon or im- " mediate after my Deceaſe; and alſo upon Condition that the ſaid *Avice* after my Deceaſe ſhall not " claim, demand, challenge, nor have any Dower of any other Parcel of the Inheritance of me the ſaid " *John Trevilian* Eſquire, by Reaſon of the Eſpowſals and Marriage between me and the ſaid *Avice* " had. And if the ſaid *Avice* interrupt or let the Tenants holding, having, or that hereafter ſhall " hold and have, any Parcel of the Premiſſes, or any Parcel of the Inheritance of my Wife's, of " my Demiſe made or to be made in Form aforeſaid, or if the ſaid *Avice* after my Deceaſe, claim, " demand, challenge, or have any Dower of any other Parcel or Part of mine Inheritance, " or if ſhe deceaſe or die, then I will that my ſaid Feoffees, their Heirs and Aſſigns, and all my " ſaid Recoverors, their Heirs and Aſſigns aforeſaid, peaceably permit and ſuffer the aforeſaid " *John Chamond* Knight, *John Barry*, *John Cavel*, and *Conand Engliſh*, or one of them between " them and by them appointed, or their ſufficient Bailiff by them deputed and appointed, to per- " ceive, levy, receive, and take all the Rents, Iſſues, Revenues, and Profits yearly coming and " growing of all the ſaid Manors of *Nettlecomb*, *Rowdon*, and *Woodavenant*, and alſo of all the " Reſidue of my Manors, Meaſes, Lands, Tenements, Rents, Reverſions, and Services, with " the Appurtenances, in the Counties of *Cornwal*, *Devon*, *Somerſet*, and *Dorſet*, compriſed in the " ſaid Recoveries and Feoffment, not yet diſpoſed or appointed in this Will, and therewith to pay " my Debts, Funerals, Charges, and Expences, and alſo to find my Sons and Daughters, or cauſe " them to be found, and virtuouſly to be brought up, (except my Son and Heir apparent,

" and ſuch other of my Sons that ſhall have ſufficient and convenient Lands and Tenements to-
" wards their living immediately after my Deceaſe) both Meat, Drink, and Apparel, Scholing,
" Learning, and all other Things neceſſary and convenient for them and every of them, accord-
" ing to their Eſtate, Degree, and Capacities, and Qualities, as by two of my ſaid Feoffees, and
" of *John Chamond*, *John Barry*, *John Cavel*, and *Conand Engliſh* ſhall be thought good and expe-
" dient for them; and alſo therewith to content and pay or cauſe to be contented and paid to
" my aforeſaid Daughters, that is to ſay, to every of them towards their Marriages, not advan-
" ced or preferred in my Lifetime to Marriage, 300 Marks Sterling, ſo that my Daughters
" be ordered and married by the Advice or Conſent of the aforeſaid *Avice* my Wife;
" and ſhe of my Daughters that will not be ſo ordered and ruled by the Advice or Conſent in
" Form aforeſaid, ſhall not have nor take any Benefit or Profit of 100 Marks parcel of the ſaid
" 300 Marks to her before given by this my preſent laſt Will, ſo refuſing to be ordered. Alſo
" I will that if it happen hereafter my ſaid Daughters to be mine Heirs for lack of Iſſue Male,
" that then they nor any of them to have nor take any Manner of Profit or Avail of the ſaid Le-
" gacy of 900 Marks, nor any Parcel thereof to them ſeverally given by this my Will in Form
" aforeſaid; or if it happen any of my ſaid Daughters to be preferred or advanced to Marriage
" in my Life time, then ſuch or they of my Daughters that ſo ſhall be preferred in my Life time
" ſhall not have any Avail or Profit by the ſaid Legacies of 300 Marks to them or to every of
" them ſeverally given in Form aforeſaid, or if any of them my ſaid Daughters die before Marriage
" had (as God defend), then I will that all ſuch Sum or Sums of Money as then ſhall be receiv-
" ed to her Uſe ſo deceaſed ſhall equally be divided among the other of my Daughters her over-
" living towards their Marriage, if they be not then preferred in Marriage, or if two of my ſaid
" Daughters fortune to deceaſe before Marriage had, then I will that ſuch that do overlive ſhall
" have 600 Marks of the Rents, Revenues, Iſſues, and Profits received of and in the ſaid Reſidue
" and other the Premiſſes, to the Uſe of the ſaid Daughters only to her Marriage, and the other 300
" Marks Reſidue of the ſaid 900 Marks to be levied and paid to ſome other Uſes as I ſhall
" more plainly declare and expreſs in my Teſtament. And if all my Daughters fortune to de-
" ceaſe before Marriage, or be married in my Life time, then I will that all ſuch Money as then
" is and ſhall be received to their Uſe, ſhall be equally divided and diſtributed to my younger
" Sons not advanced or preferred in my Life time towards their Marriages, and Augmentation of
" their living. Alſo I will that the ſaid *John Chamond*, *John Barry*, *John Cavel*, and *Conand Engliſh*
" do and ſhall yearly make Accompt before the Prior of the Monaſtery of *Friedſtock* at *Friedſtock* in
" the County of *Devonſhire* for the Time being, and before one Auditor to be appointed and e-
" lected by the aforeſaid *Avice* my Wife, and in Default of her Appointment the ſaid Auditor
" to be appointed by two of my aforeſaid Recoverors, or two other of my ſaid Feoffees, of the
" Iſſues and Profits of the aforeſaid Manors, Meaſes, Lands, Tenements, and other the Premiſ-
" ſes, or of any parcel thereof aforeſaid; and all ſuch Sums of Money as ſhall appear by the
" ſaid Accompt to be in the Hands of *John Chamond*, *John Barry*, *John Cavel*, and *Conand Eng-*
" *liſh*, or their Bailies, to be put in a Cheſt faſt locked underneath five Locks, in ſure and ſafe
" Keeping in the ſame Monaſtery, of the which Cheſt ſo locked the ſame *John Chamond*, *John*
" *Barry*, *John Cavel*, and *Conand Engliſh* ſhall have every one of them one Key, and one of my
" other ſaid Feoffees another, to the Performance of this my laſt Will; and that the ſaid *John*
" *Chamond*, *John Barry*, *John Cavel*, and *Conand Engliſh*, or which of them that ſhall ſuſtain any
" Labour or Pain in and about the Performance of this my Will ſhall have for his Labour,
" Coſts and Charges yearly 6 *s.* 8 *d.* and the Prior yearly for his Labour, Coſts and Charges,
" and hearing of the ſame Accompt, 13 s. 4 d. upon the ſame Accompt; and the ſaid Auditor
" yearly for hearing and making of the ſame Accompt and his Coſts and Charges 6 s. 8 d. *Item*
" I will after all this done, fulfilled, and performed in every Article according to the true Mean-
" ing, Declaration, and the full Intent of the ſame, that then my Feoffees aforeſaid, their Heirs
" and Aſſigns, ſtand and be ſeized of the ſaid Manor of *Nettlecomb* in *Nettlecomb* aforeſaid, to the
" Uſe of *John* my Son and Heir apparent, and of the Heirs of his Body lawfully begotten, upon
" the Condition that he make, grant, confirm, demiſe, let, and ſeal with me by
" my Lifetime by his Writing ſufficient in the Law to every of my Sons and to all Manner of
" Perſons to whom I have made, or that hereafter ſhall make, any Manner of States of any Lands
" or Tenements by Deed, Deeds, Copy of Court-roll, or otherwiſe, in Fee-tail, for Term of
" Life, Lives, Years, or at Will after the Cuſtom of the Manor. And alſo the ſaid Son and
" Heir apparent, and the Heirs of his Body lawfully begotten, permit and ſuffer all Manner of
" Perſon or Perſons that have or hereafter ſhall have any Eſtate, Poſſeſſion, Title or Intereſt,
" or Uſe of and in any Part or parcel of my Hereditaments, or of the Inheritances of the ſaid
" *Avice* my Wife of my Demiſe, Grant, Gift, or Leaſe, or of the Demiſe, Gift, Grant, or Leaſe
" of me and of the ſaid *Avice* my Wife, by Deed, Deeds, or Copy of Court-roll or otherwiſe,

" in Fee-tail, for Term of Life, Lives, Years, or at Will after the Cuſtom of the Manor, where-
" upon the old and moſt accuſtomable Rents and Services be reſerved, or more, that hath been
" uſed to be reſerved or otherwiſe, peaceably to have, hold, occupy, and enjoy their Meaſes,
" Lands, Tenements, Rents, Reverſions, and Services to them letten, granted, given, demiſed,
" or leaſed, according to the Purport, Tenor, and Effect of the ſame Leaſes, Grants, Gifts, and
" Demiſes, without any Manner of Pleading, Suit, Let, Expulſion, Vexation, Trouble, or Interrup-
" tion of my ſaid Son and Heir Apparent, or of his Heirs aforeſaid, and of all other Manner of
" Perſon and Perſons by his or their Procurement, Commandment, or Sufferance, by Reaſon of
" any Title, Right of Entry, or Title of Action to him or them given after my Deceaſe or be-
" fore; and upon Condition that the ſaid *John* my Son and Heir Apparent at this Side the Feaſt
" of the Converſion of *St. Paul* next coming after the Date of this my preſent Will, do deliver
" or cauſe to be delivered into the Hands and Poſſeſſion of me the ſaid *John Trevilian* Son of the
" ſaid *John Trevilian Knight*, mine Executors or Aſſigns, one Obligation cancelled, wherein I
" the ſaid *John Trevilian* Son of the ſaid *John Trevilian* Knight ſtand bound to *Giles Hill* in the
" Sum of 500 Marks; and upon Condition that the ſaid *John* my Son and Heir Apparent and
" his Heirs aforeſaid do permit and ſuffer, and cauſe to be permitted and ſuffered peaceably the
" ſaid *John Chamond*, *John Barry*, *John Cavel*, and *Conand Engliſh*, and every of them, to per-
" form, fulfil, and execute my ſaid Will in every Article according to the Truſt that I have put
" in them, without any Manner of Let, Trouble, Vexation, Suit, Expulſion, or Interruption
" of the ſaid *John Trevilian* my Son and Heir Apparent, and his Heirs aforeſaid, or any other
" Perſon or Perſons by his or their Procurement, Commandment, or Sufferance; and upon
" Condition that the ſaid *John* my Son and Heir Apparent do not diſturb, interrupt, let, vex,
" or trouble any Perſon or Perſons that hath or ſhall have any meddling or doing about the
" Execution or Performance of this my Will, or any Parcel thereof, or do any other Act or
" Acts whereby this my preſent laſt Will, or any Parcel thereof, may not have and take his full
" Effect and Power in every Article and Clauſe in the ſame contained, according to the true
" Meaning and Conſtruction of the ſame, according to my Mind and Will, and upon Condition
" that the ſaid *John* my Son and Heir Apparent, and his Heirs, nor any other Manner of Perſon
" or Perſons to his Uſe, nor in his Name, nor for him, by him, or by his Procurement or Suf-
" ferance ſhall not vex, trouble, nor ſue, nor cauſe to be vexed, troubled, nor ſued, any Man-
" ner of Perſon or Perſons that ſhall have, or hath the Cuſtody, Keeping, and Poſſeſſion of any
" Evidences, Charters, Exemplifications, Fines, Eſcripts, Court-rolls, Books of Accompt,
" Muniments, and other Manner of Writings concerning any Manors, Lands, Tenements, He-
" ditaments, and other Poſſeſſions and Inheritances mine, or of *Avice* my Wife, by my Deli-
" verance, Sufferance, or Appointment of or for the having and Deliverance of any ſuch Evi-
" dence, Charters, Exemplifications, Fines, Eſcripts, Court-rolls, Books of Accompt, Muni-
" ments, and other Writings, nor any of them concerning the Premiſſes or any Parcel thereof;
" And if my ſaid Son and Heir Apparent do not perform and ſuffer to be performed all and every of
" the ſame Conditions of his Part in Form aforeſaid expreſſed, but fail in Performance of the ſame, or of
" any parcel thereof, that then I the ſaid *John Trevilian* Eſquire, Son of the ſaid *John Trevilian* Knight,
" will that the ſame *John Chamond*, *John Barry*, *John Cavel*, and *Conand Engliſh* ſhall after my Will
" performed in Form aforeſaid, bargain and ſell the ſaid Manors of *Nettleton* and *Rowdon*, with
" their Appurtenances to any Perſon or Perſons, and to their Heirs that will give for the ſame
" after the Rate of twenty Years Purchaſe, and the Money for the ſame received, I will that the
" ſame *John Chamond*, *John Barry*, *John Cavel*, and *Conand Engliſh*, and every of them ſhall re-
" compence, ſatisfy, content, and pay every ſuch Leſſee for Term of Life, Lives, Years, or at Will,
" holding any Part or Parcel of the Premiſſes ſo thereof, or of any Parcel thereof, expulſed, vexed,
" troubled, or otherwiſe incumbred or hurted; and the Reſidue of the Money thereof received,
" (if any fortune to remain) to diſtribute it in Deeds of Charity after the Diſcretion of the ſaid
" *John Chamond*, *John Barry*, *John Cavel*, and *Conand Engliſh*. *Item*, I will that after my De-
" ceaſe and *Avice* my Wife, that the ſaid *John Chamond* preſent to every of the Advowſances,
" Chauntries, and free Chapels, as often as the ſame ſpiritual Promotions ſhall become void by
" Death, Reſignation, or otherwiſe. And after the Death of the ſaid *John Chamond*, the ſaid
" *John Barry*, *John Cavel*, and *Conand Engliſh*, and every other of my Feoffees before named,
" (except the ſaid Lord *Bray* and *Edward Bray*) as they be named in the ſaid Feoffment one after
" another, ſhall preſent to every of the ſaid Advowſons, Chauntries, and Free-Chapels, in like
" Manner as the ſaid *John Chamond* did, or to him was limited to do, or ſhall do. *Item*, I will
" that every of my Sons to whom any of my Manors, Lands, Tenements, and Hereditaments
" be diſpoſed unto, (except my Son and Heir) have all Manner of Evidences, Exemplifications,
" Fines, and other Manner of Muniments and Writings concerning and belonging to their Por-
" tions, and that they be delivered to them after my Deceaſe and *Avice* my Wife, when they
" ſhall be of the Age of 21 Years, and in the mean Time the ſaid Evidences and all other Writ-
" ings

" ings aforeſpecified to remain and be in the keeping of *Avice* my Wife during her Life, and af-
" ter her Deceaſe to remain and be in the Cuſtody and Keeping of the aforeſaid *John Chamond*,
" and the other his Co-feoffees one after another as they be named in the ſaid Feoffment (except
" the ſaid Lord *Bray* and Sir *Edward Bray*). *Item*, I will that my Executors, Recoverors, and
" Feoffees have the ſure Cuſtody, Keeping, and Poſſeſſion of other my Evidences, Eſcripts, Char-
" ters, Muniments, and all other Manner of Writings concerning any of my Manors, Lands,
" and Tenements, Hereditaments, and other Poſſeſſions mine, lying and being within the Coun-
" ties aforeſaid, and not to deliver the ſame nor any of them to my ſaid Son and Heir Appa-
" rent. *Item*, I will that my Son and Heir Apparent and *Maud* his Wife ſhall have, after my
" Deceaſe, 13 l. 6 s. 8 d. to them and to the Heirs of the Body of the ſaid *John Trevilian* the
" elder my Son and Heir Apparent lawfully begotten, of and in my Manor of *Whaliſſbrow* in
" the County of *Cornwal*, according to the Indentures of Covenants between *Giles Hill* and me
" the ſaid *John Trevilian* Eſquire. Provided always that it ſhall be lawful to me the ſaid *John*
" *Trevilian* Eſquire, Son of the ſaid *John Trevilian* Knight, always during my Life to change,
" add, or diminiſh this my Will, any Thing in the ſame notwithſtanding. In Witneſs whereof
" I the ſaid *John Trevilian* Eſquire, Son and Heir of the ſaid *John Trevilian* Knight, to this my
" preſent Will have ſet to my Seal, and ſubſcribed my Name the Day and Year aboveſaid, in the
" Preſence of *John Siddenham* of *Legh* Eſquire, *William Cavel* Parſon of *Nettlecomb* Clerk, *Ed-*
" *mund Winter* Gentleman, *Conand Engliſh*, *John Baker*, *George Tedd* Clerk, *John Evan*, *William*
" *Martin*, *Alice Kympt*, *James Morris*, *Conand Silk*, *John Engliſh*, and many others.

By me, *John Trevilian*."

And the aforeſaid *Anthony*, *Alexander*, *John Pollard*, *John Blackdon*, *John Davy*, *John Loveland*, and *Alexander* being ſo ſeized of the Tenements aforeſaid with the Appurtenances in their Demeſn as of Fee, to the Uſe of the aforeſaid *John Trevilian* and his Heirs, their Seizin of and in the Tenements aforeſaid continued unto the 4th Day of *February* in the 27th Year of the Reign of the aforeſaid late King *Henry* 8. on which Day, by virtue of a certain Act of Parliament of the ſame late King then held at *Weſtminſter* aforeſaid, concerning the transferring of Uſes into Poſſeſſion made, the aforeſaid *John Trevilian* was ſeized of the Tenements aforeſaid with the Appurtenances in his Demeſn as of Fee. And the ſame Jurors further ſay upon their Oath, that the ſaid laſt Will is a good and true Will of the ſaid *John Trevilian* the Son. And afterwards, viz. the 10th Day of *January* in the 30th Year of the Reign of the ſaid late King *Henry* the *eighth*, the aforeſaid *John Trevilian*, at *Yarnſcomb* aforeſaid, ſo thereof being ſeized died. And further the Jurors aforeſaid ſay, that the aforeſaid *Avice* at the aforeſaid Time of the Recovery aforeſaid in Form aforeſaid had, or ever afterwards, was not ſeized of any Eſtate of Freehold, nor had any Thing of and in the Tenements aforeſaid with the Appurtenances in which, &c. And that one *John Trevilian* Son and Heir of the aforeſaid *John Trevilian* Eſquire into the Tenements aforeſaid with the Appurtenances entered, and was thereof ſeized in his Demeſn as of Fee. And afterwards the aforeſaid *Avice* and the aforeſaid *Thomas Trevilian* at *Yarnſcomb* aforeſaid died. And that afterwards the aforeſaid *John Trevilian* Son and Heir of the aforeſaid *John Trevilian* Eſquire being ſo ſeized of the Tenements aforeſaid with the Appurtenances in which, &c. died thereof ſeized, after whoſe Death the Tenements aforeſaid with the Appurtenances deſcended to one *John Trevilian* as Son and Heir of the ſaid *John Trevilian*, Son and Heir of the ſaid *John Trevilian* Eſquire, *Hugh Trevilian* Son and Heir of the aforeſaid *Thomas Trevilian* then being within the Age of twenty-one Years. By virtue whereof the ſame *John Trevilian* Son of the aforeſaid *John* Son of the aforeſaid *John Trevilian* Eſquire was of the Tenements aforeſaid with the Appurtenances in which, &c. ſeized in his Demeſn as of Fee. And he being ſo ſeized thereof, the aforeſaid *Hugh* afterwards, viz. the 8th Day of *May* in the 18th Year of the Reign of the Lady the Queen now, into the Lands and Tenements aforeſaid with the Appurtenances in which, &c. entered, and was thereof ſeized. And being ſo ſeized thereof, the ſame *Hugh* the aforeſaid 8th Day of *May* in the 18th Year aboveſaid demiſed, granted, and to Farm let the Tenements aforeſaid with the Appurtenances in which, &c. to the aforeſaid *Nicholas Eare*, in Manner and Form as the ſame *Nicholas Eare* above in his Declaration hath alledged. By virtue of which ſaid Demiſe the ſame *Nicholas Eare* into the Tenements aforeſaid with the Appurtenances in which, &c. entered, and was thereof poſſeſſed, until the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas Elſworthy* at the aforeſaid Time when, &c. by the Command and in Right of the aforeſaid *John Trevilian* Son and Heir of *John*, Son and Heir of the aforeſaid *John Trevilian* the Teſtator, into the Tenements aforeſaid with the Appurtenances in which, &c. entered, and the ſaid *Nicholas Eare* from his Farm aforeſaid thereof (his Farm aforeſaid not yet ended) ejected, expelled, and amoved, and the ſaid *Nicholas Eare* from his Poſſeſſion thereof held out, and yet hold out, in Manner and Form as the aforeſaid *Nicholas Eare* above complains. And they pray there-

of the Advice and Diſcretion of the Court of the ſaid Lady the Queen before the Queen herſelf. And if upon the whole Matter aforeſaid in Form aforeſaid found it ſhall ſeem to the ſaid Court of the ſaid Lady the Queen here, that the Entry of the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas Elſworthy* in Form aforeſaid made is not a lawful Entry upon the Poſſeſſion of the aforeſaid *Nicholas Eare*, then the ſame Jurors ſay upon their Oath that the aforeſaid *Nicholas*, *Agnes*, and *Thomas Elſworthy* are guilty of the Treſpaſs and Ejectment aforeſaid, in Manner and Form as the aforeſaid *Nicholas Eare* above againſt them hath declared; and then they aſſeſs Damages of the ſaid *Nicholas Eare* by Occaſion of the Treſpaſs and Ejectment aforeſaid, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to 10 *s.* and for thoſe Coſts and Charges to 20 *s.* And if upon the whole Matter aforeſaid in Form aforeſaid found, it ſhall ſeem to the ſaid Court of the ſaid Lady the Queen here that the Entry of the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas Elſworthy* in Form aforeſaid made is a lawful Entry, then the ſame Jurors ſay upon their Oath that the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas Elſworthy* are not guilty of the Treſpaſs and Ejectment aforeſaid, as they the ſame *Nicholas Snow*, *Agnes*, and *Thomas Elſworthy* above in Pleading have alledged, &c.

THE CASE. Huſband is Tenant in Tail, and a Recovery is had againſt him and his Wife, and they vouch over the common Vouchee, and the Wife has no Eſtate in the Lands, but only a Chance of Dower in Caſe ſhe ſurvives her Huſband; this Recovery ſhall bar the Tail, and it ſhall be taken that the Wife was named for no other Purpoſe than to bar her of Dower. S. C. Vin. Abr. tit. Recovery common O. pl. 6. And ſee the Books there cited touching this Caſe.

THE Caſe upon the ſpecial Verdict is thus. *John Trevilian* Son of Sir *John Trevilian* was Tenant in Tail of the Tenements in Queſtion, and being ſole ſeized of ſuch Eſtate, in the 23d Year of the Reign of King *Henry* 8. a common Recovery was had againſt him and *Avice* his Wife, who vouched over according to the common Courſe of common Recoveries. And it was found that the Wife had nothing in the Tenements, and that the Recovery was to the Uſe of the Huſband and his Heirs. And the Recoverors entered, and they being ſo ſeized, and the ſaid *John Trevilian* being *Ceſtuy que Uſe*, he by his Will made and publiſhed in the 23d Year of the Reign of King *Henry* 8. gave the ſaid Tenements to *Thomas Trevilian* his youngeſt Son, and to the Heirs of his Body begotten. And afterwards the Statute of 27 *H.* 8. *of Uſes* was made, after which he publiſhed his ſaid Will again, and died in the 37th Year of the Reign of King *Henry* 8. and *Avice* ſurvived him. And *John Trevilian* the Son of the Teſtator entered into the Tenements, and *Avice* and *Thomas* died, and afterwards *John* the Son of the Teſtator died ſeized, whereby the Tenements deſcended to his Son *John Trevilian*; and at the Time of the Deſcent, *Hugh Trevilian* the Son of the ſaid *Thomas Trevilian* was within Age, and afterwards entered, and made the Leaſe to the Plaintiff, and the Defendants as Servants to the ſaid *John Trevilian* the Grandſon of the Teſtator ouſted the Plaintiff.

For the Defendants.

And the whole Queſtion in this Caſe was, whether or no the Eſtate-tail, which *John Trevilian* the Teſtator had at the Time of the Recovery, was barred by it, for if it was not barred by the Recovery, then the dying ſeized of his Son *John Trevilian* remitted *John Trevilian* the Grandſon of the Teſtator to the firſt Tail, and if it was barred, then the Eſtate and Right of *Hugh Trevilian* the Son and Heir of *Thomas Trevilian* the youngeſt Son of the Teſtator is good, and conſequently his Leaſe is of Force. And it was objected that the Recovery was not effectual to bar the Eſtate-tail, becauſe *Avice* the Wife was named in the *Præcipe* as Jointenant with her Huſband, and as Jointenant ſhe appeared and vouched, and the Vouchee entered into the Warranty admitting that he ought to warrant to them, whereby he alſo admitted that the Wife had an Eſtate in the Tenancy, and had Cauſe to vouch, for if it was otherwiſe, it might deprive them of the Benefit of the Warranty. And if it ſhall not be taken that the Wife had a joint Eſtate with her Huſband, then it ſhall be taken that it was the Land of the Wife only, and that the Huſband was ſeized in Right of the Wife, and ſo had nothing but by the Coverture, in which Caſe it is worſe for the Plaintiff. But whether it be taken the one Way or the other, the Eſtate-tail ſhall not be barred but in Reſpect of the Recovery over in Value, and whether it be taken the one Way or the other, the Wife ſurviving ſhall have the Recompence in Value by Concluſion, and then there is no Cauſe why the Iſſue in Tail ſhould be barred, for the Reaſon * why an Eſtate-tail is permitted to be barred by a common Recovery is, in reſpect of the Recompence in Value which is or by Poſſibility may be rendered for the Eſtate loſt, and if the Wife ſhall have the Recompence in Value, and not the Iſſue in Tail, then there is no Reaſon why the Iſſue ſhould be barred, or hindered from being remitted.

* Dr. & Stud. lib. 1. cap. 26. fo. 81. 2 Lev. 30, *per Hale* C. J. Bac. Law Tracts 149. Pig. on Recov. 12, 15, 22.

Curia.

And upon this Objection the Matter was oftentimes debated as well at the Bar as at the Bench, but I did not hear any of the Arguments in this Caſe either of the Counſel or of the Juſtices, but what I here report is upon the credible Information of thoſe who were of Counſel in the Caſe, and of others. And at laſt all the Juſtices unanimouſly declared their Opinions to be, that the Eſtate-tail was barred by the Recovery. For it is expreſly found by the Verdict, that the Wife had nothing in the Tenements at the Time of the Recovery, but that the Huſband was ſole ſeized in Tail; and he alone loſt the Tenancy, [a] and the Recovery in Value ſhall go to him who hath loſt the Tenancy, and ſhall be of the like Eſtate which he loſt; and here the Huſband only loſt the

[a] S. P. Co. Litt. 13. a. 376. b. Vin. Abr. tit. Voucher R. b. 3. pl. 8.

Tenancy, and loſt only an Eſtate-tail in it, and not a Fee-ſimple, and ſuch Perſon as hath the Loſs ſhall have the Recompence, and therein ſhall have ſuch Eſtate as he hath loſt, and that ought to be an Eſtate-tail here, to which the Wife is a Stranger. And if the Wife ought to ſue the Execution, what Eſtate ſhould ſhe then have? None can ſay whether ſhe ſhould have an Eſtate for Life, or whether ſhe ſhould have an Eſtate in Fee-ſimple, becauſe ſhe had no Eſtate at all, and what Eſtate the Concluſion would gain, ſhe herſelf did not know, nor did ſhe know what Eſtate to claim in the Land, if ſhe was ouſted thereof, nor did ſhe know whether ſhe ſhould have a *Quod ei deforceat* or a Writ of Right, if the Land was recovered againſt her by Default. So that foraſmuch as the Truth now appears by the Verdict, the Court ought to adjudge that ſhe, who had no Eſtate in the Land recovered, ſhall have no Eſtate in the Land recovered in Value, nor was able to ſue Execution of the Land recovered in Value, but that ſhe was named in the *Præcipe* only to be barred of her [b] Dower, to which Purpoſe Women are commonly named in common Recoveries had againſt their Huſbands; [c] and the common Uſage in this Caſe is to be regarded, for in ſuch Caſes it has always been the Intent of the Parties before this Time, that the Wife ſhall be barred of her Dower, and that the Eſtate-tail ſhall be barred alſo.

[b] S. P. 2 Co. 74. a. 77. b. 78. a. Pig. on Recov. 66. 70. 2 Bac. Abr. 140. Vin. Abr. tit. Dower Q. 2. pl. 3.

And *Southcote* and *Gawdy* Juſtices ſaid, that if it ſhould be admitted that the Wife might ſue Execution of the Lands recovered in Value againſt the Vouchee by Concluſion, yet the Iſſue in Tail might ouſt the Wife thereof, becauſe the Land ought to be his [d] in reſpect of his Loſs, and he is able to ſay againſt the Wife that ſhe had loſt nothing, and therefore that ſhe ſhould hold nothing. And tho' it ſhould be argued that the Wife might have Execution of the Value againſt the Vouchee by Eſtoppel, [e] yet the Son being Iſſue in Tail ſhall not be bound by any Eſtoppel which his Father admitted by joining in Voucher with the Wife, any more for the Recompence in Value, than he ſhould be by an Eſtoppel made by his Father for the old Entail, which is recovered againſt his Father, and ſo not ſubject to any Eſtoppel.

[c] 2 Co. 74. a. 5 Co. 41. a.

[d] Co. Litt. 376. b.

[e] 2 Leon. 57. Pig. on Recov. 196.

And becauſe I did not hear any of the Arguments in this Caſe, I delivered the above Report to Sir Chriſtopher Wray *Chief Juſtice, to know if it contained the true Cauſe of the Judgment of the Court. And when he had peruſed it, he delivered it back to me, with his Approbation of it, and told me that he had ſpoken with the Lord* Dyer, *and with* Manwood *Juſtice (who at the Time when this Caſe was printed was Chief Baron of the Exchequer) both of whom agreed in Opinion with him and his Companions. And afterwards Judgment was given accordingly, which here follows.*

Nota bene by the Reporter.

The reſt of the Record.

At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid; whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the ſaid Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, it is conſidered that the aforeſaid *Nicholas Eare* recover againſt the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas Elſworthy* his Term aforeſaid of and in the Premiſſes yet to come, and his Damages aforeſaid by the Jurors aforeſaid in Form aforeſaid aſſeſſed, and alſo 12 l. 6 s. 8 d. to the ſame *Nicholas Eare* for his Coſts and Charges by the Court of the Lady the Queen here with his Aſſent of Increaſe adjudged; which ſaid Damages in the whole amount to 13 l. 16 s. 8 d. And the aforeſaid *Nicholas Snow*, *Agnes*, and *Thomas Elſworthy* be taken, &c.

Judgment.

A Report of a Caſe argued in the Common Bench *by the Serjeants in* Hillary *Term in the* twentieth *Year of the Reign of Queen* Elizabeth, *and by the Juſtices in* Eaſter *Term in the ſame Year, in which Term Judgment was given, upon a ſpecial Verdict found in an Action of* Treſpaſs *brought by* William Welcden *Plaintiff againſt* Thomas Elkington *Defendant. And the Record is entered among the Records of* Eaſter *Term* 19 Elizabeth, Rot. 1226, *and was as follows.*

Glouceſter. Declaration. Same Precedent N. Bendl. 308. Raſt. Entr. 679. a. pl. 9.

THomas Elkington late of *Minchinhampton* in the County aforeſaid Clothier was attached to anſwer *William Welcden* of a Plea, wherefore with Force and Arms the Cloſe and Houſe of the ſaid *William* at *Minchinhampton* he broke, and his Graſs to the Value of 40 l. there lately growing with certain Cattle eat up, trod down, and conſumed, and other Wrongs to him did, to the great Damage of the ſaid *William*, and againſt the Peace of the Lady the Queen now, &c. And whereupon the ſame *William* by *Richard Pitt* his Attorney complains that the aforeſaid *Thomas*, the 21ſt Day of *October* in the 10th Year of the Reign of the Lady the Queen now, with Force and Arms, &c. the Cloſe and Houſe of him the ſaid *William* at *Minchinhampton* broke, and his Graſs to the Value, &c. there then growing with certain Cattle, viz. Horſes, Oxen, Cows, Hogs, and Sheep, eat up, trod down, and conſumed, the Treſpaſs aforeſaid as to the eating up, treading down, and conſuming of the Graſs aforeſaid from the aforeſaid 21ſt Day of *October* in the 10th Year aboveſaid unto the 9th Day of *December* in the 15th Year of the Reign of the ſaid Lady the Queen now at divers Days and Times continuing; and other Wrongs, &c. to the great Damage &c. and againſt the Peace, &c. Whereupon he ſays that he is prejudiced and has Damage to the Value of 100 l. and therefore he produces the Suit, &c.

Not guilty.

And the aforeſaid *Thomas* by *John Kirle* his Attorney comes and defends the Force and Injury when, &c. and ſays that he is not guilty of the Treſpaſs aforeſaid, as the aforeſaid *William* above againſt him complains, and of this he puts himſelf upon the Country, and the aforeſaid *William* likewiſe.

Venire facias.

Therefore the Sheriff is commanded that he cauſe to come here from the Day of the *Holy Trinity* in three Weeks 12, &c. by whom, &c. And who neither, &c. to recognize, &c. becauſe as well, &c. At which Day here came the Parties, &c. And the Sheriff hath not ſent the Writ.

Venire Facias ſicut alias.

Therefore as before the Sheriff is commanded that he cauſe to come here on the Octave of *St. Michael* 12, &c. to recognize in Form aforeſaid, &c.

Jury continued.

Afterwards the Proceſs between the Parties aforeſaid in the Plea aforeſaid being continued by the Jury thereof between them being reſpited here until this Day, viz. from the Day of *Eaſter* in 15 Days in the 18th Year of the Reign of the Lady the Queen now, unleſs the Juſtices of the Lady the Queen aſſigned to take Aſſizes in the County aforeſaid by the Form of the Statute, &c. on *Monday* the 19th Day of *March* next paſt at *Glouceſter* in the County aforeſaid had firſt come. And now here at this Day came as well the aforeſaid *William Welcden* as the aforeſaid *Thomas Elkington* by their Attornies aforeſaid.

Poſtea.

And the aforeſaid Juſtices aſſigned to take Aſſizes before whom, &c. have ſent here their Record in theſe Words. Afterwards at the Day and Place within contained, before *Edward Saunders* Knight Chief Baron of the Exchequer of the Lady the Queen, and *William Loveleſs* Serjeant at Law, Juſtices of the ſaid Lady the Queen aſſigned to take Aſſizes in the County of *Glouceſter* by the Form of the Statute, &c. came as well the within named *William Welcden* as the within written *Thomas Elkington* in their proper Perſons. And the Jurors thereof impannelled being called, ſome of them came, and ſome of them did not come, as appears by the Panel to this Record affixed.

Jury further continued.

Therefore the Jury aforeſaid is further reſpited here until from the Day of the *Holy Trinity* in 15 Days for Want of Jurors. Therefore let the Sheriff have the Bodies, &c.

Habeas corpora.

Afterwards the Proceſs between the Parties aforeſaid in the Plea aforeſaid being continued by the Jury thereof between them being reſpited here until this Day, viz. from the Day of *Eaſter* in one Month in the 19th Year of the Reign of the Lady the Queen now, and now here at this Day came as well the aforeſaid *William Welcden* as the aforeſaid *Thomas Elkington* by their Attornies aforeſaid. And the Jurors thereof impanneled being called, ſome of them, viz. *Francis Wye* Eſquire, *William Chandler*, *Henry Winchcomb*, *William Houſe*, *William Faukes*, *John Mucklow* Gentleman, *John Freeman* of *Burton*, *Auncel Saundford*, *John Ailway* of *Tainton*, *Edward Tomlinſon*, *Richard Arun-*

Special Verdict.

del, and *John Hilip* came. Who to ſay the Truth of the Premiſſes being choſen, tried, and ſworn, ſay upon their Oath that long before the aforeſaid Time of the Treſpaſs aforeſaid above ſuppoſed to be done, one *William Windeſore* Knight late Lord *Windeſore* now deceaſed was ſeized of one Meſſuage, one Water-mill called *Longfcrths*, and three Parcels of Meadow called *Doddings*, *Hentals*, and *Cleycomb-mead* in *Minchinhampton* aforeſaid, in which the Treſpaſs aforeſaid is ſuppoſed to be done, in his Demeſn as of Fee. And being ſo ſeized thereof, the ſame *William* late Lord *Windeſore* the 16th Day of *March* in the 35th Year of the Reign of Lord *Henry* late King of *England* the *eighth*, demiſed the ſaid Tenements with the Appurtenances to one *Thomas Davis*, to

have and to hold the ſaid Tenements with the Appurtenances to the ſame *Thomas Davis* his Executors and Aſſigns from the Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin then next following, unto the End and Term of 60 Years from thence next following, fully to be compleat. By virtue of which Demiſe the aforeſaid *Thomas Davis*, after the aforeſaid Feaſt of the *Annunciation* of the bleſſed *Mary* the Virgin, into the Tenements aforeſaid with the Appurtenances entered, and was thereof poſſeſſed. And being ſo thereof poſſeſſed, the ſame *Thomas Davis* afterwards, viz. the 22d Day of *Auguſt* in the 37th Year of the Reign of the ſaid late King *Henry* the *eighth*, made and declared his laſt Will and Teſtament in Writing, and by the ſame Teſtament gave and bequeathed the Tenements aforeſaid with the Appurtenances in Manner and Form underwritten in theſe Words.

" *Item*, I will that *Johan Davis* my Wife ſhall have and occupy all ſuch Meſſuages and " Lands with the Appurtenances as are contained in my Leaſe of *Longforths*, *Doddings*, *Hentals*, " and *Cleycomb-mead*, with all the Appurtenances contained in the ſaid Leaſe, for ſo many Years " as the ſaid *Johan* ſhall fortune to live. And after her Deceaſe I give and bequeath the Reſidue " of the Years of the ſaid Leaſe then not expired unto *Francis Davis* my younger Son, and to " his Aſſigns."

And further the aforeſaid *Thomas Davis* by his ſame Teſtament conſtituted and ordained the aforeſaid *Johan* his ſole Executrix of his Teſtament aforeſaid, as by the ſaid Teſtament to the Jurors aforeſaid in Evidence ſhewn more fully appears. And the aforeſaid *Thomas Davis* of the Tenements aforeſaid with the Appurtenances in Form aforeſaid being poſſeſſed, afterwards, viz. the 20th Day of *September* in the 37th Year of the Reign of the ſaid late King *Henry* the *eighth*, died thereof in Form aforeſaid poſſeſſed, having whilſt he lived, and at the Time of his Death, Goods and Chattles ſufficient to pay and ſatisfy all his Debts and Legacies, beſides the ſaid Demiſe. After the Death of which ſaid *Thomas Davis*, the aforeſaid *Johan*, the 10th Day of *November* in the Year of the Lord 1545, proved and inſinuated the Teſtament aforeſaid of the aforeſaid *Thomas Davis* in the Prerogative Court of *Thomas* late Archbiſhop of *Canterbury*, of all *England* Primate and Metropolitan, becauſe the ſame *Thomas Davis* whilſt he lived, and at the Time of his Death, had Goods, Rights, or Credits in divers Dioceſes or peculiar Juriſdictions within this Realm of *England*, and the Adminiſtration of all and ſingular the Goods, Rights, and Credits of the ſaid *Thomas Davis*, and his Teſtament in any wiſe concerning, to the aforeſaid *Johan*, Executrix in the Teſtament named for the well and faithfully adminiſtring of the ſame, by the ſame late Archbiſhop was committed. And afterwards, viz. the 10th Day of *December* then next following, the ſame *Johan* into the Tenements aforeſaid with the Appurtenances entered, and claimed to have and occupy the ſame Tenements with the Appurtenances for Term of her Life, the Remainder thereof to the ſaid *Francis*, according to the Form and Effect of the Legacy aforeſaid. By Reaſon whereof the ſame *Johan* was of the Tenements aforeſaid with the Appurtenances poſſeſſed. And the aforeſaid *Johan* of the Tenements aforeſaid with the Appurtenances in Form aforeſaid being poſſeſſed, before the aforeſaid Time when, &c. viz. the Day of in the 6th Year of the Reign of Lord *Edward* late King of *England* the *ſixth*, took to Huſband one *Richard Herbert* Eſquire. And afterwards, viz. the 24th Day of *Auguſt* in the 4th and 5th Years of the Reign of Lord *Philip* and Lady *Mary* late King and Queen of *England*, the aforeſaid *Francis Davis* died inteſtate, after whoſe Death the aforeſaid *Richard Herbert* and *Johan* his Wife, by the Names of *Richard Herbert* Eſquire and *Johan* his Wife ſole Executrix of the laſt Will and Teſtament of the aforeſaid *Thomas Davis*, the 1ſt Day of *December* in the 4th and 5th Years of the Reign of the ſaid late King and Queen *Philip* and *Mary*, by their certain Writing ſealed with their Seals, and to the ſame Jurors in Evidence ſhewn, bearing Date the ſame Day and Year, bargained, ſold, gave, granted, and aſſigned to one *Thomas Carpenter* and *Richard Hoſkins* all their Intereſt, Right, Title, and Term of Years then to come and not expired of and in the ſaid Tenements with the Appurtenances in which, &c. and all the Eſtate of the ſaid *Richard* and *Johan* in the ſame; to have, hold, and enjoy the ſaid Tenements with the Appurtenances, and the ſaid Intereſt and Term of Years aboveſaid of and in the Tenements aforeſaid with the Appurtenances, to the ſaid *Thomas Carpenter* and *Richard Hoſkins*, and to their Aſſigns, and to their ſole Uſe and Behoof, unto the full End and Term of the ſaid 60 Years. And afterwards, viz. the 13th Day of *January* then next following, the aforeſaid *Thomas Carpenter* and *Richard Hoſkins*, by their certain Writing ſealed with their Seals, and to the Jurors aforeſaid in Evidence ſhewn, bargained, ſold, gave, granted, and aſſigned to the aforeſaid *Richard Herbert* and *Johan* all their Intereſt, Right, Title, and Term of Years then to come and not expired of and in the Tenements aforeſaid with the Appurtenances; to have, hold, and enjoy the Tenements aforeſaid with the Appurtenances, and the ſaid Intereſt and Term of Years of and in the ſame, to the ſaid *Richard Herbert* and *Johan* his Wife, and to their Aſſigns, to their ſole Uſe and Behoof, during the ſaid Term of 60 Years. And afterwards, viz. the 10th Day of *February* in the Year of the Lord 1564, the Adminiſtration of all and ſingular the Goods, Rights, and Credits which belonged to the aforeſaid *Francis Davis* at the Time of his Death, by *Matthew* by divine Permiſſion then Archbiſhop of *Canterbury*, of all *England* Primate and Metropolitan, was committed

committed to one *Mary Welcden* Wife of the aforeſaid *William Welcden.* And afterwards, viz. the 14th Day of *June* in the 9th Year of the Reign of the Lady the Queen now, the aforeſaid *Richard Herbert*, by the Name of *Richard Herbert* of *Minchinhampton* in the County of *Glouceſter* Eſquire, by his certain Writing ſealed with his Seal, and to the Jurors aforeſaid in Evidence ſhewn, gave, granted, and aſſigned to one *Charles Somerſet* Eſquire, *Thomas Herbert* Eſquire, Brother of him the ſaid *Richard*, and *John Waters*, all his Intereſt, Right, Title, and Term of Years then to come and not expired of and in the Tenements aforeſaid with the Appurtenances, and alſo all the Eſtate of him the ſaid *Richard Herbert* in the ſame; to have, hold and enjoy the ſaid Tenements with the Appurtenances, among other Things, and the ſaid Intereſt and Term of Years of and in the ſaid Tenements with the Appurtenances, to the aforeſaid *Charles Somerſet*, *Thomas Herbert*, and *John Waters*, and to their Aſſigns, to their ſole Uſe and Behoof, unto the full End and Term of the ſaid 60 Years. And afterwards, viz. the 28th Day of *April* in the 10th Year of the Reign of the Lady the Queen now, the aforeſaid *Charles Somerſet*, *Thomas Herbert*, *John Waters*, and *Richard Herbert*, by a certain Indenture made between the ſame *Richard Herbert*, *Charles Somerſet*, *Thomas Herbert*, and *John Waters* of the one Part, and one *John Scudamore* Eſquire and *George Vaughan* Gentleman of the other Part, (which other Part ſealed with the Seals of the aforeſaid *Richard Herbert*, *Charles Somerſet*, *Thomas Herbert*, and *John Waters*, to the Jurors aforeſaid in Evidence was ſhewn) for and in Conſideration of a Marriage to be had and ſolemnized between one *Charles Herbert* Gentleman, Son and Heir Apparent of the ſaid *Richard Herbert*, and *Johan Aglum* Widow, then late Wife of *Walter Aglum* Gentleman deceaſed, gave, granted, and aſſigned to the aforeſaid *John Scudamore* and *George Vaughan* as well the Tenements aforeſaid with the Appurtenances in which, &c. as alſo all their Right, Title, and Intereſt of and in the ſame Tenements with the Appurtenances, and alſo all the Term of Years in the ſame then to come and not expired; to have and to hold the ſame to the ſame *John Scudamore* and *George Vaughan*, their Executors and Aſſigns, during all the Reſidue of the ſaid Term of 60 Years. And afterwards, viz. the 20th Day of *May* in the aboveſaid 10th Year of the Reign of the Lady the Queen now, the aforeſaid *Johan* the Wife of the aforeſaid *Richard Herbert*, Executrix of the Teſtament of the aforeſaid *Thomas Davis*, died, after whoſe Death the aforeſaid *William Welcden* now Plaintiff, before the aforeſaid Time when, &c. viz. the 21ſt Day of *October* in the 10th Year of the Reign of the Lady the Queen now, by virtue and by Reaſon of the aforeſaid Letters of Adminiſtration to the aforeſaid *Mary* the Wife of the aforeſaid *William Welcden* yet living by the aforeſaid *Matthew* late Archbiſhop of *Canterbury* in Form aforeſaid committed, into the Tenements aforeſaid with the Appurtenances entered, and was thereof poſſeſſed: Upon the Poſſeſſion of which ſaid *William Welcden* thereof the aforeſaid *Thomas Elkington* afterwards, viz. the aforeſaid Time when, &c. into the Tenements aforeſaid with the Appurtenances, as Servant of the aforeſaid *John Scudamore* and *George Vaughan*, and by their Command, entered, and the Cloſe and Houſe aforeſaid in the ſame Tenements with the Appurtenances broke, and the Graſs aforeſaid there then growing with the Cattle aforeſaid by the Time aforeſaid eat up, trod down, and conſumed, as the aforeſaid *William Welcden* above againſt him complains. But whether upon the whole Matter aforeſaid by them above in Form aforeſaid found, the Entry of the aforeſaid *Thomas Elkington* into the Tenements aforeſaid with the Appurtenances upon the Poſſeſſion of the ſaid *William Welcden* is lawful, or not, the Jurors aforeſaid are wholly ignorant, and thereof they pray the Advice of the Juſtices and of the Court here, &c. And if upon the whole Matter aforeſaid it ſhall ſeem to the Court of the Lady the Queen here that the ſaid Entry of the aforeſaid *Thomas Elkington* into the Tenements aforeſaid with the Appurtenances upon the Poſſeſſion of the aforeſaid *William Welcden* is not lawful, then the Jurors aforeſaid ſay upon their Oath that the aforeſaid *Thomas Elkington* is guilty of the Treſpaſs aforeſaid, as the aforeſaid *William Welcden* above againſt him complains; and then they aſſeſs the Damages of the ſaid *William Welcden* by Occaſion of the ſaid Treſpaſs, beſides his Coſts and Charges by him about his Suit in this Behalf expended, to 8 l. and for thoſe Coſts and Charges to 40 s. And if it ſhall ſeem to the Court of the Lady the Queen that the aforeſaid Entry of the aforeſaid *Thomas Elkington* into the Tenements aforeſaid with the Appurtenances upon the Poſſeſſion of the aforeſaid *William Welcden* is lawful, then the ſame Jurors ſay upon their Oath aforeſaid that the ſame *Thomas Elkington* is not guilty of the Treſpaſs aforeſaid, as he the ſame *Thomas Elkington* above has alledged.

And for that a certain Box of preſerved Barberies, and Sugar called *Sugar-candy*, and ſweet Roots called Liquoriſh, were found with the aforeſaid *John Mucklow*, one of the Jurors aforeſaid, after he had departed from the Bar here to adviſe together with the other Jurors aforeſaid of ſaying their Verdict in the Premiſſes, therefore the ſame * *John Mucklow* is committed to the Priſon of the Lady the Queen of the *Fleet*, until he ſhall have made a Fine with the Lady the Queen on that Account, &c. And afterwards, viz. the 10th Day of *May* in this ſame Term comes the aforeſaid *John Mucklow* by the Keeper of the Perſon aforeſaid to the Bar here brought, and prays that he may be admitted to make a Fine with the Lady the Queen by Occaſion of the Premiſſes, and he is admitted &c. by Pledges. Which ſaid Fine is affeered by the Juſtices here at 20 s. Therefore the ſame *John Mucklow* go thereof quietly, &c.

* *Note*, he only was puniſhed, and not the other Jurors who had not offended. Vide 11 Co. 42. b. 43. a. 1 Rol. R. 73.

And

And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until on the Morrow of the Holy *Trinity*, to hear their Judgment thereon, becauſe the ſame Juſtices hereof not yet, &c.

THE CASE. Leſſee for Years deviſes the Occupation of his Land to his Wife for as many of the Years as ſhe ſhall live, and after her Death, the Remainder of the Years unexpired to his Son and his Aſſigns, and makes her ſole Executrix, and dies, the Widow enters and agrees to the Legacy, the Son dies, and then the Widow dies before the Leaſe is expired; it was adjudged, that this is a good Limitation of a Remainder, and that the Deviſe of the Occupation of the Land is in Effect a Deviſe of the Land itſelf to the Wife, ſo that the Execution of the Legacy to her is an Execution of the Remainder to the Son alſo, both their Intereſts being one and the ſame Thing, viz. in the Land itſelf, and that this is not a Deviſe of the whole Term to the Wife abſolutely, but *ſub modo*, and upon a Contingency, viz. if ſhe lives ſo long, and her Intereſt is determined on her Death, ſo that ſhe has no Power to diſpoſe of the Term againſt the Son, any more than if the Deviſes had been tranſpoſed in the Will, and the Teſtator had firſt bequeathed the whole Term to the Son, and afterwards had bequeathed the Occupation and Uſe of it to the Wife during her Life, in which Manner the Deviſes here ſhall be conſtrued and tranſpoſed, in order to make good both the Eſtates according to the Intent of the Deviſor. And *Note*, it ſeems to be taken in this Caſe that the Deviſe to the Wife did not amount to an expreſs Eſtate for Life, but upon a Limitation only, viz. if ſhe lived ſo long, for if it had amounted to an Eſtate for Life, (as it was objected) it would have ſwallowed up the whole Term, an Eſtate for Life being in Judgment of Law greater than for Years, in which Caſe no Remainder could be appointed over. S. C. Dy. 358. pl. 50. N. Bendl. 308. Crompt. J. C. 64. b. Swinb. 197, 198. Godolph. Orph. Leg. 361, 362. Nelſ. Lex Teſtam. 156, 290, 554. Law of Teſtaments &c. 91. Vin. Abr. tit. Deviſe K. pl. 14. L. pl. 10. D. a. pl. 10. For the Point of Remainder See 10 Co. 47. a. 1 Rol. R. 357. Wentw. Off. of Exec. 227. Vide Cro. J. 461. Crompt. J. C. 53. a. And touching the Power of diſpoſing of the Term by the firſt Deviſee, See Wentw. Off. of Exec. 238.

IT appears by the Record, that *William Welcden* has brought an Action of Treſpaſs in the Common Bench againſt *Thomas Elkington* for breaking his Cloſe and Houſe at *Minchinhampton* in the County of *Glouceſter* the 21ſt Day of *October* in the 10th Year of the Reign of Queen *Elizabeth*. And the Defendant pleaded, not guilty. And the Jury found that *William* Lord *Windeſore* was ſeized in Fee of the Tenements in which the Treſpaſs is ſuppoſed to be done, and leaſed them the 16th Day of *March* in the 35th Year of King *Henry* 8. to one *Thomas Davis* for 60 Years from the Feaſt of the *Annunciation* of our Lady then next following, fully to be compleat. After which Feaſt *Thomas Davis* entered, and was poſſeſſed, and being ſo poſſeſſed, he in the 37th Year of King *Henry* 8. made his laſt Will in Writing, and thereby gave and deviſed the ſaid Tenements in Form following, viz. he deviſed that *Johan Davis* his Wife ſhould have and occupy all the Tenements for ſo many of the Years as ſhe ſhould happen to live, and after her Death he gave and deviſed the Reſidue of the Years of the ſaid Leaſe not expired to *Francis Davis* his younger Son, and to his Aſſigns. And he made his ſaid Wife his Executrix, and died in the ſame 37th Year of King *Henry* 8. being poſſeſſed in Form aforeſaid, and having whilſt he lived, and at the Time of his Death, Goods and Chattles (beſides the ſaid Leaſe) ſufficient to pay and ſatisfy all his Debts and Legacies. And after his Death, and in the Year of our Lord 1545, the ſaid *Johan* proved the Will in the Prerogative Court, becauſe the Teſtator at the Time of his Death had Goods and Debts in divers Dioceſes or peculiar Juriſdictions within this Realm of *England*. And afterwards ſhe entered into the Tenements, claiming to have and occupy them for Term of her Life, the Remainder thereof to the ſaid *Francis*, according to the Form and Effect of the ſaid Legacy, whereby the ſaid *Johan* was poſſeſſed of the ſaid Tenements. And ſhe being ſo poſſeſſed took to Huſband one *Richard Herbert*. And afterwards in the 5th Year of Queen *Mary* the ſaid *Francis* the Son died inteſtate. And afterwards in the ſame 5th Year of Queen *Mary* the ſaid *Richard Herbert* and his Wife by Deed gave and granted to two others all their Intereſt, Right, Title, and Term of Years then to come and not expired of and in the ſaid Tenements; to have and to hold the ſaid Tenements, and the ſaid Intereſt and Term of Years aforeſaid in the ſaid Tenements, to the ſaid two Perſons and to their Uſe unto the End of the ſaid 60 Years. And afterwards the ſaid two Perſons gave back to the ſaid *Richard Herbert* and his Wife their ſaid Intereſt, Right, and Term of Years of and in the ſaid Tenements; to have and to hold the ſaid Tenements and Intereſt of Years to them during the ſaid Term of 60 Years. And afterwards, viz. the 10th Day of *February* in the Year of our Lord 1564, the Adminiſtration of the Goods of the ſaid *Francis* the Son was committed to *Mary Welcden* the Wife of the Plaintiff. And afterwards, viz. in the 9th Year of Queen *Elizabeth*, the ſaid *Richard Herbert* granted all his Intereſt and Term of and in the ſaid Tenements to *Charles Somerſet*, *Thomas Herbert*, and *John Waters*, who granted it over to *John Scudamore* and *George Vaughan*. And afterwards, viz. the 20th Day of *May* in the 10th Year of the Reign of Queen *Elizabeth*, the ſaid *Johan* the Wife of the Teſtator died, after whoſe Death the Plaintiff, by Reaſon of the ſaid Letters of Adminiſtration granted to his Wife now living, entered into the ſaid Tenements, upon the Poſſeſſion of whom the Defendant at the Time of the Treſpaſs alledged, as Servant to the ſaid *Scudamore* and *Vaughan*, and by their Command, entered, and broke the ſaid Cloſe and Houſe, and did the Treſpaſs, &c. But whether the Entry of the Defendant was lawful or not, the Jury did not not know, and thereof they prayed the Advice of the Juſtices. And if upon the whole Matter it ſhould ſeem to the Court that the Entry of the Defendant upon the Plaintiff was not lawful, then they ſaid that the Defendant was guilty of the Treſpaſs, and then they aſſeſſed Damages, &c. And if the Entry of the Defendant was lawful, then they ſaid that the Defendant was not guilty.

And becauſe a Box of preſerved Barberies, and Sugar-candy, and Liquoriſh were found with *John Mucklow*, one of the Jury, after he was departed from the Bar, the ſaid *Mucklow* was committed to the Fleet, until he had made a Fine to the Queen, and afterwards in the ſame Term the ſaid *Mucklow*, being brought to the Bar by the Keeper of the Priſon, prayed that he might be admitted to make a Fine to the Queen; and he was admitted by Pledges, which Fine was aſſeſſed by the Juſtices at 20 s. and the ſaid *Mucklow* was diſcharged.

And upon this Verdict Judgment was prayed for the Plaintiff by *Baber* and *Anderſon* Serjeants. And it was objected by *Popham* and *Windham* Serjeants on the Part of the Defendant that the Plaintiff ſhould be barred, becauſe the Jury have found againſt him, as they took it. For they have found that *Thomas Davis* the Teſtator, being poſſeſſed of the Term, deviſed that *Johan* his Wife ſhould have and occupy all the Tenements for ſo many of the Years as he ſhould live, and

that after her Death he deviſed the Reſidue of the Years unexpired to *Francis Davis* his Son, and to his Aſſigns, and that he made his ſaid Wife his Executrix, and died, and that the Wife proved the Teſtament, and took a ſecond Huſband, and that ſhe and her Huſband granted the Term to Strangers. In which Caſe divers Things are conſiderable. Firſt, whether or no by this Deviſe the Teſtator gave to the Wife as Legatory the whole Term, or only Part of it. Secondly, if he did not give the whole, but Part, then whether or no this Eſtate or Intereſt which the Wife hath, is, by her Entry, an Execution of the Legacy and of the whole Eſtate as well to *Francis* as to herſelf. Thirdly, admitting that it is or is not an Execution thereof, whether or no the Intereſt intended to *Francis* is utterly excluded by the Grant of the Term made by the Wife and her ſecond Huſband to the two Strangers.

For the Defendant. 1 Point. [a] Godolph. Orph. Leg. 442, 476. § 118. [b] Ibid. [c] Poſt 543 (c). [d] 3 Bulſt. 8. [e] Swinb. 90. [f] Dy. 277. pl. 59. 10 Co. 47. b. 2 Bac. Abr. 435. 3 Bac. Abr. 488. [g] 2 Brownl. 173, *arguendo*. Vin. Abr. tit. Executors N. a. pl. 3. [h] 1 Leon. 216 *per Anderſon et Periam*. Poſt 543 (b). For if the Executor, being Legatory alſo, enters generally without Claim or Demonſtration of his Election, it is ſaid that he ſhall have it as Executor, and not as Legatory, Dy. 277. pl. 59. 10 Co. 47. b. 1 Rol. Abr. 619. D. pl. 1. Cro. E. 348. pl. 19. 2 Bac. Abr. 435. 3 Bac. Abr. 488. Godolph. Orph. Leg. 138, § 3. 442. 476, § 118. Wentw. Off. of Exec. 222. 1 Chan. Caſ. 310. Sed Contra Cro. E. 223. pl. 3. Poſt 543, *per Curiam*. Vide Swinb. 91, 92. 1 Show. P. C. 203. Skin. 536. Wentw. Off. of Exec. 227. [k] Show. P. C. 203. [l] 7 Ed. 6. Bro. Grants 154. Leaſe 66. B. N. C. § 437. 1 Co. 155. a. Moor 479, 480. 1 Bulſt. 191. Godb. 25. 3 Leon. 86. 2 And. 12. 1 Rol. Abr. 848. pl. 4. Show. P. C. 203. 1 Lev. 45 *Copenhurſt v. Copenhurſt, per Curiam*. Sed Contra 1 Rol. Abr. 848. pl. 1. [m] See the Caſe here intended H. 10 Eliz. Dy. 272. pl. 30, *Lilley v. Whitney*. And S. P. Hob. 171. 1 Bulſt, 191, 192. See Skin. 535. [n] M. 9 H. 5. 8. pl. 1.

And upon theſe Points the Matter was debated by the Serjeants the laſt *Hillary* Term, and by the Juſtices this preſent *Eaſter* Term 20 *Eliz.* But I did not hear the Argument of *Baber* Serjeant, nor of *Mead* and *Mounſon* Juſtices, and only Part of *Popham*'s Argument. And as to the firſt Point, it was ſaid that when the Teſtator died, and the Wife entered into the Land, ſhe had two Titles, the one as Executrix, the other as Legatory, and ſhe [a] might chuſe which ſhe would ſtand to. [b] For if ſhe choſe the Intereſt which the Law firſt veſted in her as Executrix, then by that Election ſhe waived the other Intereſt as Legatory, (which ſhe might well do, [c] for no Legatory is compellible to take the Legacy againſt his Will) and if ſhe choſe the Intereſt veſted in her as Legatory, then ſhe did not hold as Executrix, [d] for that which ſhe held as Executrix ſhe held to another's Uſe, [e] and that which ſhe held as Legatory, ſhe held to her own Uſe; ſo that by the Election of the one the other Intereſt was deſtroyed and confounded. And when ſhe entered, her firſt [f] Title was as Executrix, for as Executrix ſhe had the Term in a Manner before Entry, and as Executrix ſhe might have [g] aliened the Term before Entry, wherefore in Order to make her Election, [h] ſome Circumſtance was neceſſary to be uſed, to ſhew whether ſhe would aſſent to the Legacy or refuſe it. And then when ſhe entered, claiming to have and occupy the Tenements for Term of her Life, with the Remainder over, according to the Legacy (as the Jury have found), admitting for Argument's Sake that this was an Execution of the Legacy, yet ſhe had in her the whole Term and the whole Intereſt, for the Words of the Teſtament are, *that ſhe ſhould have and occupy all the Tenements for as many of the Years as ſhe ſhould live*, that is, for as long Time as ſhe ſhould live, and it is as much as if the Teſtator had ſaid, that ſhe ſhould have the Term during her Life. In which Caſe he could not limit or appoint a Remainder over, [i] for a Time for Life is in Judgment of Law larger than a Time for Years. [k] And if one who has a Term for Years grants it to another during his Life, it is as much as if he had granted it during all the Years, for the Limitation for Life is as great as a Limitation for all the Years, and comprehends in Judgment of Law all the Years, for inaſmuch as a Time for Life is greater than a Time for Years, therefore the leſſer is included in the greater. And ſo the whole Term and Eſtate was given to the Wife here, from whence it follows that the Remainder is void. And hereupon *Popham* ſaid it had been held, [l] that if one has a Leaſe for Years of Land, and grants to another all his Term which ſhould be to come at the Time of his Death, this Grant is void, for in that he will hold the Term during his own Life, thereby he holds it for a Time which is as long as he has an Intereſt in the Land, ſo that there is no Certainty that the Term will ever commence; and therefore the Grant ſo made is void. And the Lord *Dyer* in his Argument afterwards affirmed that ſuch Grant could not be good to commence after the Death of him who had the Term, but he ſaid that in a Caſe which lately came before the Juſtices of the King's Bench upon a *Poſtea*, [m] where Leſſee for Years granted by Deed all his Term to another, *habendum* to the Grantee from the Time of the Death of the Grantor, it was adjudged that the *habendum* was void, and that the Term paſſed preſently, becauſe the Premiſſes of the Deed and the *habendum* could not ſtand together; for by the Premiſſes of the Deed the Term was granted preſently, and then the *habendum*, which would make the Term commence after Death, was inconſiſtent with the Premiſſes, and could not make any Intereſt to paſs, becauſe the Time when it ſhould paſs was thereby made incertain, for by the *habendum* the Grantor intended to reſerve to himſelf the Eſtate or Intereſt as long as he ſhould live, and that the Years which were to come after his Death ſhould paſs, which could not be, becauſe when he reſerved it for his Life, therein he reſerved it for all the Term which he had, for a Time for Life is greater than a Time for Years; and therefore inaſmuch as the *habendum* and the Premiſſes could not ſtand together, the Court adjudged that the Term paſſed by the Premiſſes of the Deed, rather than the *habendum* ſhould deſtroy the whole. But in the other Caſe where Leſſee for Years, without any *habendum*, grants to another all his Term which ſhall be to come at the Time of his Death, the whole ſhall be totally void, becauſe it is but one entire Sentence. And ſo the Serjeants ſaid that in the principal Caſe the Wife, to whom the Term was given, had the whole Term during her Life, and the Limitation of the Reſidue of the Term which was to come at the Time of her Death was void. [n] And hereupon *Windham* cited the Caſe in 9 *H.* 5. where a Man was ſeized in Fee, and made a Leaſe for 10 Years, and afterwards he made another Leaſe for 6 Years, to commence the ſame Day on which the firſt Leaſe commenced, and afterwards the Leſſee for 6 Years made a Leaſe to another for 4 Years, rendering 6 l. *per ann.* and afterwards, and during the 4 Years, the Leſſee for 10 Years ſurrendered his Term to the firſt Leſſor, and afterwards the Leſſee for 6 Years brought an Action of Debt againſt the Leſſee for 4 Years, for 24 l. being the Rent in Ar-

rear for the 4 Years at the ſaid Rate of 6 l. *per ann.* and it was the Opinion of *Martin* Juſtice, that the Action of Debt did not lie, wherefore the Plaintiff there traverſed the Leaſe for 10 Years, becauſe if the Leaſe for 10 Years was made, the Leaſe for 6 Years was void, [b] for when the Leſſor had made a Leaſe for 10 Years, during that Term he could not contract with another for a Leaſe to take Effect within that Time, for which Reaſon his Leaſe for 6 Years afterwards made to commence the ſame Day with the former Leaſe was abſolutely null and void: And altho' the Leſſee for 10 Years afterwards ſurrendered his Eſtate, yet the Leaſe for 6 Years could not take Effect, becauſe it was void at the Beginning, the greater Term of 10 Years having made the Contract for the leſſer Term void, for the Leſſee for 10 Years had the Land for all the 6 Years and more, ſo that the Intereſt for 6 Years was utterly void. And ſo in the principal Caſe here the Wife had the Land for the whole Term, and then the Teſtator could not limit it or any Part of it to another during the Time that the Wife had it. From whence it follows that the Plaintiff, who claims by the Remainder which was void, ſhall be barred.

[b] S. P. Ante 422 (e). 432 (a).

But admitting that the Wife had not the whole Eſtate in the Term given to her by the expreſs Words of the Will, but that the Words *(that the Wife ſhould have and occupy all the Tenements for as many of the Years as ſhe ſhould live)* ſhall be interpreted not to give her the Term itſelf, but only the Occupation thereof, yet the other Words, by which the Teſtator gave the Reſidue of the Years unexpired, after the Death of the Wife, to *Francis* his Son, imply that the Wife ſhould have the Term during her Life, and by Implication they amount to a Gift of the Term to the Wife for her Life. [c] And hereupon *Popham* cited the Caſe in 13 *H.* 7. where a Man deviſed all his Goods to his Wife, and that after the Death of the Wife, his Son and Heir ſhould have the Houſe, there notwithſtanding the Houſe was not expreſly deviſed to the Wife, yet foraſmuch as it was the Intent of the Deviſor that the Son ſhould not have the Houſe during the Life of his Mother, therefore by Implication ſhe ſhould take an Eſtate for Life in the Houſe, to which all the Juſtices in that Caſe agreed. So in the principal Caſe (it was ſaid) altho' it ſhould be taken that the Words of the Will did not expreſly give the Term to the Wife during her Life, but only the Occupation of the Land, yet foraſmuch as the Teſtator gave the Term to *Francis* his Son after the Death of the Wife, therein it appears to be his Intent that the Wife ſhould have it during her Life, and therefore the Term was by Implication preſently given to the Wife, and ſhe had it as fully as if it had been given to her by expreſs Words. So that whether ſhe had it the one Way or the other, no Remainder could be limited to *Francis* the Son, and conſequently the Plaintiff has no Title or Intereſt by Reaſon of the Letters of Adminiſtration of the Goods of *Francis*, but ſhall be barred.

[c] H. 13 H. 7. 17. pl. 22. Bro. Deviſe 52.

2 Point.

As to the ſecond Point, viz. if the Entry of the Wife was an Execution of the whole Eſtate as well to *Francis* the Son as to herſelf, it was ſaid that the Plaintiff in Right of his Wife the Adminiſtratrix of *Francis* cannot enter, unleſs the Remainder or Intereſt which he claims was executed in the Life of the Wife of the Teſtator, for there was no ſufficient Aſſent had after the Death of the Wife of the Teſtator. And if ſo be that the Eſtate is given only to *Francis* the Son, and nothing to the Wife but the Occupation or Uſe, or the Profits thereof, (as ſome of the Counſel on the other Side have collected from the Senſe of the Words, according to their own Expoſition of them) then there was no Execution of the Term in the Son, for the Eſtate or Term is one Thing, and the Occupation thereof is another Thing, for the Occupation or taking of the Iſſues is nothing but a Profit *a prender*, and is a diſtinct Thing from the Eſtate. And therefore her Entry and Claim of her own Intereſt, which was but a Profit, could not be an Execution of the Eſtate itſelf, which is another Thing. [d] As if a Man has a Leaſe for Years, and deviſes out of it a Rent or Common to A, and deviſes the Leaſe itſelf to B. and dies, and his Executors pay the Rent, or aſſent that A. the Deviſee of the Common ſhall put in his Cattle, and uſe the Common, this is no Aſſent that B. the Deviſee of the Term ſhall have the Term, nor is it an Execution of the Term, for the Term is one Thing, and the Profit out of it is another Thing. [e] But if a Man has a Term for 20 Years, and deviſes 4 Years to one, and the Remainder or Remnant of the Term to another, there if the Executors aſſent that the Deviſee for 4 Years ſhall enter, and he does ſo, this Aſſent goes to him in Remainder, and is an Execution of the whole Term as well to him in Remainder as to the Deviſee for 4 Years, for the firſt Eſtate and the Remainder is all of one ſame Thing, ſo that the Aſſent to the one is an Aſſent to the other. But the Occupation of the Land is a different Thing from the Eſtate in the Land itſelf. And to prove that the Execution of the Occupation of a Thing is not an Execution of the Thing itſelf, *Popham* cited the Caſe in 37 *H.* 6. [f] where A. being poſſeſſed of a Book called a *Grail*, deviſed it to B. one of his Executors, to have and uſe for Term of his Life, and after his Death, the Remainder to C. in the ſame Manner for Term of his Life, and after his Death, the Remainder to the Pariſhioners of a Church for ever, and died, and B. the Executor took the ſaid Book, and held it by Force of the ſaid Deviſe, and afterwards B. died, and C. to whom the Remainder was appointed took the Book, and in an Action of Treſpaſs brought againſt him for the Book, he would have juſtified upon this Matter, and could not, becauſe the Deviſe proves in itſelf that the Property of the Book was always in the Executors to the Uſe of the Teſtator, and not in the Deviſees, for they had but the Occupation and Uſe of it for their Lives, ſo that they had no Property in it, but the Property continued in the Executors, who were to deliver it to the Pariſhioners

[d] S. P. 1 Rol. R. 248 *per Dodder.* J. 3 Bulſt. 122, *per Idem.* Bridgm. 55. Swinb. 27. Godolph. Orph. Leg. 234. Wentw. Off. of Exec. 235. Poſt 541. But it ſeems that an Aſſent to the Deviſe of the Term is an Aſſent to the Rent or Common, 1 Rol. Abr. 620. pl. 3. Godolph. Orph. Leg. 360.

[e] S. P. 1 Finch 151. 2 Finch 172. Godolph. Orph. Leg. 148, 244.

[f] T. 37 H. 6. 30. Fitz. Deviſe 6. Bro. 13. Lane 60, 61. 1 P. Wms. 3. 1 Finch 151. 2 Finch 172. Poſt 542.

ners after the Death of B. and C. From which Caſe (it was ſaid) it appears that the Execution of him who has but the Occupation of a Thing is no Execution to another who has the Occupation after him, for their Occupations are ſeveral and diſtinct from each other, nor is it any Execution to him to whom the Property is given. So in the principal Caſe, if it ſhall be taken that nothing is deviſed to the Wife but the Occupation of the Term, and that the Property of it is deviſed to the Son, the Execution of the Occupation is no Execution of the Property.

And *Windham* ſaid that no Aſſent could be given to *Francis* until it was known whether he ſhould have any Thing or not, or if the Wife had ſurvived the Term, he ſhould have had nothing, and therefore an Aſſent in the Life of the Wife is void. And he alſo ſaid, that if the Wife ſhall be adjudged to have nothing by the Deviſe but the Occupation of the Term, ſuch Occupation, which is but a Profit out of the Land, ſhall be merged in the Land being in the Hands of the Wife, for ſhe hath the Property of the Term in her before it ſhall be in the Son, and the Thing itſelf extinguiſhes the Profit ariſing out of it.

3 Point. As to the third Point, viz. if *Francis* was excluded of the Intereſt intended him by the Grant made by the Wife and her ſecond Huſband, *Popham* ſaid that he was utterly excluded. For when the Teſtator deviſed that his Wife ſhould have and occupy all the Tenements during her Life, and after her Death that his Son ſhould have them, if this ſhall not be adjudged an abſolute Deviſe to the Wife, yet at leaſt ſhe thereby had the whole entire Intereſt upon Condition or upon Determination, viz. that if ſhe died, then her Eſtate ſhould be void. For to give all his Term to his Wife during her Life, and to give all his Term to his Wife if ſhe ſhall ſo long live, ſeems to be all of one Effect. For when he ſays, "during her Life," he ſhews his Intent to be that her Eſtate ſhall end with her Life, for if he meant that her Eſtate ſhould continue longer than for her Life, it was idle to put in the Words, "during her Life," or "for as many Years as ſhe ſhall live." So that to give the Term during her Life, or for as many Years as ſhe ſhall live, or if ſhe ſhall ſo long live, or provided that if ſhe dies, the Deviſe ſhall be void, ſeems to be all of one Effect, if ſo be that the Mention of her Life has any Effect or Operation at all. And if ſo be that the Words (during her Life) are Words of Limitation or Condition, then the Executors ſhall take Advantage thereof, and not *Francis* the Son, who is a Stranger; for ſuch Condition, or ſuch Expectation to have the Term upon her Death, is nothing but a Poſſibility, and whether it be called a Poſſibility or a Condition, or any Thing elſe, it cannot be granted or limited to any other who is a Stranger. For it is a Thing which goes in Privity, as Conditions, and ſuch like, do, which are given by Law to Privies only, and cannot be limited or granted to others who are Strangers, as the Son is here, but the Executors ought to take Benefit of ſuch Things of Privity. And here inaſmuch as the Wife herſelf was Executrix, and ſhe and her ſecond Huſband granted the Term over to two others, thereby they granted this Poſſibility or Condition by Way of Extinguiſhment, and therefore there is no Perſon that ſhall take Benefit of any Determination by the Death of the Wife. So that whether the Wife had an abſolute Eſtate in the Term without Remainder, or whether ſhe had an Eſtate upon Condition or Determination by her Death, the Grant of her and of her Huſband took away and extinguiſhed ſuch Condition or Determination, and made the Eſtate of the Grantees of the Term good and abſolute and indefeaſible; for which Reaſon nothing accrued to the Adminiſtratrix of *Francis*, and ſo the Plaintiff ought to be barred.

E Contra for the Plaintiff. But the Serjeants of Counſel for the Plaintiff, and all the Juſtices, argued to the contrary. For when the Teſtator deviſed that *Johan* his Wife ſhould have and occupy all the Tenements for as many of the Years as ſhe ſhould happen to live, therein he expreſſed his Intent to be, that ſhe ſhould have the Tenements during her Life, [a] for "as many of the Years as ſhe ſhould live," and "during her Life" is all one. [b] For if I demiſe Land, to have and to hold from Hour to Hour, or from Month to Month, or from Year to Year, during 40 Years, it is a good Leaſe for 40 Years. And ſo if I leaſe Land, to have from Day to Day, or from Week to Week, or from Month to Month, or from Year to Year during the Life of the Leſſee, and I make Livery, this is a good Leaſe for Life. And ſo ſuch Grant of a Rent or of a Reverſion ſhould be a good Grant for Life, for ſuch Form of Speech is but a Circumlocution of Life, for to have from Month to Month during Life, or from Year to Year during Life, and to have during Life, is all one, becauſe he that has a Thing for Life, has it from Day to Day, or from Month to Month during his Life. For an Hour, Day, Month, and Year are but particular Parts of Time, which run into, and are contained in, a greater Time. And ſo here the Teſtator by Circumlocution hath given the Leaſe to his Wife during her Life, ſo that it is evident to every Man that it was his Intent that his Wife ſhould have the Leaſe during her Life. And (during her Life) is a Limitation here, and is as much as to ſay, that ſhe ſhall have the Land during the Leaſe, if ſhe lives ſo long, and ſuch is the Senſe of the Words (during her Life). And if ſhe ſhould happen to die during the Leaſe, then it is alſo evident to every Man that it was the Teſtator's Intent, by his Gift to the Son, that the Son ſhould have the Leaſe during the Reſidue of the Years which ſhould be then to come.

[a] 8 Co. 95. b.

[b] See Ante 273 (b).

And inaſmuch as the Intent of the Teſtator is evident by theſe Words, it is the Office of the Court, as *Anderſon* and *Manwood* ſaid (and as *Mounſon* Juſtice alſo afterwards ſaid to me) ſo to marſhal and conſtrue the Words that the [c] Intent may take Place, and the Thing be effected, and not deſtroyed, if any Senſe at all can be made of them by Law.

[c] See Ante 162 (m), and the Books there cited.

Then here it appears to the Court that the Leaſe was made for 60 Years from the Feaſt of the *Annunciation* of our Lady *in Anno* 35 *H.* 8. ſo that the Leaſe would end in the Year of our Lord 1604. And it was the Will of the Teſtator that his Wife ſhould have the Land for as many of the Years as ſhe ſhould live, and no longer, and that his Son ſhould have the Reſidue. Then in order to ſet the Eſtates deviſed in a clear Light, and to make them ſtand with the Law, ſuppoſe that the Eſtate limited to the Son had been firſt expreſſed, and the Wife's Eſtate laſt, as if he had deviſed that the Son ſhould have the Land from the Death of his Wife unto the End of the Term, or unto the *Annunciation* of our Lady in the Year of our Lord 1604, and ſuppoſe further that he had deviſed the Land to his Wife during her Life, would not this Form of Words have ſerved the Turn of both the Wife and the Son? and would not the Law have warranted every Part of this Deviſe? Moſt certainly it would. And, Sir, ſo much is done in the preſent Deviſe of the Teſtator, for his Deviſe is in Subſtance to that Purpoſe, and his Words amount to as much. And it is the Office of the Court to adjudge what Part of the Sentence precedes, and what follows, and they ought ſo to place them that the one Part may not deſtroy the other, but that each may ſtand together. And hereupon *Manwood* put this Caſe. [a] If A. is ſeized in Fee of Land, and deviſes it to B. and to his Heirs, and afterwards in the latter Part of his Will he deviſes a Rent of 40 *s.* out of the Land to C. with Clauſe of Diſtreſs, this is a good Deviſe of the Rent to C. and a good Deviſe of the Land to B. and yet the Land was firſt deviſed, ſo that the ſubſequent Deviſe of the Rent out of it may ſeem to ſome who are ignorant of the Matter to be repugnant; but it is the Office of the Court ſo to marſhal the Words which are ſpoken at one Time, that the one Part may be conſiſtent with the other, and therefore the Deviſe of the Rent ſhall be conſtrued to precede the Deviſe of the Land, by which Means all Repugnancy will be avoided. And ſo, he ſaid, there was a like Caſe in the King's Bench, [b] where Leſſee for Years deviſed his Leaſe to his Son during the whole Term, and nevertheleſs it was his Will that his Wife ſhould have the Land during her Life, and this was there taken to be a good Deviſe of the Term to the Wife as long as ſhe lived, yet there the whole Term was firſt given to the Son, but the Court ſo expounded the Words that the Intent of the Teſtator might be obſerved, which was, that the Wife ſhould firſt have the Term during her Life, and the Son afterwards: So that the Words, by which the Term was firſt deviſed to the Son, were in Senſe placed laſt, and the Deviſe to the Wife, which was ſubſequent, was in Conſtruction made precedent. And this Sort of Expoſition will by no Means ſeem ſtrange to us, if we do but caſt our Eyes back, and conſider in what Manner the Judges in former Times have expounded the Words of Wills. [c] For, *Anderſon* ſaid, it appears in 21 *R.* 2. that a Man deviſed certain Tenements to one for Life, the Remainder for Life, the Remainder over to the Church of *St. Andrew* in *Holborn*, and upon this Deviſe the Parſon of the Church, after the Death of the Tenants for Life, ſued an *Ex gravi querela* to have Execution, and the Deviſe was adjudged good, and it was awarded that the Plaintiff ſhould have Execution, and yet the Church was not *Perſona capax*, but the Juſtices conſidered the Intent of the Teſtator, which was, that the Parſon ſhould have it, and not the Church, and therefore they conſtrued the Words ſo as to preſerve the Intent, and not to deſtroy it. [d] So, he ſaid, it was lately adjudged in *Lingen*'s Caſe, that where a Man, after the Statute of 27 *H.* 8. *of Uſes*, deviſed that his Feoffees ſhould be ſeized to the Uſe of A. in Fee, this was a good Deviſe of the Land to A. and yet at the Time of the Deviſe the Deviſor had not nor could he have any Feoffees ſeized to his Uſe, but his Intent was that A. ſhould have the Land, and agreeably to that Intent the Court conſtrued the Will. [e] And upon this Ground is the Caſe adjudged in 38 *Aſſ.* where a Man deviſed Land to be ſold by his Executor, and to make Diſtribution of the Money for his Soul, and he was offered Money for the Land, but not to the Value, for which Reaſon he held the Land in his Hands for two Years, and took the Profits to his own Uſe, without doing any Thing for the Soul of the Teſtator, and it was adjudged that the Heir might enter upon him, becauſe he had broken the Intent of the Teſtator, inaſmuch as he had not aliened the Land, nor converted the Profits of it to the Uſe of the Soul of the Teſtator: So that without any Words of Condition the Judges expounded the Will to create a Condition, becauſe that appeared to them to be the Intent of the Teſtator. Wherefore inaſmuch as the [f] Intent is the principal Point to be conſidered in Wills, and the Words ought to be conſtrued and applied ſo as to perform that Intent, it is reaſonable and the Office of the Judges to make ſuch Expoſition of the Words in the preſent Caſe, as is agreeable to the Intent of the Teſtator, and conſiſtent with the Law of the Realm, and that is, to conſtrue the latter Deviſe to the Son to precede the former Deviſe to the Wife, which Expoſition is conſonant to Law and Equity.

And as to what has been ſaid, that there was an Incertainty in the Eſtate limited to the Son, for it might have happened that the Wife had outlived the Years, and then nothing would have accrued to the Son, by Reaſon of which Incertainty the Eſtate limited to the Son ſhall be void; as to this, although there was an Incertainty when the Term would commence in the Son, [g] yet in Contracts if there is a Certainty upon an Incertainty, the Law allows ſuch to be good. [h] As if I make a Leaſe to A. *habendum* from the Time of the Death of I. S. unto the Feaſt of *St. Michael* which ſhall be in the Year of our Lord 1600, there I. S. may poſſibly outlive the Feaſt, which if he does, the Leaſe ſhall be void; and ſo on the other Hand he may poſſibly die before the ſaid Feaſt, and then the Leaſe ſhall be good. So that although there is an incertain Commencement founded upon a Contingency, yet upon that Contingency there is a certain End; and ſuch conditional Leaſes are good, as *Anderſon* and *Manwood* ſaid. [i] And *Anderſon* ſaid, if a Man deviſes ſo many of the Years of his Term as J. S. ſhall name, and J. S. afterwards names a certain

Leſſee for Years deviſes the Occupation of his Land to his Wife for as many of the Years as ſhe ſhall live, and after her Death, the Remainder of the Years unexpired to his Son, this ſhall be conſtrued firſt a Deviſe of the Term to the Son after the Death of the Wife, and afterwards a Deviſe of the Occupation of it to the Wife for her Life, in order that both may ſtand. See the like Conſtruction Poſt 540, and many Caſes there cited upon the ſame Ground.

[a] S. P. Lane 118 *Per Tanfield.* 1 Bulſt. 192. Godolph. Orph. Leg. 306, § 3. 327. Poſt 451 (c). 2 Rol. R. 424. at the Bottom. 1 Finch 49. 2 Finch 69. Treat. of Wills 30. So if there is firſt a Deviſe of Land to A. in Fee, and afterwards a Deviſe of the ſame Land to B. for Life, both Parts of the Will ſhall ſtand, and in Conſtruction of the Law the Deviſe to B. ſhall be firſt, ſo that it ſhall be an Eſtate for Life, the Remainder in Fee, Cro. E. 9. pl. 2. 2 Rol. R. 424. And ſee where Sentences and Eſtates have been tranſpoſed to preſerve the Intent of a Will, Hob. 75. pl. 93. 2 Chan. Caſ. 10. 1 Salk 234. Poſt 540.

[b] Crompt. J. C. 64. b. See the like Caſe Poſt 540 *Paramour v. Yardley.*

[c] P. 21. R. 2. Fitz. Deviſe 27. Bro. Corporation 77. Ante 345 (b).

[d] S. C. Paſch. 15 Eliz. Dy. 323. pl. 29 1 Leon. 313. 2 Leon. 43. 3 Leon. 167, 262. 4 Leon. 75. Poph. 188. 2 Brownl. 52. 1 Rol. Abr. 611. pl. 11. See like Point Bro. Deviſe 48. B. N. C. § 316. 1 Rol. Abr. 611. pl. 10.

[e] 38 Aſs. pl. 3. Bro. Condition 215. Deviſe 19. Fitz. Entry congeable 46. Bro. 124. Litt. § 383. Dy. 127. pl. 52. 2 Leon. 43. 4 Leon. 75. 1 Bulſt. 192.

[f] See Ante 162 (m).

[g] Ante 273 (b).

[h] Vin. Abr. tit. Eſtate Y. a. pl. 17.

[i] Swinb. 200. Godolph. Orph. Leg. 349, §. 6. Vin. Abr. tit. Deviſe D. pl. 4.

Number of Years, the Deviſe is good, but if he does not name any, the Deviſe is void. So, he ſaid, if Leſſee for Years grants to A. that if J. S. dies, A. ſhall have his Term, this is a good Grant conditionally. And ſo, he ſaid, if one grants to another that if he can obtain the good Will of the Leſſor, he ſhall have his Term, there if he performs the Condition, he ſhall have the Term, or otherwiſe not. [b] And upon this Ground *Manwood* cited a Caſe which is put by *Strange* in 9 *H.* 6. in Maintenance, *viz.* if I grant to A. that if my Tenant for Life dies during my Life, then A. ſhall have the Land for the Term of 10 Years, and afterwards my Tenant for Life is impleaded, A. may lawfully maintain him, and yet it is doubtful whether he ſhall have the Term or not. From which Caſe, he ſaid, it appears that a Leaſe for Years may be made upon an Incertainty, and although it is doubtful whether the Leaſe ſhall ever commence, or not, yet upon that Incertainty the Leſſee may maintain the Tenant of the Land, which he could not do, if he had no Intereſt in him in the Judgment of the Law. So in the principal Caſe here although the Commencement of the Eſtate limited to the Son was incertain, yet it might be certain upon a Contingency, *viz.* upon the Death of the Wife, which was then to come, whereby the Incertainty would be removed, and be reduced to a Certainty. And by her Death the Eſtate limited to the Son, which his Adminiſtratrix now hath, was made good, and ſo the Eſtate limited to the Wife and to the Son ſtand well together.

[b] H. 9. H. 6. 64. a. b. Bro. Maintenance 3. Wing. Max. reg. 113. pl. 10. Ante 83 (e).

A Deviſe of the Occupation of Land is in Effect a Deviſe of the Land itſelf, ſo that if the Occupation is deviſed to the Executor for a Time, and afterwards the Land itſelf to another, the Executor's Execution of the Legacy to himſelf is an Execution of the Legacy to the other, both their Intereſts being the ſame. S. P. adjudged Poſt 541 *Paramour* v. *Yardley*. And See Owen 6, 7. 2 Leon. 92. 3 Bulſt. 105. 1 Brownl. 79. Swinb. 141. Godolph. Orph. Leg. 349, § 6. 400, § 34. Co. Litt. 4. b.

And as to what has been ſaid, that that which the Wife had by the Deviſe was but the Occupation of the Land, and no Part of the Term or Intereſt itſelf, and therefore that the Occupation of the Wife was no Execution of the Term, which is a diſtinct Thing; to this *Manwood* and the Lord *Dyer* ſaid that it is not ſo, for the Intereſt limited to the Wife, and the Intereſt limited to the Son, is of one ſame Thing, and not of diſtinct Things. For, they ſaid, that which is limited as well to the one as to the other is the Land itſelf, for the Deviſe that the Wife ſhould have and occupy the Land was a Gift of the Land itſelf to the Wife, and ſhe had [c] *jus poſſeſſionis*, as *Dyer* termed it, although ſhe had not *jus proprietatis*. [d] But, he ſaid, an Action of Waſt might and ought to have been brought againſt the Wife, for ſhe was Tenant to the Leſſor. [e] And therefore the Execution of the Legacy in the Wife was an Execution to the Son alſo, for it was one ſame Term which was in them both, and one ſame Thing, and not ſeveral, and the Wife might have been ſaid to have the whole Term, [f] *ſed ſub modo* (as *Dyer* ſaid), and not abſolutely but determinably, and her Claim as Legatory ought to be adjudged a good Execution of the Term as well to the Son as to herſelf, for no other Aſſent could be had to the Eſtate of the Son in the Life of the Wife.

[c] Dy. 358. pl. 51. 1 Rol. R. 180.

[d] Vide 10 Co. 47. a.

[e] Godolph. Orph. Leg. 148, 245. Bridgm 55. Vin. Abr. tit. Deviſe D. a. pl. 10.

[f] See 10 Co. 47. a.

And, *Manwood* ſaid, it is not ſtrange in our Law to ſee two Perſons have ſeveral Intereſts in one ſame Land, and two Properties therein. [g] For, he ſaid, if Leſſee for Years by Deed indented grants over his Term to another, rendring Rent, and for Default of Payment that he ſhall re-enter and hold the Land until the Grantee hath paid him the Rent, there if he re-enters for Default of Payment, and holds the Land, he has one Property, (which is an incertain one, for it is determined upon the Payment of the Arrears by the Grantee) and the Grantee alſo has another Property, for all his Intereſt is not gone, but he has a Property ſuch as it is, and he may have the whole Property upon Payment of the Arrears. [h] So is it, he ſaid, if one has a Term for Years, and is bound in a Recognizance, or Statute-ſtaple, and Execution for Non-payment is ſued againſt him, and the Term is [i] extended, and delivered to the Conuſee at a certain annual Value, (as it well may be, [k] for it may be abſolutely ſold, or be extended at the annual Value, as Freehold may, at the Election of the Sheriff) there the Conuſee to whom the Term is delivered has one Property (which is an incertain one, for how long he ſhall hold it he does not know), and the Leſſee himſelf has another Property, for upon the Payment of the Debt, or upon its being received by the Conuſee out of the Revenue and Income of the Land, the Leſſee ſhall have the Term again: So that two Perſons have ſeveral Properties in one ſame Term. [l] And he cited a Caſe which happened in *Kent*, where a Woman made a Leaſe for Years of Mills are *Kent*, with an Exception that ſhe ſhould have the Profits for Term of her Life, and it was greatly debated whether or no this Exception was good, inaſmuch as the Profits of the Mills are the whole Benefit, and in Effect the Mills themſelves, and at laſt the Exception was adjudged to be good in Law, and the Woman had the Profits; and there if ſhe entered to take the Profits, ſhe had thereby one Property, (which was incertain how many Years it might continue) and the Leſſee had another Property. And he ſaid that in Chattles merely perſonal, as in Caſe of Sheep leaſed for a Time to compeſter the Land, or of a Chain pledged, as the Caſe was in [m] 5 *H.* 7. the Owner has one Property, and he to whom the Sheep are leaſed, or the Chain is pledged, has another; *a fortiore* then two Properties may be in a Leaſe, which is a Chattle real, and has a long certain Continuance. And therefore the Deviſe here is good to the Wife, and to the Son alſo, and the Entry of the Wife, with her Claim of the Land as a Legacy, is an Execution for both the Eſtates, [n] and the Intereſt of the Wife is not a collateral Occupation, as it was objected, but it is of the ſame Thing which was limited to the Son, and the Limitation to the Son is not a [o] Poſſibility, as *Popham* termed it, but a Deviſe of the Land itſelf. So that the whole Court was of Opinion, that upon the whole Matter the Adminiſtratrix of the Son ſhould have the Land after the Death of the Wife, and conſequently that the Action is maintenable.

[g] Vin. Abr. tit. Property K. pl. 1.

[h] Vin. Abr. tit. Property K. pl. 2.

[i] M. 7 H. 6. 2. a. b. *Per Strange.*

[k] Palm. 274.

[l] Vin. Abr. tit. Condition A. a. pl. 2. in Margine. tit. Property K. pl. 3. 3 Leon. 111, S. P. in a Queſtion put by *Manwood* Ch. B. Crompt. J. C. 64. b. See Dy. 264. b. T. 7 H. 6. 43. b.

And *Manwood* ſaid in his Argument, [p] that if Tenant for Years of Land grants a Rent-charge out of it to another for the Life of the Grantee, the Grantee ſhall not have an Eſtate of Freehold in

[m] This ſeems to be M. 5 H. 7. 1. a.

[n] Godolph. Orph. Leg. 362.

[o] Godolph. Orph. Leg. 245, 362. But whether it is a Poſſibility, as it is called in *Lampet*'s Caſe 10 Co. 47. and in Wentw. Off. of Exec. 237. or a preſent Intereſt, as it is called in 2 Bulſt. 130. it ſeems it is ſuch as may be releaſed, 10 Co. 47, &c. adjudged. Strange 132, by the Maſter of the Rolls. Wentw. Off. of Exec. 237. Contra 4 Leon. 135.

[p] 3 Bulſt. 125. 1 Rol. R. 248, at the bottom. Wentw. Off. of Exec. 55.

the Rent, becauſe he cannot have an Eſtate of Freehold derived out of a Chattle-real, but he ſaid that he ſhall have the Rent during all the Years; as if the Leſſee hath 40 Years in the Land, the Grantee ſhall have 40 Years in the Rent, and ſo he may make his Title, for the Limitation of the Time for Life is greater than the Years, and in the Limitation of the greater, the leſſer Time, *viz.* all the Years, ſhall be comprehended and included, ſo that he ſhall only have a Chattle in the Rent. *But he did not ſay whether the Rent ſhould be determined by the Death of the Grantee, or not,* * *but it ſeems reaſonable to take it ſo, viz. that the Grantee ſhall have the Rent for all the Years which the Leſſee hath in the Land, if he ſhall live ſo long, and no longer.*

Nota bene by the Reporter.

And afterwards Judgment was given in the principal Caſe for the Plaintiff, which was as follows.

* Herewith agrees 1 Rol. R. 370, *Per Dodderidge* J.

Note, that no Notice was taken in this Caſe of the Death of him in Remainder before the firſt Deviſee for Life, in which Caſe ſome have thought that ſince the Intereſt of the Remainder-man is but a meer poſſibility, becauſe the whole Term may poſſibly be ſpent in the Life of the firſt Deviſee, therefore if it does not take Effect and become an Eſtate in the Life of him to whom it is limited, it ſhall never ſettle in his Executor or Adminiſtrator, to which purpoſe they vouch the Rector of *Chedington*'s Caſe 1 Co. 155. and more ſtrongly *Price* and *Atmore*'s Caſe 4 Leon. 246. But the Law ſeems clearly to be, that the Death of him in Remainder ſhall be no Impediment to its ſettling in his Executors or Adminiſtrators, as well as it ſhould have done in himſelf, if he had out-lived the firſt Deviſee for Life; and ſo are the Books 10 Co. 51. b. Cro. J. 509, 510. 3 Leon. 195. 4 Leon. 192. 2 Bulſt. 130, *Per Coke* C. J. W. Jones 59. Strange 132. Wentw. Off. of Exec. 239. And ſo it is to be preſumed the Counſel for the Defendant here underſtood the Law to be, for that they never brought this Point into Queſtion.

At which Day here came as well the aforeſaid *William Welcden* as the aforeſaid *Thomas Elkington* by their Attornies aforeſaid. And thereupon the Premiſes being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here that the aforeſaid Entry of the aforeſaid *Thomas Elkington* into the Tenements aforeſaid with the Appurtenances upon the Poſſeſſion of the aforeſaid *William Welcden* was not lawful; therefore it is conſidered that the aforeſaid *William Welcden* recover againſt the aforeſaid *Thomas Elkington* his Damages aforeſaid to 10 *l.* by the Jurors aforeſaid in Form aforeſaid aſſeſſed, and alſo 66 *l.* to the ſame *William Welcden* at his Requeſt for his Coſts and Charges aforeſaid by the Court here of Increaſe adjudged. Which ſaid Damages in the whole amount to 76*l.* And nothing of Fine of the aforeſaid *Thomas Elkington*, becauſe he is pardoned, *&c.*

The reſt of the Record.

Judgment.

A Report of the Opinions of all the Juſtices of the King's-Bench, *in* Eaſter *Term in the 20th Year of the Reign of Queen* Elizabeth, *upon a Point ariſing in an* Ejectione firmæ *brought there by* Robert Bransby *againſt* Vincent Grantham *upon a Leaſe of Tenements in* Bracebridge *in the County of the City of* Lincoln, *which Leaſe was made to him by* Edward Sapcots *the 13th Day of* April *in the 17th Year of the preſent Queen for five Years next following from the Feaſt of* St. Michael *the Archangel then laſt paſt. And the Record was entered among the Records of* Trinity *Term* 19 Eliz. Rot. 741.

THE Defendant entitled himſelf by a former Leaſe made to his Grand-father by *Thomas Bracebridge*, who was then ſeized in Fee of the Tenements. And his Grand-father made his Teſtament, and ordained his Son *Thomas Grantham* his Executor, and died. And *Thomas* as Executor to the Grand-father entered, and made his Teſtament, whereby he deviſed the ſaid Term and Intereſt to the Defendant his Son, and made four others his Executors and died. And the Defendant by the Aſſent and Conſent of the Executors entered, and was poſſeſſed. And the ſaid *Thomas Bracebridge* entered, and ejected him, and made a mean Conveyance, whereby the Land at the laſt came to *Sapcots* the Leſſor of the Plaintiff. And the Defendant re-entered, claiming his former Leaſe, and ejected the Plaintiff.

The CASE.

An Executor cannot deviſe the Goods which he has as Executor. S. P. 1 Rol. R. 140, 143. 3 Leon. 209. 3 Bulſt. 7. Crompt. J. C. 118. b. 1 Finch 149. 2 Finch 168. Swinb. 90, 189. Godolph. Orph. Leg. 30, § 3. 110, § 5. 137, 138, § 3. 296, § 6. 307. Wentw. Off. of Exec. 17. Treat. of Wills 25, 138, 139. Nelſ. Lex. Teſtam. 90. Law of Teſtaments, &c. 35. Vin. Abr. tit. Deviſe A. pl. 23. J. 3. pl. 5. tit. Executors N. a. pl. 6. O. a. 2. pl. 4. X. b. pl. 6.

And it was the Opinion of all the Juſtices (as I was credibly informed, for I was not preſent when they declared their Opinions, though I was of Counſel in the Caſe) that the Bar was not good, becauſe the Deviſe to the Defendant was void. For the Deviſor had the Term as Executor to the Grand-father, and that which a Man has as Executor, he cannot deviſe to another. [a] For as ſoon as he is dead, the Thing goes to the Uſe of the firſt Teſtator, and his Executors ſhall have it as Executors to the firſt Teſtator, and to his Uſe, and not as Executors to the laſt Teſtator, nor to his Uſe. [b] For the Goods which were the firſt Teſtator's ſhall not be put in Execution for the Debt of the laſt Teſtator, and the laſt Executors have them by Relation as immediate [c] Executors to the firſt Teſtator. So that the Property which the laſt Teſtator had in them is taken away by the Relation, and the Goods are in ſuch Plight as if they had never been in him. And yet in his Life-time he had the Diſpoſal of them, for then he had Authority over them, and had the whole Property as Executor, but by his Death that Authority ceaſes, and is transferred to others, *viz.* to his Executors, who ſhall be Executors to the firſt Teſtator, and as Executors to the firſt Teſtator only they ſhall hold the Goods, for they cannot have them as Executors to both the Teſtators. So

[a] Vin. Abr. tit. Deviſe I. 3. pl. 5.

[b] Swinb. 413. Godolph. Orph. Leg. 138, § 4. 184, § 7. Wentw. Off. of Exec. 86. Vin. Abr. tit. Executors O. a. 2. pl. 3.

[c] S. P. Ante 290 (c) and (z).

that

that inaſmuch as the Property which the laſt Teſtator had was in Reſpect of the Executorſhip, which is an Office that ceaſes by his Death, and is then inſtantly transferred, together with the Things which he had, to another, his Deviſe of them is abſolutely void. [a] For no Man can deviſe any Thing but what he has to his own Uſe. And although the Defendant has ſaid that he entered by the Aſſent and Conſent of the laſt Executors, this cannot be taken as a Grant of the Term by the laſt Executors, but only as an Aſſent that he ſhould have that which the Teſtator had given him: [b] And if the Deviſe is void in Law, their Aſſent alſo is void. Wherefore it was the Opinion of all the Juſtices that the Deviſe and the Aſſent was void. And *Wray* Chief Juſtice ſaid that he had ſpoken with ſeveral of the Juſtices of the Common Bench concerning this Matter, and they were of the ſame Opinion with him and his Companions, that the Deviſe was void.

And the Judgment was, that the Plaintiff ſhould recover the Term, but that was upon another Point of the Caſe not here mentioned. Which Judgment here follows.

[a] 3 Bulſt. 7. Dr. & Stud. lib. 2. cap. 55. fo. 326. Swinb. 90, 188, 194. Godolph. Orph. Leg. 296, § 5. For which Reaſon a Term in Right of the Wife is not deviſeable by the Huſband, Ante 418 (e).

[b] An Aſſent to a void Legacy is alſo void, Vin. Abr. tit. Deviſe E. a. 2. pl. 2. Nelſ. Lex. Teſtam. 90. So an Attornment to a void Grant is void, and ſhall not bind the Tenant; as if the Lord grants the Rent of his Tenant with Clauſe of Diſtreſs, ſaving to himſelf the Fealty, this Clauſe of Diſtreſs is void in Law, and therefore although the Tenant attorns, the Grantee ſhall not diſtrain, H. 7 Ed. 3. 2. b. 3. a. adjudged. Co. Litt. 150. b.

The Judgment. At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid; whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the ſaid Lady the Queen here more fully underſtood, and mature Deliberation being thereupon had, it is conſidered that the aforeſaid *Robert Branſby* recover againſt the aforeſaid *Vincent Grantham* his Term aforeſaid yet to come of and in the Tenements aforeſaid with the Appurtenances, and his Damages as well by Occaſion of the Treſpaſs and Ejectment aforeſaid, as for his Coſts and Charges by him about his Suit in this Behalf expended. But becauſe it is unknown to the Court of the Lady the Queen here what Damages the ſame *Robert* in this Behalf hath ſuſtained, therefore the Sheriff is commanded that by the Oath of 12 good, *&c.* of the City aforeſaid he diligently enquire what Damages the ſame *Robert* hath ſuſtained as well by Occaſion of the Treſpaſs and Ejectment aforeſaid, as for his Coſts and Charges by him about his Suit in this Behalf expended. And the Inquiſition which, *&c.* to the Lady the Queen at *Weſtminſter* on *Wedneſday* next after 18 Days of *Eaſter*, under the Seals, *&c.* and the Seals, *&c.* they ſend, together with the Royal Writ to them thereof directed, *&c.* The ſame Day is given to the aforeſaid *Robert Branſby* there, *&c.*

A Report of the Opinions of the Juſtices of the Common Bench *in a Caſe argued by them in* Trinity *Term in the* 20th *Year of the Reign of Queen* Elizabeth, *upon a Demurrer in a Writ of* Annuity *brought by* Edmund Hare *againſt* Thomas Bickley, *Prebendary of the Prebend of* Alderwas *in the cathedral Church of* Litchfield, *Succeſſor to one* Alban Langdale *who granted the ſaid Annuity. And the Record thereof is entered among the Records of* Hillary *Term* 20 Eliz. Rot. 244. *and was as follows.*

LONE.

Midd: THOMAS BICKLEY, late of the City of *Litchfield* in the County of the City of *Litchfield* Clerk, Prebendary of the Prebend of *Alderwas* in the Cathedral Church of *Litchfield*, was ſummoned to anſwer *Edmund Hare* other called *Edmund Hare* Scholar in *Peterhouſe* within the Univerſity of *Cambridge*, of a Plea that he render to him 87 *l.* 10 *s.* which to him are Arrear of an annual Rent of 100 *s.* which he owes him, *&c.* And whereupon the ſame *Edmund* by *Apollo Plain* his Attorney ſays, that whereas one *Alban Langdale* Clerk, late Prebendary of the Prebend of *Alderwas* in the Cathedral Church of *Litchfield* in the County of *Stafford*, Predeceſſor of the aforeſaid *Thomas Bickley*, the 30th Day of *January* in the 1ſt Year of the Reign of the Lady the Queen now, at *Holborn* in the aforeſaid County of *Middleſex*, by his certain Writing bearing Date the 20th Day of *January* in the 1ſt Year of the Reign of the ſaid Lady the Queen now, and firſt delivered to the ſame *Edmund* the aforeſaid 30th Day of the ſame Month of *January* in the 1ſt Year aboveſaid, (which the ſame *Edmund* here produces in Court, ſealed with the Seal of the aforeſaid *Alban*) by the Name of *Alban Langdale* Clerk, Doctor of Divinity, and Prebendary of the Prebend called *Alderwas* in the Cathedral Church of *Litchfield* in the County of *Stafford*, for divers many good and reaſonable Conſiderations him ſpecially moving, had given, granted, and by the ſame Writing gave and granted for himſelf and his Succeſſors to the ſame *Edmund*, by the Name of *Edmund Hare* Scholar in *Peterhouſe* within the Univerſity of *Cambridge*, the annual Rent aforeſaid, by the Name of a certain Annuity or annual Rent of 5 *l.* of good and lawful Money of *England*, iſſuing out of all and ſingular the Manors, Meſſuages, Lands, Tenements, and Hereditaments belonging or in any wiſe appertaining to the Prebend aforeſaid, or being Part, Parcel, or Member of the ſame Prebend: To have, perceive, and enjoy the aforeſaid Annuity or annual Rent to the ſame *Edmund* and to his Aſſigns for

for and during the natural Life of the ſaid *Edmund*; to be paid annually at the ſtone Font in the Cathedral Church of *St. Paul* in the City of *London*, at two Times of the Year by equal Portions, viz. on the 7th Day of *April*, and the 12th Day of *October*, between the Hours of One and Three in the Afternoon of each Day of thoſe ſeveral Days of *April* and *October*, the firſt Payment thereof to begin the 12th Day of *October* then next following the Date of the ſame Writing, as by the ſame Writing more fully appears. ‡ And afterwards, viz. the laſt Day of *January* in the aboveſaid 1ſt Year of the Reign of the ſaid Lady the Queen now, one *Ralph* then Biſhop of *Coventry* and *Litchfield*, and true and undoubted Patron of the Prebend aforeſaid in Right of his Church, at *Holborn* aforeſaid in the aforeſaid County of *Middleſex*, by his certain Writing of Confirmation bearing Date the 22d Day of *January* in the Year of the Lord 1558, and firſt delivered to the ſame *Edmund* the aforeſaid laſt Day of *January* in the 1ſt Year aboveſaid, (which the ſame *Edmund* here produces into Court, ſealed with the Seal of the ſaid Biſhop) the aforeſaid Gift and Grant of the aforeſaid Annuity or annual Rent to the ſame *Edmund*, by the aforeſaid *Alban* by the Writing aforeſaid in form aforeſaid granted, and all and ſingular Things in the ſame Writing contained and ſpecified, accepted, approved, ratified, and by his Authority pontifical and ordinary, as much as in him was, by his ſame Writing confirmed, as by his ſame Writing likewiſe more fully appears. And afterwards, viz. the 3d Day of *February* in the Year of the Lord 1558 aforeſaid, *John Ramridge* Clerk, Dean of the aforeſaid Cathedral Church of *Litchfield*, and the Chapter of the ſame Place, at the City of *Litchfield* aforeſaid, by their certain Writing of Confirmation, (which the ſame *Edmund* here likewiſe produces into Court, ſealed with the common Seal of the ſaid Dean and Chapter, the Date whereof is at *Litchfield* aforeſaid in the Chapter-Houſe of the ſame Dean and Chapter the ſame 3d Day of *February* in the Year of the Lord 1558 aboveſaid) the aforeſaid Giſt and Grant of the aforeſaid Annuity or annual Rent, and all and ſingular Things in the aforeſaid Writing of the aforeſaid *Alban* ſpecified, as much as to them the ſaid Dean and Chapter belonged, accepted, approved, and by their ſame Writing ratified, and by the ſame Tenor of the ſame Writing of the ſame Dean and Chapter, by their capitular Authority, confirmed, as by the ſame Writing likewiſe more fully appears. And afterwards the aforeſaid *Alban* from the Prebend aforeſaid for certain Cauſes lawfully was deprived. After which ſaid Deprivation one *Thomas Drentham*, then Biſhop of *Coventry* and *Litchfield*, that Prebend conferred to the aforeſaid *Thomas Bickley*, and him cauſed to be inſtituted and inducted, and to be put into the corporal Poſſeſſion of the ſame Prebend; and the ſame *Thomas Bickley* the aforeſaid annual Rent by Seventeen Years and the Half of one Year next before the Day of obtaining the Writ original of him the ſaid *Edmund*, viz. the 3d Day of *January* in the 19th Year of the Reign of the ſaid Lady the Queen now, from the ſame *Edmund* withdrew, and the ſame to him hitherto to render hath refuſed, and yet doth refuſe. Wherefore he ſays that he is damnified, and hath Damage to the Value of 40 l. And therefore he produces the Suit, &c.

‡ See 3 Bac. Abr. 376, as to the Neceſſity of the Confirmation of the Biſhop.

And the aforeſaid *Thomas* by *Chriſtopher Crow* his Attorney, comes and defends the Force and Injury, when, &c. And ſays that the aforeſaid *Edmund* his Action aforeſaid againſt him ought not to have, becauſe he ſays that before the making of the aforeſaid Writing of the Grant of the annual Rent aforeſaid, viz. the 20th Day of *November* in the aboveſaid 1ſt Year of the Reign of the ſaid Lady the Queen now, the Prebend aforeſaid became vacant by the Death of one *Adam Pye* Clerk, whereby the aforeſaid *Ralph*, then Biſhop of *Coventry* and *Litchfield*, Ordinary of the ſame Place, and true and undoubted Patron of that Prebend, in Right of his Biſhopric, the 19th Day of *January* in the 1ſt Year aboveſaid, conferred the aforeſaid Prebend to the aforeſaid *Alban*, and him cauſed to be inſtituted into the ſame, and afterwards, viz. the 3d Day of *February* in the 1ſt Year aboveſaid, the aforeſaid *Alban* into the aforeſaid Prebend lawfully was inſtalled and inducted, and not before. So that he the ſame *Thomas Bickley* ſaith, that the aforeſaid Grant of the annual Rent aforeſaid was meſne between the aforeſaid Collation and Inſtitution of the aforeſaid *Alban* to the Prebend aforeſaid, and the Inſtallation and Induction of the ſame *Alban* into the ſame. And this he is ready to verify, wherefore he prays Judgment if the aforeſaid *Edmund* his Action aforeſaid againſt him ought to have, &c. Plea.

And the aforeſaid *Edmund* ſays, that the aforeſaid Plea of the aforeſaid *Thomas* above in Bar of the Action aforeſaid pleaded is inſufficient in Law to preclude him the ſaid *Edmund* from having his Action aforeſaid againſt the aforeſaid *Thomas*, and that he to that Plea in Manner and Form aforeſaid pleaded has no Neceſſity, nor is by the Law of the Land bound to anſwer. And this he is ready to verify, wherefore for Want of a ſufficient Anſwer in this Behalf, he the ſame *Edmund* prays Judgment, and the annual Rent aforeſaid, together with the Arrearages of the ſame, and his Damages by Occaſion of the withdrawing of the ſaid annual Rent, to be adjudged to him, &c. Plaintiff demurs.

And the aforeſaid *Thomas* for that he hath above alledged ſufficient Matter in Law in Bar of the Action of the aforeſaid *Edmund*, which he is ready to verify, which ſaid Matter the aforeſaid *Edmund* doth not deny, nor thereunto in any wiſe anſwer, but that Averment wholly refuſes to admit, as before prays Judgment, and that the ſame *Edmund* from having his Action aforeſaid Joinder in Demurrer.

againſt him may be precluded, &c. And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes before they give Judgment thereon, Day is given to the Parties aforeſaid here until from the Day of *Eaſter* in 15 Days to hear their Judgment thereon, becauſe the ſame Juſtices here thereof not yet, &c.

The CASE. An Annuity granted by a Prebendary after Admiſſion and Inſtitution, and beforeInduction, is not good to charge the Prebend, S. P. 1 Finch 412. 2 Finch 89, 90. Kitch. 121. Watſ. Compl. Incumb. 424. Vin. Abr. tit. Confirmation E. pl. 10. And S.P. held by three Juſtices againſt one, Paſch. 5 Eliz. Dy. 221. pl. 18, which Caſe is almoſt the ſame *in terminis* with the preſent.

IT appears by the Record, that the Plaintiff has brought a Writ of Annuity againſt *Thomas Bickley* Prebendary, upon a Grant of an Annuity of 5 l. out of the Prebend made to him by Deed by one *Langdale* the Defendant's Predeceſſor, after the Biſhop had conferred the Prebend on him, and had inſtituted him, and before he was inſtalled and inducted; which Grant the Biſhop confirmed before Induction, and the Dean and Chapter confirmed it the ſame Day on which the Inſtallation and Induction was. And for the Arrears for 17 Years and a Half the Plaintiff brought his Writ againſt *Bickley* the Succeſſor. And upon this Matter the Parties demurred in Judgment.

And it was argued as well at the Bench as at the Bar. (But I did not hear *Mead* Juſtice argue, though I heard the Arguments of the other three.) And all the Juſtices unanimouſly agreed that the Grant was not good to bind the Succeſſor, becauſe it was made before Induction, at which Time it was not a good Grant, for the Succeſſor ſhall not be bound but in Reſpect that the Grant was good to charge the Prebend. And the Prebendary could not charge it before he was inducted, [a] becauſe the Induction makes him to have the actual Poſſeſſion of the Prebend, and to have the Freehold in Deed of the Poſſeſſions thereof, for before Induction he has not the Freehold either in Deed or in Law. [b] But the Collation and Induction makes him, as well as it makes a Parſon or Vicar, to have the Cure of Souls, and it enables them to adminiſter the Sacraments to the Pariſhioners, and to perform all divine Service. So that he is a Prebendary or Parſon to ſuch Purpoſe, [c] but yet a Prebendary cannot lawfully have Seizin of the Houſe, Glebe, or Tithes, in our Law, before his Inſtallation, nor the Parſon before his Induction, [d] and the Inſtallation is to be done to the Prebendary by the Dean and Chapter, and the Induction to the Parſon or Vicar by the Archdeacon. And although a common Perſon may have a *Quare Impedit*, and declare that his Clerk was preſented, admitted, and inſtituted, [e] yet he ſhall never have a Writ of Right of Advowſon in our Law, unleſs his Clerk was inducted: For in a Writ of Right of Advowſon he ought to alledge Eſplees in his Clerk, as in taking the great Tithes, and that he cannot do without Induction. And before Induction no Parſon, Vicar, or Prebendary ſhall have [f] Spoliation, or Action of Treſpaſs, or Aſſize, for the Induction gives the temporal Poſſeſſion. And if he will pray in Aid of the Patron or Ordinary in a Writ of Annuity, he ought to ſay (as *Mounſon* ſaid) that he is *Parſon* of the aforeſaid Church *imperſonated* in the ſame on the Preſentation of A. B. Patron of the ſame Church, and that he found his Church diſcharged of the Annuity, and that he cannot charge the ſame Church without the Patron and Ordinary, and ſo he ſhall demand Aid of them, but he cannot ſay [g] that he is *Parſon Imparſonee*, if he has not Induction. [h] And *Manwood* cited the Caſe in 38 *Ed.* 3. where the Chancellor of *England*, whoſe Office it is to preſent to all the King's Churches under the annual Value of 20 Marks, being appriſed that an Advowſon of the King of the Value of 40 s. was void, preſented to it, and his Clerk was admitted and inſtituted, and the Biſhop ſent his Mandate to his Archdeacon to induct him, and before he was inducted the King being appriſed that the Advowſon was of the Value of 40 l. ſent an Inhibition to the Biſhop, and preſented his Clerk to him, and a Month after the Delivery of the Inhibition the Chancellor's Clerk was inducted, and thereupon the King brought a *Quare Impedit* againſt the Biſhop, upon which Matter it was demurred in Law, and Judgment was given for the King, and a Writ was awarded for him to the Biſhop: For the Chancellor's Clerk was not a full Parſon before Induction, for it is there held [i] that if the Biſhop makes Admiſſion and Inſtitution to his own Clerk, and by the Death of the Biſhop the Temporalties come into the King's Hands before Induction, the King ſhall have the Preſentation: And alſo it is there put, [k] that if one who holds of the King preſents to a Church, and his Preſentee is admitted and inſtituted, and before Induction the Patron dies, and the Church comes into the King's Hands, the King ſhall preſent to this Avoidance. Whereby it appears that without Induction, which is a corporal Poſſeſſion, he who is admitted and inſtituted is not Parſon; and it is there ſaid, that the Biſhop might have countermanded his Mandate to his Archdeacon, who is but his * Miniſter, and becauſe he did not, he was a Diſturber, ſo that a Writ was there awarded againſt him for the King. From which Caſe one may ſee that [l] without Induction the Party has not corporal Seizin, nor is a full Incumbent. [m] And to this Purpoſe *Manwood* alſo cited the Caſe in 11 *H.* 4. where the King brought a *Quare Impedit* againſt the Biſhop of *Coventry* and *Litchfield*, and the Incumbent of a Prebend, the Incumbent pleaded Collation by the Biſhop, and that he was inducted, and that the King had by his Letters-Patent ratified and confirmed to him his Eſtate for Term of his Life, to which the King replied that he was not inducted at the Time of the Confirmation, and this Matter being well debated, Iſſue was afterwards joined thereupon. So that from hence it is to be obſerved, that no Poſſeſſion can be had before Induction,

a T. 33. H. 6. 24. pl. 3. Dy. 1. pl. 8. 221. pl. 18. 2 Rol. Abr. 357. pl. 4. Moor 443. 3 Keb. 821. 1 Vent. 15. 1 Finch 412. 2 Finch 89. Kitch 121. Infra (l.)

b H. 38. Ed. 3. 4. a. *Per Kirt.* T. 33. H. 6. 24. pl. 3. Moor 443. 2 Rol. Abr. 349. Q. pl. 1.

c 1 Finch 412. 2 Finch 89. Poſt 529 (g.) Co. Compl. Copyh. fo. 71.

d Vin. Abr. tit. Preſentation C. b. pl. 6. in Notis. 1 Vent. 319. Poſt 529 (h).

e T. 26. H. 8. 3. pl. 7. *Per Knightly et Shelley.* Bro. Droit 1. P. 38 Ed. 3. 9. a. *Per Thorp.* Dy. 221. pl. 19. 2 Rol. Abr. 383. O. pl. 1. Watſ. Compl. Incumb. 137, 138. Vin. Abr. tit. Preſentation D. b. 2 pl. 1, 2.

f T. 33. H. 6. 24. pl. 3. in fine Caſus. Bro. Spoliation 7.

g Dy. 221. pl. 19. in fine.

h 38 Ed. 3. 3. b. 9. a. Fitz. Quare Impedit 125. Watſ. Compl. Incumb. 223, 224.

i H. 38 Ed. 3. 4. a. *Per Knivet.* H. 44 Ed. 3. 3. pl. 14. Fitz. Quare Impedit 136. Bro. Preſentment al Egliſe 4. M. 11. H. 4. 7. b Bro. Plenarty 3. Moor 4. 3. 2 Lev. 199. 3 Keb. 821.

k P. 38. Ed. 3. 9. a. *Per Thorp.* P. 21. Ed. 4. 34. b. *Per Keble.* Hob. 319. 1 Finch 411.

l Supra (a).

m M. 11 H. 4. 7. pl. 20. 9. a. Fitz. Confirmation 5. Bro. 7. 1 Rol. Abr. 483. Z. Watſ. Compl. Incumb. 246.

* See

and

and without Poſſeſſion Confirmation is worth nothing. [a] And to the like Effect he alſo cited the Caſe in 1 *H.* 5. in a *Quare Impedit*, where one had in Tail the Nomination of a Clerk to an Abbot and to his Succeſſors, who were to preſent the Clerk nominated to the Biſhop, and the Iſſue in Tail brought a *Quare Impedit* againſt the Abbot, (for it is there held that he who has the Nomination is able to bring a *Quare Impedit*, becauſe the Nomination is the [b] Effect of the Advowſon, and he that has the Nomination is the Patron, and the other, who is to preſent him, is a Subject and Servant to execute the Preſentment) and there the Abbot pleaded that his Predeceſſor preſented J. S. to the Advowſon, without the Nomination of him who claimed the Nomination, which J. S. was received, inſtituted, and inducted; and alſo he pleaded the Releaſe of the collateral Anceſtor of the Tenant in Tail with Warranty, which deſcended after the ſaid Uſurpation: And the Plaintiff traverſed the Induction, for *Hankford* ſaid that if the Incumbent was inducted upon the Preſentation of the Abbot, without any Nomination of the Plaintiff Tenant in Tail, then was the Tenant in Tail [c] out of Poſſeſſion, in which Caſe the Releaſe and Warranty might take Effect, but otherwiſe not. So that it ſeems by the Book, that the Iſſue ſhould be taken upon the Induction, for the Induction of the Incumbent veſted the Poſſeſſion of the Patronage in him who preſented him, and put him that had Right out of Poſſeſſion, ſo that he had no Poſſeſſion left in him, but a Right only, which ſhould be bound by the collateral Warranty. [d] Alſo he ſaid that there is a Caſe in 21 *Ed.* 4. in a *Scire facias* which is twice argued there, and is thus: The Dean and Chapter of *Litchfield* ſued a Writ of Annuity againſt one J. who was Vicar of the Church of *Winwick* in the County of *Lancaſter*, and alledged Seizin in the County of *Stafford*, where the Writ was brought; the Defendant prayed in Aid of Patron and Ordinary, and the Ordinary joined, and the Patron being warned made Default, and the Defendant traverſed the Title, which was found againſt him, whereby the Plaintiff had Judgment to recover; and a *Scire facias* was ſued in the County of *Stafford* againſt the Succeſſor of the Vicar, to have Execution of the Arrears incurred ſince that Time, and he prayed in Aid of the Patron and Ordinary, and the Ordinary made Default, and the Patron appeared and joined with the Defendant, and they pleaded that the Church of *Winwick*, and the whole Pariſh of *Winwick*, were within the County of *Lancaſter*, and that the ſaid J. againſt whom the firſt Writ of Annuity was brought, was not Vicar of *Winwick* aforeſaid the Day of the firſt Writ purchaſed, nor at any Time pending that Writ, nor at any Time afterwards, ſo that the Recovery was void; and the Plaintiff maintained the contrary, wherefore they were at Iſſue thereupon: And whether it ſhould be tried in the County of *Lancaſter*, or in the County of *Stafford*, was much debated, and at laſt it was the better Opinion that it ſhould be tried in the County of *Lancaſter* where the Church was, for that none can be Parſon without Induction, and the Induction is triable *per Pais*, and not by the Biſhop, becauſe it is a temporal Poſſeſſion, and that cannot be done but where the Church is, and it is to be preſumed that in that County it is beſt known whether he was Vicar, and where the Seizin was. From which Caſes (he ſaid) it appears that the Induction is the principal Thing which makes the Prebendary to be a Prebendary, and to have corporal Seizin, and to be able to charge the Poſſeſſions of the Prebend, which he cannot do before Induction. And, he ſaid, as a [e] Woman who hath recovered Dower cannot enter, but ought to have Seizin delivered to her by the Sheriff, and as a [f] Copyholder, to whom a Copyhold Tenement is deſcended, ought to be admitted by the Lord before he ſhall have Seizin in the Judgment of Law, [g] ſo he who is admitted or inſtituted to a Prebend, Parſonage, or Vicarage cannot have Seizin, nor be a full Incumbent, until the Archdeacon has inducted him, or if he be a Prebendary, until the Dean and Chapter of the Cathedral Church where the Prebend is have inſtalled him. [h] And the Lord *Dyer* ſaid that the Archdeacon cannot induct any Prebendary, but the Dean and Chapter of the Cathedral Church of which he is a Prebendary ought to inſtall and induct him. And many other Things were ſaid touching this Point, which I have not here recited, my Intent being briefly to ſhew the Reaſons and Cauſes of the Judgment. Wherefore it was the Opinion of all the Juſtices, that the Grant of the Annuity made by the Prebendary before his Inſtallation and Induction was not good to charge the Prebend, and conſequently that the Action did not lie.

[a] H. 1 H. 5. 1. pl. 2. Fitz. Quare Impedit 110. Watſ. Compl. Incumb. 79.

[b] Lane 72. Watſ. Compl. Incumb. 72, 85. Ante 157 (p). Poſt 542 (d).

[c] See Watſ. Compl. Incumb. 123.

[d] 21 Ed. 4. 7. b. 33. b. Fitz. Trial 28. Bro. Viſne 88.

[e] Co. Litt. 34. b. 37. a. b. 1 Rol. Abr. 681. S. pl. 1. 2 Bac. Abr. 134.

[f] See 4 Co. 22. b. Kitch. 121. Co. Compl. Copyh. fo. 71.

[g] Ante 528 (c) and (d).

[h] See Ante 528 (d), and the Books there cited.

And the Lord *Dyer* took three Exceptions to the Declaration. The firſt was, for that it is therein contained that *Langdale* the Prebendary of the Prebend of *Alderwas* in the Cathedral Church of *Litchfield* made the Grant, and the Name of the Saint who was Patron of the ſaid Church is not mentioned, whereas it ought to have been ſaid, *in the Cathedral Church of St. Chad in Litchfield*, for every Cathedral Church has a Saint, which is named as Patron.

Exceptions to the Declaration.

The ſecond was, for that the Writ was brought in the County of *Middleſex*, [i] whereas it ought to have been brought in the County where the Cathedral Church was in which the Prebend is. For although the Grant of the Annuity was in the County of *Middleſex*, yet the Charge is impoſed upon the Prebend, and in Reſpect thereof the Prebendary is charged, ſo that the Cauſe of Action aroſe where the Body of the Prebend is, and the Action ought to have been brought in that County, and not in *Middleſex*.

[i] 1 Dy. 194. pl. 33.

The third was, for that the Confirmation of the Biſhop is pleaded, and he is called Patron, and it is not ſaid that he was the Ordinary of the Place, for he may be Patron and not Ordinary, becauſe another may be Ordinary.

But

Note, Theſe ſeem to be the Obſervations of the Reporter.

But theſe Exceptions did not ſeem to be the Cauſe of the Judgment; for as to the firſt, it does not appear to the Court that the Cathedral Church had any Saint as Patron of the ſame Church, and a Cathedral Church may be without any ſuch Patron. And as to the ſecond, there are two Cauſes which charge the Succeſſor here, the one is the Grant, which is in *Middleſex*, the other is the Prebend, which is in another County, * and foraſmuch as two Things in ſeveral Counties are the Cauſe of the Action, it is ſufficient to bring the Action in one of the Counties, ſeeing it cannot be brought in both. And as to the third Exception, it appears upon Record by the Count that the Biſhop of *Litchfield* was Patron † and Ordinary of the Prebend, for the Count is, that the Biſhop *by his Authority pontifical and ordinary confirmed*, &c. and ſo he ſhall be taken to continue. And afterwards Judgment was given that the Plea in Bar was ſufficient, wherein it is implied that the Count was good; which Judgment here follows.

• Vide 7 Co. 1. b.

† See Dy. 61. pl. 30. 1 Rol. Abr. 481. pl. 3. 3 Bac. Abr. 376. that the Biſhop is Patron and Ordinary of every Prebend.

The Reſt of the Record.

At which Day here came as well the aforeſaid *Edmund Hare* as the aforeſaid *Thomas Bickley* by their Attornies aforeſaid. Whereupon the aforeſaid Plea of the aforeſaid *Thomas* above in Bar of the Action aforeſaid pleaded being ſeen, and by the Juſtices here more fully underſtood, it ſeems to the ſame Juſtices here that the ſaid Plea is ſufficient in Law to preclude the aforeſaid *Edmund* from having his Action aforeſaid againſt the aforeſaid *Thomas*. Therefore it is conſidered that the aforeſaid *Edmund* take nothing by his Writ aforeſaid, but be in Mercy for his falſe Claim: And that the aforeſaid *Thomas* go thereof without Day, &c.

Judgment.

A brief Report of a Judgment, and of the Cauſes thereof, given in the King's Bench *by the Juſtices there in* Trinity *Term in the 20th Year of the Reign of Queen* Elizabeth, *upon a Special Verdict found on the General Iſſue in an* Ejectione firmæ *brought by* Edmund Croft *againſt* Henry Howel, *upon a Leaſe for Years of Tenements in* Marſh *in the County of* Buckingham *made to the Plaintiff the 13th Day of* September *in the 18th Year of the Reign of the preſent Queen by* William Feriman *and* Robert Sadler, *the Maſters or Governors and the Commonalty of the Myſtery of Cooks in* London. *And the Record is entered among the Records of* Eaſter *Term* 19 Elizabeth, *Roll and was as follows.*

Declaration. Same Precedent Raſt. Entr. 259. b. pl. 16.

OTHERWISE, as it appears in the Term of *St. Hillary*, in the 19th Year of the Reign of the Lady the Queen now, Roll it is contained thus. *Bucks.* viz. Be it remembered that otherwiſe, viz. in the Term of *St. Michael* laſt paſt, before the Lady the Queen at *Weſtminſter* came *Edmund Croft* by *George Colborn* his Attorney, and brought here into the Court of the ſaid Lady the Queen then there his certain Bill againſt *Henry Howel* in the Cuſtody of the Marſhal, &c. of a Plea of Treſpaſs and Ejectment of a Farm. And there are Pledges of proſecuting, viz. *John Doe* and *Richard Roe*; which ſaid Bill follows in theſe Words, viz. *Bucks*, viz. *Edmund Croft* complains of *Henry Howel* in the Cuſtody of the Marſhal of the Marſhalſea of the Lady the Queen before the Queen herſelf, for this, viz. that whereas one *William Feriman* and *Robert Sadler*, Maſters or Governors and the Commonalty of the Myſtery of Cooks in *London*, otherwiſe called *William Feriman* and *Robert Sadler*, Citizens and Cooks in *London*, Maſters or Governors of the Myſtery of Cooks in *London*, and the Commonalty of the ſame Myſtery, the 13th Day of *September* in the 18th Year of the Reign of the Lady *Elizabeth* now Queen of *England*, at *Marſh* in the County aforeſaid, by their certain Indenture ſealed with their common Seal, and here into Court produced, bearing Date the Day and Year aboveſaid, had delivered, granted, and to Farm let to the aforeſaid *Edmund Croft* one Meſſuage with the Appurtenances in *Marſh* aforeſaid, and alſo 40 Acres of Land, 20 Acres of Meadow, and 30 Acres of Paſture with the Appurtenances in *Marſh* aforeſaid in the aforeſaid County of *Bucks*; to have and to hold the Tenements aforeſaid with the Appurtenances to the aforeſaid *Edmund* and to his Aſſigns, from the Feaſt of *Eaſter* then laſt paſt, unto the End and Term of 5 Years from thence next following,

following and fully to be compleat. By virtue whereof he the ſame *Edmund* into the Tenements aforeſaid with the Appurtenances entered, and was thereof poſſeſſed until the aforeſaid *Henry Howel* afterwards, viz. the 14th Day of the ſaid Month of *September* in the aboveſaid 18th Year of the Reign of the ſaid Lady the Queen now, with Force and Arms, &c. into the Tenements aforeſaid with the Appurtenances entered, and him the ſaid *Edmund* from his Farm aforeſaid thereof (his Term aforeſaid not yet ended) ejected, expelled, and amoved, and him the ſaid *Edmund* from his Poſſeſſion thereof held out and yet doth hold out; and other Wrongs to him did, againſt the Peace of the ſaid Lady the Queen now, to the Damage of him the ſaid *Edmund* 40 l. and therefore he produces the Suit, &c.

And now here at this Day, viz. *Wedneſday* next after the Octave of *St. Hillary* in this ſame Term, until which Day the aforeſaid *Henry Howel* had Leave to imparl to the Bill aforeſaid, and then to anſwer, &c. before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Edmund* by his Attorney aforeſaid, as the aforeſaid *Henry* by *Roger Norton* his Attorney. And the ſame *Henry* defends the Force and Injury when, &c. and ſays that he is not guilty thereof, and of this he puts himſelf upon the Country, and the aforeſaid *Edmund Croft* likewiſe, &c. Therefore the Jurors thereon came before the Lady the Queen at *Weſtminſter* on *Wedneſday* next after the Morrow of the Purification of the bleſſed *Mary*; and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame Day is given to the Parties aforeſaid there, &c. At which Day the Jurors between the Parties aforeſaid in the Plea aforeſaid thereof between them is reſpited before the Lady the Queen at *Weſtminſter* until *Wedneſday* next after 15 Days of *Eaſter* then next following, unleſs the Juſtices of the Lady the Queen aſſigned to take Aſſizes in the County of *Bucks* ſhall firſt come on *Monday* in the third Week of *Lent* at *Ailſbury* in the County aforeſaid by the Form of the Statute, &c. for Want of Jurors, &c. Therefore let the Sheriff have the Bodies, &c. The ſame Day is given to the Parties aforeſaid there, &c. And now at this Day, viz. the aforeſaid *Wedneſday*, before the Lady the Queen at *Weſtminſter* comes the aforeſaid *Edmund Croft* by his Attorney aforeſaid, and the aforeſaid Juſtices before whom, &c. have ſent here their Record in theſe Words. Afterwards at the Day and Place within contained before *Chriſtopher Wray* Knight, Chief Juſtice of the Lady the Queen aſſigned to hold Pleas before the Queen herſelf, and *Gilbert Gerard* Attorney-general of the ſaid Lady the Queen, Juſtices of the ſaid Lady the Queen aſſigned to take Aſſizes in the County of *Bucks*, by the Form of the Statute, &c. came as well the within named *Edmund Croft* by *Richard Grey* his Attorney as the within written *Henry Howel* by his Attorney within contained. And the Jurors of the Jury whereof Mention is within made being called, ſome of them came, and ſome of them did not come, as appears in the Panel. And one of the ſame Jurors now appearing, viz. *William Edmunds*, becauſe he is found ſuſpected between the Parties aforeſaid, from that Panel is wholly withdrawn. And certain of the ſame Jurors now likewiſe appearing, viz. *Edward Betham* Gentleman, *John Moor* Gentleman, *Edmund Paxton*, *William Coleman*, *John Sheppard* of *Ovinge*, *Richard Meridal*, *John Coker*, and *Clemens Chilton* came, and upon that Jury are ſworn. And becauſe the Reſidue of the Jurors of the ſame Jury have not appeared, therefore others of the By-ſtanders, by the Sheriff of the County aforeſaid thereunto choſen, at the Requeſt of the aforeſaid *Edmund Croft*, and by the Command of the Juſtices aforeſaid are added anew, whoſe Names to the Panel aforeſaid are put, according to the Form of the Statute in ſuch Caſe lately made and provided. Which ſaid Jurors ſo added anew now appearing, viz. *Ralph Redman* Gentleman, *Richard Hatch*, *Benedict Holland*, and *John Wade* come. Who to ſay the Truth of the within contained together with the other Jurors aforeſaid firſt impanneled and ſworn being elected, tried, and ſworn, ſay upon their Oath that long before the within written Time of the Treſpaſs and Ejectment within ſpecified within ſuppoſed to be done, Lord *Edward* late King of *England* the *fourth* incorporated the free-Men of the Myſtery of Cooks in *London* by his Letters patent in theſe Words. " *Edward* by the Grace of *God* King " of *England* and *France*, and Lord of *Ireland*, to all to whom the preſent Letters ſhall come, " Greeting. Know ye that we conſidering how that our beloved good and free-Men of the My- " ſtery of Cooks of our City of *London* great and many Attendances and Labours as well at our " great Feaſt of *St. George* as at others on our Command for a long Time withou: the City afore- " ſaid perſonally have ſuſtained and ſupported, and daily to ſuſtain and ſupport do not ceaſe; and " whilſt they have ſo perſonally attended upon our Buſineſs, they have many Times been impan- " neled and ſummoned upon Aſſizes of Jurors and other Inqueſts within the ſame City, and by " Reaſon of ſuch their perſonal Attendances they could not appear, whereby they have before " theſe Times had and ſuſtained many Hardſhips and Loſſes in the loſing of great Iſſues and A- " mercements; we being deſirous that ſuch Loſſes ſhould be now removed from the ſaid good " and free Men of the Myſtery aforeſaid, for the Cauſes aforeſaid, and for other Conſiderations

Imparlance.

Not guilty.

Venire.

Jury continued to the Aſſizes.

Poſtea.

Tales de circumſtantibus.

Special Verdict.

" Us ſpecially moving, at the Supplication of the ſame, have granted to them that that Myſtery " and all Men of the ſame Myſtery of the City aforeſaid be in Subſtance and Name one Body and " one Commonalty perpetual. And that two Principals of the ſame Commonalty, by the unani- " mous Aſſent of 12 or 8 Perſons at leaſt of that Commonalty in the Myſtery aforeſaid moſtly
* Vide 10 Co. 31. a. " expert, every Year may * elect and make out of that Commonalty two Maſters or Governors " in the ſame Myſtery moſtly expert, to ſuperviſe, direct, and govern the Myſtery and Commo- " nalty aforeſaid, and all Men of the ſame Myſtery, and the Buſineſs of the ſame for ever. " And that the ſame Maſters or Governors and Commonalty may have perpetual Succeſſion, and " a common Seal to ſerve the Buſineſs of the ſaid Commonalty. And that they and their Suc- " ceſſors for ever be Perſons fit and capable to purchaſe and poſſeſs in Fee and Perpetuity Lands, " Tenements, Rents, and other Poſſeſſions whatſoever. And that they by the Names of Maſ- " ters or Governors and Commonalty of the Myſtery of Cooks in *London* may implead and be " impleaded before whatever Judges, in Courts and Actions whatever. And that the aforeſaid " Maſters or Governors and Commonalty and their Succeſſors may lawfully and ſafely make law- " ful and honeſt Aſſemblies of themſelves, and Statutes and Ordinances for the wholeſome Go- " vernment, Superintendency, and Correction of the Myſtery aforeſaid, according to Neceſſities " and Exigence, as often as and when it ſhall be needful, without Let or Hinderance of Us, our " Heirs or Succeſſors, Juſtices, Eſcheators, Sheriffs, Coroners, or other Bailiffs or Miniſters of " Us, our Heirs or Succeſſors whatſoever; ſo that their Statutes and Ordinances are in no wiſe " contrary to the Laws and Cuſtoms of our Realm of *England*. Further we will and grant for " Us, our Heirs and Succeſſors, as much as in Us is, that the Maſters or Governors of the afore- " ſaid Commonalty for the Time being, and their Succeſſors for ever, may have the Overlook- " ing, Search, Correction, and Government of all and ſingular Men of the ſaid Commonalty of " Cooks uſing the Myſtery of Cooks in the ſame City and in the Suburbs thereof, and the Pu- " niſhment of the ſame for their Offences, and for the not perfectly executing, doing, and uſing " their Myſtery, ſo that ſuch Puniſhment follow by reaſonable and fit Ways. Alſo we will and " grant for Us, our Heirs and Succeſſors, as much as in Us is, that the ſaid Maſters or Gover- " nors and Commonalty of the ſaid Myſtery of Cooks, or their Succeſſors, or any of them in " any wiſe for the future, within the City aforeſaid and the Suburbs of the ſame, ſhall not be ſum- " moned or put, nor ſhall any of them be ſummoned or put, in any Aſſizes, Juries, Inqueſts, " Inquiſitions, Attaints, or other Recognitions within the ſaid City and the Suburbs of the ſame " for the Time to come, before the Mayor and Sheriff or the Coroner of the ſaid City for the " Time being to be taken, or by any their Officer or Miniſter, or Officers or Miniſters to be " ſummoned, altho' the ſame Jurors were ſummoned to the Inquiſitions or Recognitions upon " our Writ or Writs of Right, or of our Heirs: But that the ſaid Maſters or Governors and " Commonalty of the Myſtery aforeſaid, and their Succeſſors, and every of them, againſt Us, " our Heirs and Succeſſors, and againſt the Mayor and Sheriffs of our City aforeſaid for the " Time being, and their Officers and Miniſters whatſoever, be thereof quit and wholly diſchar- " ged for ever by theſe Preſents. And further We, in Conſideration of the Premiſſes, of our " ſpecial Grace have granted for Us, our Heirs and Succeſſors, to the aforeſaid Maſters or Go- " vernors and Commonalty of the ſaid Myſtery of Cooks, and to their Succeſſors, this Liberty, " viz. that in all Times to come they may admit and receive into the ſame Myſtery of Cooks to " have and enjoy the Liberties of the ſaid City, according to the Cuſtom of the ſaid City, fit and " ſufficient Perſons, ſkilled and informed in the ſaid Myſtery of Cooks, approved by the Maſters " or Governors of the ſaid Myſtery for the Time being, and preſented to the Mayor of the " City aforeſaid for the Time being, and no other Perſons whatſoever, nor in any other Manner, " any Command or Requeſt of Us, our Heirs or Succeſſors, by the Letters within written or " otherwiſe howſoever to the contrary made or to be made notwithſtanding. And altho' the " ſame Maſters or Governors and Commonalty and their Succeſſors ſhall for the future continu- " ally uſe this Liberty, againſt any Command or Requeſt of Us, our Heirs, or Succeſſors, or " of any others whatſoever in Form aforeſaid to be made, nevertheleſs they nor any of them ſhall " in no wiſe incur any Fine, Contempt, or Loſs towards Us, our Heirs or Succeſſors, or any " Damage or Ill in their Goods or Bodies towards other Perſons whatſoever by that Occaſion, " any Statute, Ordinance, or Act to the contrary before this Time enacted, made, ordained, or " provided notwithſtanding. In Witneſs whereof we have cauſed theſe our Letters to be made " patent. Witneſs Ourſelf at *Weſtminſter* the 11th Day of *July* in the 22d Year of Our Reign."

By virtue of which ſaid Letters-patent the Freemen of the Myſtery of Cooks in *London* were incorporated by the Name of Maſters or Governors and Commonalty of the Myſtery of Cooks in *London*. And that after the making of the Letters-patent aforeſaid, the Maſters or Governors and

and the Commonalty of the Myſtery aforeſaid were ſeized of the Tenements within written with the Appurtenances, in which the Treſpaſs and Ejectment within ſpecified is ſuppoſed to be done, in their Demeſn as of Fee, in * Right of their Corporation aforeſaid. And they being ſo ſeized thereof, one *John Johnſon* the younger, *Matthew Robinſon*, *John Birch*, and *Ralph Iſwel* Maſter and Wardens of the Art or Myſtery of Cooks of *London*, and the Commonalty of the ſame Art or Myſtery, and alſo *John Lawrence* Citizen and Cook of *London*, before the aforeſaid Time of the Treſpaſs and Ejectment aforeſaid within ſuppoſed to be done, viz. the laſt Day of *November* in the 21ſt Year of the Reign of Lord *Henry* late King of *England* the *eighth*, the Father of the Lady the Queen now, by a certain Indenture made between the ſame *John Johnſon* the younger, *Matthew Robinſon*, *John Birch*, and *Ralph Iſwel* Maſter and Wardens of the Myſtery of Cooks of *London*, and the Commonalty of the ſame Myſtery, and *John Lawrence*, by the Names of *John Johnſon* the younger, *Matthew Robinſon*, *John Birch*, and *Ralph Iſwel* Maſter and Wardens of the Art or Myſtery of Cooks of *London*, and of the Commonalty of the ſame Art or Myſtery, and alſo of *John Lawrence* Citizen and Cook of *London*, of the one Part, and one *Robert Dormer* Eſquire, by the Name of *Robert Dormer* Eſquire, of the other Part, which other Part ſealed with the Seal of the aforeſaid *Robert Dormer* to the Jurors aforeſaid was ſhewn in Evidence, (the Tenor of which ſaid Indenture follows in theſe Words: "This Indenture made the laſt Day of *Novem-* " *ber* in the one and twentieth Year of the Reign of King *Henry* the *eighth*, between *John John-* " *ſon* the younger, *Matthew Robinſon*, *John Birch*, and *Ralph Iſwel* Maſter and Wardens of the " Craft or Myſtery of the Cooks of *London*, and the Commonalty of the ſame Craft or Myſtery, " and alſo *John Lawrence* Citizen and Cook of *London*, of the one Part, and *Robert Dormer* Eſquire " of the other Part, witneſſeth that the ſaid Maſter, Wardens, Commonalty, and *John Lawrence* " have bargained and ſold, and by theſe Preſents clearly bargain and ſell, to the ſaid *Robert Dor-* " *mer* the Manor of *Weſtbury* with the Appurtenances in *Marſh* in the County of *Buckingham*, " and all Lands, and Tenements, Rents, Reverſions, Services, and other Hereditaments which " they the ſaid Maſter, Wardens, and Commonalty have, or that any other Perſon or Perſons to " their Uſe or to the Uſe of any of them have, in *Marſh* aforeſaid, or elſewhere within the ſaid " County; and alſo all Evidences, Charters, Muniments, and Writings concerning the Premiſſes " or any Parcel thereof. And the ſaid Maſter, Wardens, Commonalty, and *John Lawrence* cove- " nant and grant further by theſe Preſents to the ſaid *Robert*, that they the ſaid Maſter, Wardens, " Commonalty, and *John Lawrence*, or their Succeſſors, before the Feaſt of the *Purification* of " our Lady next enſuing the Date hereof, ſhall deliver or cauſe to be delivered to the ſaid *Ro-* " *bert*, his Executors or Aſſigns, all the ſaid Evidences, Muniments, and Writings concerning " the Premiſſes or any parcel thereof. And the ſaid Maſter, Wardens, Commonalty, and *John* " *Lawrence* covenant and grant further by theſe Preſents to the ſaid *Robert*, that they the ſaid " Maſter, Wardens, Commonalty, and *John Lawrence*, or their Succeſſors, before the ſaid Feaſt " of the *Purification* of our Lady next coming, ſhall make or cauſe to be made to the ſaid *Robert* " and his Heirs, and to ſuch other Perſon and Perſons and their Heirs as the ſaid *Robert* his Heirs " or Aſſigns ſhall name and appoint, and to the Uſe of the ſaid *Robert Dormer* and of his Heirs, " a good, ſure, ſufficient, lawful, and indefeaſible Eſtate in the Law in Fee-ſimple of and in the " ſaid Manor, Lands, Tenements, and other the Premiſſes and every parcel thereof, at the Coſts " and Charges in the Law of the ſaid *Robert Dormer* and his Heirs. And over that the ſaid " Maſter, Wardens, Commonalty, and *John Lawrence* covenant and grant by theſe Preſents to " the ſaid *Robert Dormer*, that they the ſaid Maſter, Wardens, Commonalty, and *John Lawrence*, " and their Succeſſors, ſhall at all Time and Times hereafter do, ſuffer, and cauſe to be done and " ſuffered, all and every ſuch Thing and Things, be it by Fine, Feoffment, Recovery, Releaſe, " Warranty of the ſaid Maſter, Wardens, Commonalty, and *John Lawrence*, and their Succeſ- " ſors or Aſſigns, againſt all Perſons, or otherwiſe, as by the Counſel learned of the ſaid *Robert* " his Heirs and Aſſigns ſhall be adviſed, at the Coſts and Charges in the Law of the ſaid *Robert* " *Dormer* and of his Heirs. And moreover the ſaid Maſter, Wardens, Commonalty, and *John* " *Lawrence* covenant and grant by theſe Preſents to the ſaid *Robert*, that they have good and " juſt Title, and lawful Authority and Power, to bargain and ſell the ſaid Manor and other the " Premiſſes to the ſaid *Robert Dormer* in Manner and Form aboveſaid: And that the ſaid Manor " and other the Premiſſes are of the clear yearly Value of five Marks, over and above all " yearly Charges and Repriſes: And alſo that the ſaid Manor and other the Premiſſes, at the " Sealing of theſe Preſents, are diſcharged of all former Bargains, Sales, Jointures, Dowers, Uſes, " Wills, Statutes-merchant, Statutes of the Staple, and of all other Incumbrances and Charges " had, made, or done before the Date of theſe Preſents, except Rent-ſervice of old Time due " and accuſtomed. For the which Bargain and Sale, Covenants, Grants, and Agreements well " and truly to be obſerved, performed, fulfilled, and kept on the Behalf of the ſaid Maſter,

* See 10 Co. 34. a.

" Wardens, Commonalty, and *John Lawrence*, their Succeſſors and Aſſigns, the ſaid *Robert* hath " contented and paid to the ſaid Maſter, Wardens, Commonalty, and *John Lawrence*, at the " Sealing of theſe Preſents, 60 *l. Sterling*, whereof the ſaid Maſter, Wardens, Commonalty, and " *John Lawrence* acknowledge themſelves truly contented and paid by theſe Preſents. In Witneſs " whereof as well the Seals of the ſaid Maſter, Wardens, and Commonalty, and the Seal of the " ſaid *John Lawrence*, as the Seal of the ſaid *Robert Dormer* to theſe Indentures interchangeably " be ſet. Given the Day and Year aboveſaid.") bargained and ſold the Tenements within written with the Appurtenances in which, &c. among other Things, to the aforeſaid *Robert Dormer*. And that the aforeſaid *Robert Dormer* by virtue of that Bargain and Sale into thoſe Tenements with the Appurtenances entered, and was thereof ſeized in his Demeſn as of Fee. And he being ſo thereof ſeized, a certain Fine with Proclamations thereon was levied in the Court of the ſaid Lord *Henry* late King of *England* the *eighth* at *Weſtminſter* from the Day of *Eaſter* in 15 Days in the 22d Year of his Reign, before *Robert Brudnel*, *Anthony Fitzherbert*, *Thomas Engleſield*, and *William Shelley* Juſtices, and other faithful Men of the ſaid late King then there preſent, between the aforeſaid *Robert* and one *John Baldwin* Eſquire, *John Goodwin* Gentleman, *Peter Dormer* Gentleman, and *Henry Cooper* Complainants, and one *Thomas Smith* Brother and Heir of *John Smith*, and *William Smith* Son and Heir Apparent of the ſaid *Thomas*, Deforceants, of the Tenements within written with the Appurtenances in which, &c. among other Things, in theſe Words: This is the final Agreement made in the Court of the Lord the King at *Weſtminſter* from the Day of *Eaſter* in 15 Days in the 22d Year of the Reign of *Henry* the *eighth* from the Conqueſt by the Grace of God of *England*, *France*, King, Defender of the Faith, and Lord of *Ireland*, before *Robert Brudnel*, *Anthony Fitzherbert*, *Thomas Engleſield*, and *William Shelley* Juſtices, and other faithful Men of the Lord the King then there preſent, between *Robert Dormer* Eſquire, *John Baldwin* Eſquire, *John Goodwin* Gentleman, *Peter Dormer* Gentleman, and *Henry Cooper* Complainants, and *Thomas Smith* Brother and Heir of *John Smith*, and *William Smith* Son and Heir Apparent of the ſaid *Thomas*, Deforceants, of the Manor of *Weſtbury* in the *Marſh* with the Appurtenances, and of 100 Acres of Land, 40 Acres of Meadow, and 20 Acres of Paſture with the Appurtenances in *Marſh*, whereof a Plea of Covenant was ſummoned between them in the ſame Court, viz. that the aforeſaid *Thomas* and *William* have acknowledged the aforeſaid Manor and Tenements with the Appurtenances to be the Right of the ſaid *Robert*, as thoſe which the ſame *Robert*, *John*, *John*, *Peter*, and *Henry* have of the Gift of the aforeſaid *Thomas* and *William*, and them have remitted and quit-claimed from them the ſaid *Thomas* and *William*, and the Heirs of the ſaid *Thomas*, to the aforeſaid *Robert*, *John*, *John*, *Peter*, and *Henry*, and to the Heirs of the ſaid *Robert* for ever. And further the ſame *Thomas* and *William* have granted for themſelves and the Heirs of the ſaid *Thomas*, that they will warrant to the aforeſaid *Robert*, *John*, *John*, *Peter*, and *Henry*, and to the Heirs of the ſaid *Robert*, the aforeſaid Manor and Tenements with the Appurtenances againſt all Men for ever. And for this Acknowledgment, Remiſe, Quit-claim, Warranty, Fine, and Agreement, they the ſame *Robert*, *John*, *John*, *Peter*, and *Henry* have given to the aforeſaid *Thomas* and *William* 60 l. Sterling. *Buck.* according to the Form of the Statute, the firſt Proclamation was made the 23d Day of *May* in the Term of *Eaſter* in the 22d Year of the King within written, the ſecond Proclamation the 25th Day of *May* in the ſame Term, the third Proclamation the 28th Day of *May* in the ſame Term, the fourth Proclamation the 30th Day of *May* in the ſame Term, the fifth Proclamation was made the 4th Day of *July* in the Term of the *Holy Trinity* in the 22d Year of the King within written, the ſixth Proclamation the 6th Day of *July* in the ſame Term, the ſeventh Proclamation the 8th Day of *July* in the ſame Term, the eighth Proclamation the 11th Day of *July* in the ſame Term, the ninth Proclamation was made the 22d Day of *November* in the Term of *St. Michael* in the 22d Year of the King within written, the tenth Proclamation the 24th Day of *November* in the ſame Term, the eleventh Proclamation the 26th Day of *November* in the ſame Term, the twelfth Proclamation the 28th Day of *November* in the ſame Term, the thirteenth Proclamation was made the 6th Day of *February* in the Term of *St. Hillary* in the 22d Year of the King within written, the fourteenth Proclamation the 8th Day of *February* in the ſame Term, the fifteenth Proclamation the 10th Day of *February* in the ſame Term, the ſixteenth Proclamation the 13th Day of *February* in the ſame Term. Which ſaid Fine in Form aforeſaid was levied to the Uſe of the aforeſaid *Robert Domer*, and of his Heirs, whereby the ſame *Robert* was ſeized of the Tenements within written with the Appurtenances in his Demeſn as of Fee. And being ſo thereof ſeized, he the ſame *Robert Dormer* his Eſtate thereof continued five Years next following after the Proclamations in Form aforeſaid made, without any Entry, Claim, or Occupation upon him or againſt him made or obtained by the aforeſaid Maſters or Governors and Commonalty of the Myſtery aforeſaid, or by any Perſon or Perſons whatſoever. And afterwards, and before the within written Time of the Treſpaſs and Ejectment

within

within ſpecified within ſuppoſed to be done, the aforeſaid *Robert Dormer* of the Tenements aforeſaid with the Appurtenances in Form aforeſaid being ſeized, of the ſame Tenements with the Appurtenances enfeoffed one *William Howel*, to have and to hold the ſaid Tenements with the Appurtenances to the aforeſaid *William Howel* and to his Heirs for ever. By Virtue of which Feoffment the aforeſaid *William Howel* was ſeized of the ſaid Tenements with the Appurtenances in his Demeſn as of Fee. And being ſo thereof ſeized, the ſame *William Howel* afterwards, and before the within written Time of the Treſpaſs and Ejectment within ſpecified within ſuppoſed to be done, viz. the laſt Day of *November* in the Year of the Lord 1557, made and declared his Teſtament and laſt Will in Writing, and by his ſame laſt Will gave and bequeathed the Tenements within written with the Appurtenances, by the Name of all his Lands and Tenements in the Pariſh of *Marſh*, to one *John Howel* his eldeſt Son, and to the Heirs of his Body lawfully begotten, and for Default of ſuch Iſſue, the Remainder thereof to the aforeſaid *Henry Howel* now Defendant, by the Name of *Henry Howel* his Son, and to the Heirs of his Body lawfully begotten. And afterwards, and before the within written Time of the Treſpaſs and Ejectment within ſpecified within ſuppoſed to be done, the aforeſaid *William Howel* at *Weſtbury* aforeſaid died of the Tenements aforeſaid in Form aforeſaid ſeized, after whoſe Death *John Howel* into the Tenements aforeſaid with the Appurtenances entered, and was thereof ſeized in his Demeſn as of Fee-Tail. And being ſo thereof ſeized, the ſame *John Howel* afterwards, and before the within written Time of the Treſpaſs and Ejectment within ſpecified within ſuppoſed to be done, of ſuch his Eſtate at *Weſtbury* aforeſaid died thereof ſeized, without Heirs of his Body iſſuing; after whoſe Death the aforeſaid *William Feriman* and *Robert Sadler*, Maſters or Governors and the Commonalty of the Myſtery aforeſaid, the 10th Day of *September* in the 18th Year of the Reign of the Lady the Queen now, made their certain Writing ſealed with their common Seal, in theſe Words: "To all the faithful in *Chriſt* to whom this preſent Writing ſhall come, *William Feriman* and *Robert Sadler* Maſters or Governors and the Commonalty of the Myſtery of Cooks of *London*, otherwiſe called *William Feriman* and *Robert Sadler* Citizens and Cooks of *London*, Maſters or Governors of the Myſtery of Cooks of *London*, and the Commonalty of the ſame Myſtery, greeting in the Lord eternal. Know ye that we the aforeſaid Maſters or Governors and the Commonalty of the ſaid Myſtery have ordained, conſtituted, authorized, and deputed by theſe Preſents our beloved in *Chriſt Richard Hodges* our true and lawful Attorney to enter in our Right, Stead, Title, and Names into one Meſſuage with the Appurtenances in *Marſh* in the County of *Bucks*, late in the Occupation of one *Edmund Croft* Gentleman, and into all the Lands, Meadows, Leaſows, and Paſtures with the ſame Meſſuage occupied in *Marſh* aforeſaid, and the ſaid Meſſuage and other the Premiſſes with the Appurtenances to our Uſe to claim, and the Poſſeſſion thereof to our Uſe to take, and having had Poſſeſſion thereof or of any Parcel thereof, then to ſeal upon the Premiſſes or upon any Parcel of the ſame, and in our Stead, Right, and Names, as our Deed, to deliver to the ſame *Edmund Croft* a certain Writing containing the Form and Words of a Demiſe of the Premiſſes for the Term of five Years, to begin from the Feaſt of *Eaſter* laſt paſt to the aforeſaid *Edmund Croft* in our Names made. And we the aforeſaid Maſters or Governors and the Commonalty of the Myſtery aforeſaid ſhall ratify and approve all Things which our aforeſaid Attorney ſhall do in the Premiſſes. In Witneſs whereof to this preſent Writing we have put our common Seal. Given the 10th Day of *September* in the 18th Year of the Reign of our Lady *Elizabeth* by the Grace of *God* of *England*, *France*, and *Ireland* Queen, Defender of the Faith, &c." And the Jurors aforeſaid further ſay upon their Oath aforeſaid, that the Meſſuage and Tenements aforeſaid in the Declaration within written ſpecified, and the Meſſuages and Tenements in the aforeſaid Writing to the aforeſaid *Richard Hodges* as is aforeſaid made, are one and the ſame, and not others nor divers. And that by Virtue of the ſame Writing, the aforeſaid *Richard Hodges* in that Writing named, the within written 13th Day of *September* in the 18th Year aboveſaid, at *Marſh* aforeſaid, into the Meſſuage within written and other the Premiſſes with the Appurtenances entered, and them to the Uſe of the ſame Maſters or Governors and Commonalty claimed, and the Poſſeſſion thereof to their Uſe took, and the Writing aforeſaid with the common Seal of the ſaid Maſters or Governors and Commonalty of the Myſtery aforeſaid, containing in itſelf the Form and Words of a Demiſe of the Tenements within ſpecified for the aforeſaid Term of five Years to begin from the Feaſt of *Eaſter* then laſt paſt, ſealed, and as the Deed of the ſame Maſters or Governors and Commonalty of the Myſtery aforeſaid then and there to the ſame *Edmund Croft* delivered, which ſaid Writing follows in theſe Words: "This Indenture made the 13th Day of *September* in the 18th Year of the Reign of the moſt excellent Princeſs our Lady *Elizabeth*, by the Grace of *God* of *England*, *France*, and *Ireland* Queen, Defender of the Faith, &c. between *William Feriman* and *Robert Sadler*, Maſters or Governors and the Commonalty of the Myſtery of Cooks of *London*, otherwiſe called *William Feriman* and *Robert Sadler* Citizens and Cooks of *London*, Maſters or Governors of the Myſtery of Cooks of *London*, and the Commonalty of the ſame Myſtery, of the one Part, and *Edmund Croft* of *Marſh* in the County of *Bucks* of the other Part, witneſſeth, that the aforeſaid Maſters or Governors and the Commonalty of the Myſtery aforeſaid have delivered, granted, and to farm let, and by theſe Preſents do deliver, grant, and to farm let to the afore-

" ſaid *Edmund Croft* one Meſſuage with the Appurtenances in *Marſh* aforeſaid, late in the Occu-
" pation of the aforeſaid *Edmund*, and all the Lands, Meadows, Leaſows, and Paſtures with
" the ſame Meſſuage occupied in *Marſh* aforeſaid. To have and to hold the Meſſuage aforeſaid
" and all other the Premiſſes with the Appurtenances to the aforeſaid *Edmund* and to his Aſſigns
" from the Feaſt of *Eaſter* laſt paſt unto the End of five Years from thence next following.
" Yielding therefore yearly to the aforeſaid Maſters or Governors and the Commonalty of the
" Myſtery aforeſaid, and to their Succeſſors, 10l. at the Feaſts of the *Nativity of St. John*
" *Baptiſt* and of *All Saints*, by equal Portions, and the beſt Beaſt of the aforeſaid *Edmund* at
" his Death, in the Name of a Heriot, if he ſhall die within the Term aforeſaid. In Witneſs
" whereof to one Part of this preſent Writing indented with the aforeſaid *Edmund* remaining
" the aforeſaid Maſters or Governors and the Commonalty of the Myſtery aforeſaid have put
" their common Seal aforeſaid, and to the other Part with the aforeſaid Maſters or Governors
" and the Commonalty aforeſaid remaining the aforeſaid *Edmund* hath put his Seal; Given the Day
" and Year firſt aboveſaid." By Virtue of which ſaid Indenture and Demiſe the aforeſaid *Edmund Croft* into the Tenements within written with the Appurtenances entered, and was thereof poſſeſſed until the within written *Henry Howel* the aforeſaid 14th Day of *September* in the 18th Year aboveſaid into the ſaid Tenements with the Appurtenances entered, and the ſaid *Edmund* from his Farm aforeſaid thereof (his Term aforeſaid then not ended) ejected, expelled, and amoved, and the ſaid *Edmund* from his Poſſeſſion thereof held out and yet doth hold out, as the aforeſaid *Edmund* within againſt him complains. But whether upon the whole Matter aforeſaid the Demiſe aforeſaid by the aforeſaid *William Feriman* and *Robert Sadler* Maſters or Governors and the Commonalty of the Myſtery aforeſaid to the aforeſaid *Edmund Croft* of the Tenements within written with the Appurtenances in Form aforeſaid made be good, ſufficient, and valid in Law, or not, the Jurors aforeſaid are wholly ignorant, and they pray thereof the Advice of the Juſtices and of the Court, &c. And if it ſhall ſeem to the Court of the Lady the Queen that that Demiſe is good, ſufficient, and valid in Law, then the Jurors aforeſaid ſay upon their Oath, that the aforeſaid *Henry Howel* is guilty of the Treſpaſs and Ejectment within ſpecified, as the aforeſaid *Edmund* within hath alledged, and then they aſſeſs the Damages of the ſaid *Edmund* by Occaſion of that Treſpaſs and Ejectment (beſides his Coſts and Charges by him about his Suit in this Behalf expended) at 10 s. and for thoſe Coſts and Charges at 40 s. But if it ſhall ſeem to the Court of the Lady the Queen that the Demiſe aforeſaid by the aforeſaid *William Feriman* and *Robert Sadler* to the aforeſaid *Edmund* of the Tenements within written in Form aforeſaid made is not good, ſufficient, and valid in Law, then the ſame Jurors ſay upon their Oath aforeſaid, that the aforeſaid *Henry Howel* is not guilty of the Treſpaſs and Ejectment within ſpecified, as the ſame *Henry Howel* within hath alledged. But becauſe the Court of the Lady the Queen here is not yet adviſed of giving their Judgment thereon, Day is given to the Parties aforeſaid before the Lady the Queen at *Weſtminſter* until *Friday* next after the Morrow of the *Holy Trinity* to hear their Judgment thereon, becauſe the Court of the Lady the Queen here thereof not yet, &c.

Continuance.

The CASE.

The Cooks of *London* were incorporated by King *Edw.* 4. by the Name of two Maſters or Governors and Commonalty of the Myſtery of Cooks of *London*, and they bargained and ſold Land by the Name of A. B. C. and D. Maſter and Wardens of the Craft or Myſtery of the Cooks of *London*, to R. D. and adjudged that the Corporation was miſnamed in the Indenture, and that the Bargain and Sale was void by Reaſon thereof, and therefore that the Bargainee by his Entry was a Diſſeizor. S. C. Shep. Pract. Counſ. 103.

THE Caſe as it was found by the Jury was thus. King *Edward* 4. by his Letters Patent, bearing Date the 11th Day of *June* in the 22d Year of his Reign, granted to the good and free Men of the Myſtery of Cooks of the City of *London*, that that Myſtery and all Men of the ſame Myſtery of the City aforeſaid ſhould be in Reality and in Name one Body and one Commonalty perpetual. And that two Principals of the ſame Commonalty, with the unanimous Aſſent of 12 or 8 Perſons at leaſt of that Commonalty moſt experienced in the Myſtery aforeſaid, might every Year elect and make out of that Commonalty two Maſters or Governors moſt experienced in the ſame Myſtery, to overlook, direct, and govern the Myſtery and Commonalty aforeſaid, and all Men of the ſame Myſtery, and the Buſineſs of the ſame for ever. And that the ſame Maſters or Governors and Commonalty ſhould have perpetual Succeſſion, and a common Seal to ſerve the Buſineſs of the ſaid Commonalty. And that they and their Succeſſors for ever ſhould be Perſons fit and capable to purchaſe and poſſeſs in Fee and Perpetuity, Lands, Tenements, Rents, and other Poſſeſſions whatſoever. And that they, by the Names of Maſters or Governors and Commonalty of the Myſtery of Cooks of *London*, might implead and be impleaded before any Judges whatſoever, in any Courts and Actions whatſoever, &c. By Virtue of which Letters Patent the free Men of the Myſtery of Cooks of *London* were incorporated by the Name of Maſters or Governors and Commonalty of the Myſtery of Cooks of *London*. And afterwards they were ſeized of the Tenements, in which the Treſpaſs and Ejectment is ſuppoſed to be done, in their Demeſn as of Fee, in Right of their Corporation. And they being ſo ſeized, *John Johnſon*, *Matthew Robinſon*, *John Birch*, and *Ralph Iſwel*, Maſter and Wardens of the Craft or Myſtery of Cooks of *London*, and the Commonalty of the ſame Craft or Myſtery, and one *John Lawrence*, the laſt Day of *November* in the 21ſt Year of the Reign of King *Henry* 8, by an Indenture (ſhewn forth) made between them, by the Name of *John Johnſon* the youn-

Vin. Abr. tit. Corporations G. 4. pl. 7. Vide Lane 18. Dy. 150. pl. 84.

Note, (Reader) that Suits to avoid Grants upon the Account of Miſnomer are odious Suits, and a ſhameful Thing it is that when Grantees or Leſſees, who for the moſt Part are illiterate Perſons, have paid great Fines, Corporations, who are preſumed beſt to know their Name of Foundation, ſhould go about to avoid their own Grants under their common Seal upon ſuch a ſlight Miſtake. And therefore the Judges ought in theſe Caſes (as generally they do) to make ſuch Conſtructions, if they may, that the Grants may ſtand good, Gouldſh. 122, *Gawdy*. However it ſeems that in ſuch Caſe Remedy may be had in the Court of Chancery, for the Lord Chancellor ſaid it was fit to help ſuch Leaſes there, if for reaſonable Time, and made upon good Conſideration, otherwiſe not. 1. Jac. 1, Cary 44. 32 & 33 Eliz. Lord Audley v. Sydenham, Tothil 228, pl. 100.

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ger, *Matthew Robinſon*, *John Birch*, *Ralph Iſwel*, Maſter and Wardens of the Craft or Myſtery of the Cooks of *London*, and by the Name of the Commonalty of the ſame Craft or Myſtery, and by the Name of *John Lawrence*, of the one Part, and *Robert Dormer* of the other Part, bargained and ſold the Tenements aforeſaid to the ſaid *Robert Dormer*. By Virtue of which Bargain and Sale the ſaid *Robert Dormer* into the ſaid Tenements entered, and was thereof ſeized in his Demeſn as of Fee. And he being ſo ſeized, a Fine was levied in *Eaſter* Term in the 22d Year of King *Henry* 8, between the ſaid *Robert Dormer* and four others Complainants, and *Thomas Smith* and his Son Deforceants; by which Fine *Smith* and his Son acknowledged the ſaid Tenements to be the Right of the ſaid *Dormer*, as thoſe which he and the four others had of their Gift; and Proclamations were thereupon accordingly made, which Fine was to the Uſe of the ſaid *Dormer* and his Heirs, whereby the ſaid *Dormer* was ſeized of the ſaid Tenements in his Demeſn as of Fee, and continued his Eſtate five Years next after the ſaid Proclamations, without any Entry, Claim, or Action upon or againſt him made by the ſaid Maſters or Governors and Commonalty of the Myſtery aforeſaid, or by any other. And afterwards, viz. the 10th Day of *September* in the 18th Year of the Reign of the preſent Queen, the ſaid Maſters or Governors and Commonalty made a Letter of Attorney to one *Richard Hodges* to enter into the ſaid Tenements, and to deliver to the Plaintiff upon the Land the Deed of Leaſe ſpecified in the Count, as their Deed, who accordingly did ſo. And the Defendant having an Eſtate by Conveyance under the Eſtate of the ſaid *Dormer*, (which was ſhewn in Certainty) ouſted the Plaintiff. Upon which the Jurors prayed the Diſcretion of the Juſtices.

And the Matter was argued many Times at the Bar, *ſed non interfui*. And at laſt the Juſtices unanimouſly agreed upon two Points. The firſt was, that when *Dormer* entered after the Bargain and Sale made to him, he was a * Diſſeizor to the Corporation, becauſe the Corporation was miſnamed in the Indenture of Bargain and Sale, whereby the Bargain and Sale and the Indenture were void. For the Grant of King *Edward* 4. to the Cooks was, that two Principals of the Commonalty, with the Aſſent of 12 or of 8 at leaſt of the ſame Commonalty, might annually elect and make out of the ſaid Commonalty two Maſters or Governors in the ſame Myſtery; and that the ſame Maſters or Governors and Commonalty ſhould have perpetual Succeſſion; and that they and their Succeſſors ſhould be able and capable to purchaſe and poſſeſs in Fee and Perpetuity, Lands and Tenements; and that they might implead and be impleaded by the Name of Maſters or Governors and Commonalty. So that by this Grant there ought to be two Maſters or Governors. And the Indenture of Bargain and Sale to *Dormer* was made between *John Johnſon*, *Matthew Robinſon*, *John Birch*, and *Ralph Iſwel*, Maſter and Wardens of the Craft or Myſtery, &c. So that there are four named by their proper Names, and *Maſter* is added at the End in the ſingular Number, which cannot be referred to them all, nor to two of them, for Maſter and Maſters [a] is not the ſame. And if *Maſter* ſhould be referred to all four (which it cannot poſſibly be) then there would be four Maſters, whereas the Charter warrants only two, ſo that the Number would be greater than is warranted by the Charter. And if *Maſter* ſhould be referred to the laſt Perſon named, viz. to *Iſwel* (as of Neceſſity it muſt,) then there are not Maſters, and the plural Number is material in the Caſe, becauſe two will govern better than one. So that for Want of the plural Number, the Name of the Corporation given in the Indenture, viz. Maſter, is not warranted by the Charter.

* Rol. R. 160. Cro. C. 396.

[a] 10 Co. 103. a.

Alſo in the Indenture they are called Maſter and Wardens, whereas *Warden* is not in the Charter. And if ſo be that *Governors* had been put inſtead of *Wardens*, in order to purſue the Charter, yet they ought to have been called Maſters *or* Governors, ſo that the Word *(or)* ſhould have been put inſtead of *(and)*.

[b] But as to the Words *(of the Craft or Myſtery of the Cooks of London)*, which are put in the Indenture before the Words *(and the Commonalty)*, and as to the Word *(Craft)*, which is put as well before the Word *(Commonalty)* as after it, they ſeemed to the Juſtices to be Surpluſage, which ſhould not hurt the Bargain and Sale, nor make the Indenture void. For *(Craft)* and *(Myſtery)* are Words of the [c] ſame Senſe, and the putting them before the Word *(Commonalty)* is but to ſhew of what Myſtery they are Maſters or Governors, which is more than neceſſary, for if they had been called Maſters or Governors and Commonalty of the Myſtery of Cooks of *London*, thereby it would have been known of what Myſtery they were Maſters or Governors, for the Word *(Myſtery)* there put would have ſhewn certainly that the Myſtery to which they were Maſters or Governors, and the Myſtery whereof the Commonalty conſiſted, was of the Cooks of *London*. So that the Words *(Craft or Myſtery)* being put before the Word *(Commonalty)* are but Words of Abundance, which do not deſtroy the Name given to the Corporation. But that which hurts and vitiates the Name given to them in the Indenture is the other Matter abovementioned, which makes the Bargain and Sale and the Indenture void. From whence it follows that when *Dormer* entered, he was a Diſſeizor to the Corporation, inaſmuch as he claimed an Eſtate or Intereſt which was not given to him by the Indenture, for which Reaſon he ſhall not be adjudged a Tenant at Will or at Sufferance, but a Diſſeizor.

[b] S. P. Moor 233. Lane 15. 1 And. 208. 1 Leon. 20, 159, 160.

[c] 1 And. 208. 1 Leon. 20, 160. Cart. 115, 120.

As to the ſecond Point, the Court were of Opinion that the Fine levied to *Dormer* (who had an Eſtate of Freehold and Fee) and to the others, and the Continuance of the Poſſeſſion in *Dor-*

A Fine with Proclamations, and five years Non-claim, is, by the Equity of the Statute of 4 *H.* 7. *cap.* 24. a Bar to ſuch Corporations as have an abſolute Eſtate and Authority in their Poſſeſſions, and may maintain a Writ of Right thereof, as Mayor and Commonalty, Dean and Chapter, Colleges, &c. but not to ſuch Corporations as have no abſolute Eſtate in their Poſſeſſions, and cannot charge or incumber them without the Aſſent of others, nor maintain a Writ of Right of them, but a *Juris Utrum*, as Biſhops, Deans, Parſons, Vicars, Prebendaries, &c. S. P. 11 Co. 69. b. 71. a. 1 Rol. R. 153, 160, 172. Weſt's Symb. pt. 2. fo. 66. b. Crompt. J. C. 20. b. Shep. Pract. Counſ. 50, 74, 76, 103, 104. Weſt. Compl. Incumb. 437. Vin. Abr. tit. Corporations K. 3. pl. 6. tit. Fine U. pl. 3, 4, 6.

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mer for five years after the Fine, barred the Corporation by Reaſon of their Non-claim within the five Years. For they had an abſolute Eſtate in Fee Simple, and might have given the Land to another without the Aſſent or Agreement of any other, and might have had a Writ of Right, for which Reaſon their Non-claim ſhall bind them. And the Statute of 4 *H.* 7. *of Fines* was made for the public good, and to ſettle and quiet the Inheritances of the Subjects of the Realm. And therefore the Senſe of it ought to be largely extended to the Benefit of thoſe who are in Poſſeſſion of Land, and to the Deſtruction of the Right of thoſe who have Right, and are remiſs in making their Claim. [a] For the Intent of the Act was to favour thoſe who had Eſtates by Fine, and to hurt thoſe who had Right, and neglected to purſue it within five Years. [b] And therefore although the Words of the Act ſeem to bar only natural Perſons and their Heirs, becauſe they do not ſave any Right but to Men and their Heirs, and no Mention is made of any Corporation, or of Succeſſors, yet it was the Intent of the Makers of the Act that it ſhould be extended to Corporations and to their Succeſſors, if they are ſuch Corporations as have of themſelves abſolute Eſtate and Authority, as Mayor and Commonalty, Dean and Chapter, Colleges, and ſuch like. For as they have Power to take Lands and Tenements, ſo ought they to have Care to defend them, and they and their Succeſſors ought to make their Entries and Claims to avoid Fines, as other Men and their Heirs ought. And if Corporations ſhould not be included in the Statute of 4 *H.* 7. many Troubles and Miſchiefs would happen in their Poſſeſſions, which would be left without Remedy or Reformation, and an Act of Parliament which reforms a common Miſchief ought to be extended ſo as to extinguiſh the whole Miſchief. So here the Act of 4 *H.* 7. which is an Act of Convenience in that it brings public Repoſe to Inheritances, ought to be extended to bind Corporations which neglect to make their Entries or Claims or to bring their Actions within the Time limited by the Act, viz. within five Years.

[a] 2 Rol. R. 252. 1 Leon. 84 *Per Periam* J. Comb. 73. Ante 369 (g).

[b] 1 Leon. 84.

[c] But if a Biſhop, Dean, Parſon, Vicar, or Prebendary, or ſuch like, do not make their Entry or Claim, nor bring their Action to avoid a Fine within five Years, but are remiſs and negligent for all that Time, yet their Succeſſors ſhall not be bound for ever, becauſe they have no abſolute Eſtate or Authority in their Poſſeſſions. For the Biſhop and Dean cannot do Things to bind their Poſſeſſions without having the Aſſent of the Dean and Chapter: And the Parſon, Vicar, and others, who may have a *Juris Utrum*, and cannot have a Writ of Right, ought to have the Aſſent of the Patron and Ordinary, who have ſome Intereſt or Part in the Matter, in order to bind their Succeſſors. And forasſmuch as theſe have no abſolute Authority over their Poſſeſſions, but are dependant upon others, and cannot charge or incumber their Poſſeſſions of themſelves without the Aſſiſtance of others, therefore it is reaſonable to be preſumed that it was the Intent of the Makers of the Act of 4 *H.* 7. that their Latches and Non-claim within five Years ſhould bind their Succeſſors for ever.

[c] 11 Co. 71. a. Crompt. J. C. 20. b. Shep. Pract. Counſ. 50, 104. Weſt's Symb. pt. 2. fo. 66. b. Ante 375 (e), by the Reporter.

Nevertheleſs it was held by ſome of the Juſtices, that although every Succeſſor ſhall have five Years to make his Claim or Entry, [d] yet every one that ſuffers the five Years to paſs ſhall be bound during his own Time. But although he is bound, yet his Succeſſor ſhall have other five Years to make his Entry or Claim, or to bring his Action, by the Saving and *Proviſo* in the Act. And ſo, it was ſaid, if a Man has an Office for Life, to which Land or a Houſe is appurtenant, as a Parker, Foreſter, Keeper of a Goal, and the like, whoſe Offices are uſed to be given for Life, and he is diſſeized of the Land or Houſe which is appurtenant to his Office, and the Diſſeizor levies a Fine with Proclamations, every Officer one after another ſhall have five Years, but he that ſuffers the five Years to paſs is bound for the Time that he is Officer.

[d] 1 Rol. R. 160, 172. Vin. Abr. tit. Corporations K. 3. pl. 6. tit. Fine U. pl. 6. Shep. Pract. Counſ. 50.

And becauſe in the principal Caſe the Letter of Attorney made to *Hodges* to enter into the Premiſſes, and to deliver the Leaſe to the Plaintiff, was void, for that the Corporation was bound by the Fine and five Years Non-claim, and ſo had no Right, Intereſt, or Power in the Land at the Time when they gave the Authority to the Attorney, and conſequently the Leaſe claimed by the Plaintiff was void, Judgment was afterwards given againſt the Plaintiff, which was as follows.

The Reſt of the Record.

At which Day before the Lady the Queen at *Weſtminſter* came the Parties aforeſaid by their Attornies aforeſaid. Whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the ſaid Lady the Queen now here more fully underſtood, and mature Deliberation being thereupon had, for that it ſeems to the Court of the Lady the Queen now here that the Demiſe aforeſaid by the aforeſaid *William Feriman* and *Robert Sadler* Maſters or Governors and the Commonalty of the Myſtery aforeſaid to the aforeſaid *Edmund Croft* of the Tenements aforeſaid with the Appurtenances in Form aforeſaid made, is not good, ſufficient, nor valid in Law, it is conſidered that the aforeſaid *Edmund* take nothing by his Bill aforeſaid, but for his falſe Claim thereof be in Mercy; and that the aforeſaid *Henry Howel* go thereof without Day, &c.

Judgment.

In the Argument of this Caſe two other Points were moved, the firſt of which was, if by the Bargain and Sale by the Corporation they might be ſeized to the Uſe of *Dormer* the Bargainee. [e] For it was ſaid that no Corporation can be ſeized to Uſe, for none can have Confidence committed to him but a Body natural, who hath Reaſon, and is capable of Confidence, and may be compelled by Impriſonment, by the Order of the Chancellor of *England*, to perform the Confidence, for that is the Way which the Party ſhall take to have it performed, [f] and no Corporation which conſiſts of many can be impriſoned, and their natural Body ſhall not be impriſoned for the Offence of their Body corporate, which is another Body.

[e] S.P. Ante 102, 103.

[f] Cowel's Inſt. 235, § 5. Shep. Pract. Counſ. 104.

[a] The other Point moved was, whether *Dormer* the Bargainee ſhould have a Fee-ſimple in the Uſe, or but for Life only, becauſe the Bargain and Sale was made to him, and no Mention was made of his Heirs. [a] Shep. Pract. Counſ. 104. Vide Dy. 169. pl. 22.

But the Judges made no Reſolution upon theſe Points, becauſe if the Bargain and Sale was void by the Miſnomer of the Corporation, and *Dormer* was a Diſſeizor by his Entry, then theſe Points cannot come in Queſtion, nor does the Record miniſter any Cauſe to diſpute them.

And *Note*, as touching Fines levied at the Common Law by a Prior or Parſon, and how far they were effectual to bind their Succeſſors, theſe Caſes were conſidered, viz. M. 38 Ed. 3. 33. a. Bro. Fines 45. T. 11 H. 4. 68. b. Bro. Fines 38. 12 H. 4. 11. pl. 1. 21. pl. 13. Bro. Fines 40.

A brief Report of a Judgment, and of the Cauſes thereof, given in the King's-Bench *in* Hillary *Term in the 21ſt Year of the Reign of Queen* Elizabeth, *upon a ſpecial Verdict found in a Bill of* Treſpaſs *brought by* Richard Paramour *againſt* Raphael Yardley *and* George Smart, *for breaking his Houſe and Cloſe called the Manor-Houſe and Park of* Drayton-Baſſet *at* Drayton-Baſſet *in the County of* Stafford. *And the Record appears among the Records of* Michaelmas *Term* 19 & 20 Eliz. Rot. 194.

THE Treſpaſs was aſſigned to be done the 19th Day of *December* in the 19th Year of the Reign of Queen *Elizabeth*, with Continuance until the 15th Day of *May* next following. And the Defendants pleaded not guilty. And the Jury found that one *William Robinſon* was poſſeſſed of the Places, in which the Treſpaſs was ſuppoſed to be done, by Force of a Leaſe for 77 Years, which commenced at the Feaſt of *St. Michael* the Archangel in the Year of our Lord 1560. And by his Teſtament in Writing, made the 15th Day of *September* in the 4th Year of the Reign of Queen *Elizabeth*, he gave all his Leaſes to *Thomas Robinſon* his eldeſt Son, to have and to hold to the ſaid *Thomas* during all the Term which he had to come therein, if the ſaid *Thomas* ſhould ſo long live; and if he ſhould die before he had Iſſue of his Body, then he deviſed all the ſaid Leaſes to * *John Robinſon* his youngeſt Son, and to his Aſſigns, during all the Years then to come, if he ſhould ſo long live, and have Iſſue of his body. And he limited Remainders over. And further he ſaid that it was his Will and Intent that *Grace* his Wife ſhould have the Occupation and Profits of all his Lands and Leaſes until the ſaid *Thomas* ſhould come to his full Age of 21 Years; and if the ſaid *Thomas* ſhould die before he came to ſuch Age, then until the ſaid *John Robinſon* ſhould come to the Age of 21 Years, to the Intent that ſhe, with the Profits of his Lands and Leaſes, might educate his Iſſues, and ſee his laſt Will performed in all Points. And he deviſed further to *Dorothy* his Daughter 600 *l.* to be paid at the Day of her Marriage, and divers other Sums he deviſed to divers others. And he made the ſaid *Grace* his Wife his ſole Executrix, and died poſſeſſed of the ſaid Leaſe, the Reverſion of the Tenements belonging to the Queen and to her Heirs.

Leſſee for Years deviſes his Term to his Son, and further ſays that his Will is, that his Wife ſhall have the Occupation and Profits of the Leaſe during the Minority of his Son, to the Intent that with the Profits ſhe may educate his Children, and ſee his laſt Will performed, and he makes her his Executrix, and dies; afterwards ſhe proves the Will, and ſells the Term to a Creditor of her Huſband's before all the Debts are paid, having other Goods in her Hands ſufficient to pay the Debts and funeral Expences: She educates the Iſſues after her Huſband's Death until her own Death: The Son comes to his full Age, and enters into the Premiſſes, and his Entry adjudged lawful. S. C. Crompt. J. C. 64. a. Vin. Abr. tit. Deviſe L. pl. 11. And ſee S. P. Mich. 15 & 16 Eliz. Dy. 328. pl. 11. * 1 Rol. R. 321, this Deviſe to *John* is ſaid by *Coke* to be a Poſſibility upon a Poſſibility, and yet good.

And they found further that the ſaid *Grace*, having taken upon her the Burden of the Teſtament, entered into the ſaid Houſe and Park, and was thereof poſſeſſed. And ſhe being ſo poſſeſſed, the 12th Day of *May* in the 6th Year of the Reign of the preſent Queen, by her Deed granted to one *Wilgfort Tanfield* her Siſter all the ſaid Term, and all her Intereſt, Right, and Title in the Premiſes, to have and to hold to her during all the Years in the Leaſe then to come. And they found that the ſaid *Grace*, at the Time of the ſaid Grant, had Goods and Chattles of the ſaid *William Robinſon* in her Hands ſufficient to pay all the Debts and funeral Expences of the ſaid *William Robinſon*, beſides the ſaid Leaſe. But they found that a Debt of 100 *l.* due by the ſaid *William Robinſon* was payable and not paid at the Time of the Grant made to the ſaid *Wilgfort*. And further they found that the ſaid *Grace* had educated and maintained the Iſſues of her ſaid Huſband all the Time after the Death of the ſaid Teſtator, and during her Widowhood; and that afterwards the ſaid *Grace* took to Huſband *Simon Harcourt*, and died. And afterwards the ſaid *Thomas Robinſon* entered into the ſaid Houſe and Park, and was thereof poſſeſſed. And being ſo poſſeſſed, he the 3d Day of *March* in the 17th Year of the Reign of the preſent Queen, (then being of the Age of 23 Years) granted the ſaid Houſe and Park, and all his Intereſt and Term of Years in them, to *Richard Paramour* the Plaintiff, by Virtue whereof he entered, and was poſſeſſed until the Defendants, as Servants to the ſaid *Thomas Robinſon*, and by his Command, entered and did the Treſpaſs. And upon this Matter the Jurors prayed the Advice of the Court, and if the Court ſhould adjudge that the Defendants were guilty, then they aſſeſſed Damages to the Plaintiff for the Treſpaſs at 20 *l.* and for his Coſts 20 *s.* and if otherwiſe, then they ſaid that the Defendants were not guilty.

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And whether Judgment ſhould be given for the Plaintiff, or not, was debated in the King's Bench laſt *Trinity* Term by *Brograve* on the Part of the Plaintiff, and by *Beaumond* the elder on the Part of the Defendants. And now this preſent *Hillary* Term in the 21ſt Year of the Reign of Queen *Elizabeth*, it was argued by an Apprentice of the Middle Temple on the Part of the Plaintiff, and by *Tanfield* on the Part of the Defendants.

1 Point.

For the Defendants.

Leſſee for Years deviſes all his Term to his Son, and afterwards in another Clauſe deviſes to his Wife the Occupation and Profits of the Leaſe during the Minority of his Son, theſe Deviſes ſhall be tranſpoſed, and it ſhall be conſtrued firſt a Deviſe to the Wife, and afterwards to the Son, in order that both may ſtand. S. P. Crompt. J. C. 64. a. Swinb. 198. Nelſ. Lex Teſtam. 291, 554. 1 Finch 49. 2 Finch 69. And ſee the like Conſtruction made Ante 523, *Welcden v. Elkington*, and many Caſes there put upon this Ground.

And in order to overthrow the Plaintiff's Title, and to maintain that the Term was never executed in *Thomas Robinſon* as a Legacy, it was objected that the Limitation or Gift to *Grace* the Wife during the Minority of *Thomas Robinſon* the Infant was void, becauſe in the Premiſes of the Will the Teſtator had given to *Thomas* all his Leaſes, to have and to hold to him during the whole Term which he had to come, by which Words the whole Eſtate and Term paſſed to *Thomas*, ſo that the ſubſequent Words, by which he gave to *Grace* the Occupation and Profits of all his Leaſes during the Minority of *Thomas*, were repugnant to the firſt Words whereby the Leaſe was deviſed to *Thomas*; for if *Thomas* ſhould have the Leaſe, therein he ſhould have the Occupation and Profits preſently, and then the Deviſe thereof to the Wife was contrariant and repugnant, for which Contrariety the latter Deviſe ſhall be void, and then the Wife ſhall have nothing by Force of the Deviſe, but only as Executrix, in which Caſe her Occupation as Executrix cannot be any Execution of the Legacy to *Thomas*; from whence it follows that the Grant of the Term by the Executrix to *Wilgfort* ſhall bind *Thomas*, and conſequently the Title of the Plaintiff, who claims under *Thomas*, is not good.

Econtra for the Plaintiff.

[a] Forteſc. Rep. 25. 2 P. Wms. 282. Swinb. 10. Vin. Abr. tit. Deviſe F. a. pl. 5. Ante 162 (m). 413 (d). 523 (a). and the Books there cited.

Againſt which it was ſaid on Behalf of the Plaintiff, that [a] Words in Wills ought to be ſo favourably expounded that the Intent of the Teſtator appearing in the Will may be performed in every Point, and not a Jot be confounded. To which End it is the Office of Judges to marſhal the Words of Wills, and the more ſo if it be conſidered that Wills are for the moſt Part made in the Party's laſt Moments, when he has not Time to apply to or adviſe with Counſel in the Law, and that Teſtators themſelves in general are unacquainted with the Law, and know not how to put their Words in their proper Order, for which Reaſon their Ignorance and Simplicity demands a favourable Interpretation of their Words.

Then to apply this Doctrine to our own Caſe, it appears to be the Intent of the Teſtator that his Wife ſhould have the Occupation and Profits of the Premiſſes during the Minority of *Thomas* his Son, and that afterwards *Thomas* ſhould have the Leaſe. And in order to make this Intent take Effect, it is the Office of the Court to take that Part firſt which comes laſt, and that laſt which comes firſt in the Will; as if the Teſtator had ſaid that his Wife ſhould have the Occupation and Profits of the Land in Leaſe during the Minority of *Thomas*, and that *Thomas* at his full Age ſhould have the Leaſe. And the Words being ſo placed will anſwer the Intent of the Teſtator, and agree with the Law.

And this is nothing more than is frequently done by the Common Law in Deeds and ſuch other Acts, for when divers Things are appointed at one ſame Inſtant, and the one cannot take Effect without the other, the Common Law will adjudge that to precede, and that to follow, which properly ought to precede and follow, in order to make the Intent of the Parties take Effect. [b] As if a Diſſeizor makes a Leaſe for Years, and afterwards he and the Diſſeizee releaſe by one Deed to the Tenant for Years, there the Law will adjudge the Releaſe of the Diſſeizor firſt to take Effect, and afterwards the Releaſe of the Diſſeizee to take Effect, for there is no Privity nor [c] Eſtate in the Leſſee upon which the Releaſe of the Diſſeizee may enure, unleſs it be taken that the Releaſe of the Diſſeizor firſt enured, and afterwards the Releaſe of the Diſſeizee. So that when there is Matter ſufficient, the Law adjudges what Thing ſhall precede, and what ſhall follow. [d] And ſo if Tenant for Life makes a Leaſe for Years, and the Tenant for Life and the Reverſioner in Fee confirm the Eſtate of the Tenant for Years, to have the Land to him and to his Heirs, there he ſhall

[b] S. P. 1 Leon. 255, at the Bottom. 2 Bulſt. 125. Vin. Abr. tit. Releaſe K. 2. pl. 6.

[c] S. P. Co. Litt. 266. a.

[d] Vin. Abr. tit. Grants G. a. 2. pl. 16.

have the Fee, becauſe the Law will adjudge the Eſtate of the Tenant for Life to paſs firſt, and afterwards the Eſtate of him that had the Fee, ſo that the Leſſee may have Privity, whereupon the Releaſe of the Reverſioner in Fee may enure and enlarge his Eſtate. [a] And ſo if Tenant for 30 Years makes a Leaſe for 10 Years, and both of them ſurrender to him in the Reverſion in Fee, the Surrender is good for both the Eſtates, as it ſeems by 14 *H.* 7. and yet the Leſſee for 10 Years could not ſurrender by himſelf for Want of Privity, but when the other joined with him, his Surrender ſhall be taken in Law to precede, and the Surrender of the Leſſee for 10 Years to follow, ſo that the ſame ſhall be good. And ſo in the principal Caſe the Deviſe ſhall be ſaid in the Law to be firſt made to the Wife, and afterwards to the Son, and the Generality of the Deviſe to the Son, which was firſt placed in the Will, ſhall be reſtrained by the Deviſe afterwards made to the Wife. [b] As if a Man by Deed makes a Feoffment to one, to have and to hold to him and to his Heirs, and if it happen that the Feoffee dies without Heir of his Body, that then the Land ſhall revert, the Generality of the Gift to him and to his Heirs ſhall be corrected by the Clauſe afterwards, as it ſeems by 13 *R.* 2. ſo that the Donee ſhall only have a Fee tail. And if the Law ſhall be ſo expounded in Deeds, and ſhall marſhal the Words of them ſo as to make one Thing precede another, contrary to the Order in which they are placed in the Deed, *a fortiore* it ſhall do ſo in the Wills of Lay-men. [c] And therefore it was ſaid to be a common Caſe, that if A. by his Will deviſes Land to B. and to his Heirs, and afterwards in another Clauſe he deviſes a Rent-charge out of the Land to C. and to his Heirs, this ſhall be a good Deviſe of the Rent to C. and of the Land to B. and the Rent ſhall in Conſtruction of Law be taken to be firſt deviſed, although it is placed laſt in the Will. So in the principal Caſe the Deviſe to the Wife ſhall be adjudged in Law to precede the Deviſe to the Son, although it it is ſubſequent in Words; and ſo both Parts of the Will ſhall ſtand together, and good Senſe ſhall be made of them, and the Teſtator's Intent ſhall be obſerved throughout.

And it was ſaid that if there had been any Repugnancy in the Will, the laſt Part ſhould have deſtroyed the firſt. [d] As if in the Premiſſes of the Will A. deviſes his Land to B. in Fee, and in the End of the Will he deviſes it to C. in Fee, the laſt Part ſhall deſtroy the firſt, becauſe it was his laſt Intent to give it to C. For as the laſt Will repeals the firſt Will, ſo by the ſame Reaſon the laſt Part of the Will ſhall repeal the firſt Part of the Will, when they are contrary to each other. But in the principal Caſe there is no Contrariety, but both the Parts may ſtand together. Wherefore it is a good Deviſe to the Wife, and alſo to the Son after he comes of full Age. And to this the whole Court agreed.

[a] M. 14 H. 7. 3. Vin. Abr. tit. Grants G. a. 2. pl. 17.

[b] T. 13 R. 2. in Formedon. Dal. 9. pl. 5. 2 Rol. Abr. 68. pl. 28. 1 Rol. R. 375, 384. Litt. R. 258. 1 P. Wms. 72. Ld. Raym. 623, 1146 Ante 53 (c), and ſee the other Books there cited.

[c] S. P. Lane 118. 1 Rol. R. 320. 2 Rol. R. 424, at the Bottom. 1 Bulſt. 192. 3 Bulſt. 105. Godolph. Orph. Leg. 306, § 3. 327, 461. 1 Finch 49. 2 Finch 67. Treat. of Wills 30. Vin. Abr. tit. Deviſe M. b. pl. 5. Ante 523 (a).

[d] Herewith agrees Co. Litt. 112. b. 2 Rol. R. 423, arguendo. Owen 84. *Per Anderſon* J. Swinb. 552, 553. Godolph. Orph. Leg. 461. But by the greater

Opinions it ſeems that B. and C. ſhall be Join-tenants, as appears 3 Leon. 11. pl. 27, *Per Dyer et Brown* J. 3 Bulſt. 105, *Per Dodder.* J. 1 Rol. R. 320, *Per Idem.* Yelv. 210, *Per Williams* J. Lane 118, *Per Tanfield* Ch. B. Cro. E. 9. pl. 2. *Per Anderſon et Mead* J. Cro. J. 49. Jenk. 256. pl. 50. 10 Mod. 522. 1 Vern. 30. Treat. of Wills 129, 130. Pickering's Caſe. Mich. Term 33 Geo. 2.

2 Point.

For the Defendants.

A Deviſe of the Occupation and Profits of Land is a Deviſe of the Land itſelf, ſo that if the Occupation is deviſed to the Executor for a Time, and afterwards the Land itſelf to another, the Executor's Execution of the Legacy to himſelf is an Execution of the Legacy to the other, both their Intereſts being the ſame in Subſtance. S. P. adjudged Ante 524, *Welden v. Elkington.* And ſee 2 Leon. 92. 3 Bulſt. 105. Owen 6, 7. 1 Brownl. 79. Swinb. 141. Godolph. Orph.

Further, it was debated in what Manner the Deviſe ſhould enure to the Wife, and what it was that was deviſed to her. For it was ſaid in Behalf of the Defendants that the Deviſe to the Wife of the Occupation and Profits of the Land was not a Deviſe of the Land itſelf, but of a Profit or Intereſt to be taken out of the Land, whereas by the Deviſe *of all his Leaſes* to *Thomas* the Land itſelf during the Term paſſed, for a Gift of a Leaſe which a Man has contains two Things, *viz.* the Land itſelf, and the Time which he has in it. And when the Teſtator afterwards ſaid that it was his Intent that his Wife ſhould have the Occupation and Profits of all his Leaſes, this is a Deviſe to her of another Thing than of the Leaſe itſelf, *viz.* of a Profit or Commodity out of it, as Herbage, and other like Things, which may be taken by Occupation or Perception; in which Caſe if the Wife took the ſame according to the Deviſe, it could not be an Execution of the Leaſe deviſed to the Son, which was another diſtinct Thing. [e] As if A. has a Leaſe for Years, and he deviſes out of it a Rent or Common for certain Years to B. and deviſes the Leaſe itſelf to C. there although the Executor aſſents that the Deviſee of the Common ſhall put in his Cattle, or although he pays the Rent to the Deviſee of the Rent, yet this is no Aſſent that the Deviſee of the Term ſhall have it, nor is it an Execution of the Term in the Deviſee thereof, becauſe the Rent and Common are Profits out of the Land, and diſtinct from the Land, for which Reaſon the Executor's Aſſent to the Deviſe of them is no Aſſent to the Deviſe of the Term itſelf, which is of another Nature. So here the Wife had not the Eſtate of the Leaſe by the Deviſe to her, but only the Occupation and Profits thereof, and the Leaſe itſelf was in her as Executrix until ſhe ſhould aſſent to the Deviſe of it to the Son, and before any ſuch Aſſent given by her, ſhe granted the Leaſe to her Siſter, whereby the Eſtate of the Son was defeated, and his Entry afterwards into the Land not lawful, and conſequently the Title of the Plaintiff, who claims under him, falls to the Ground.

Leg. 349, § 6. 400, § 34. Co. Litt. 4. b. Cart. 26, 27.

[e] S. P. Ante 521 (d), and ſee the Books there cited.

E contra for the Plaintiff.

Againſt which it was ſaid by the Counſel for the Plaintiff, that the Deviſe to the Wife of the Occupation and Profits of all his Leaſes, until the Son ſhould come to his full Age, was a Deviſe of the Houſe and Park themſelves until that Time. For the Word *(Leaſe)* comprehends the Land leaſed, and then if ſhe ſhall have the Occupation and Profits of the Houſe and Park, this amounts to a Deviſe of the Houſe and Park themſelves, for to have Land for Years is nothing more than to occupy it, and to take the Profits of it for Years. So that by Circumlocution it is a Deviſe of the Land itſelf, for he who has the Occupation and Profits of Land may plough and ſow the Land, which is more than the [f] King ſhall have of the Tenant in Fee-ſimple upon his Outlawry in a perſonal Action, for there the King ſhall only have the Profits as they ariſe of themſelves without manuring the Land; but he who has the Occupation and Profits of Land may manure the Land, and cut

[f] See H. 21 H. 7. 7. a. Bro. Forfeiture 30. T. 9 H. 6. 2c. b. 2 Rol. Abr. 808. pl. 2. 1 Lev. 33. Hardr. 106, 176. 1 Finch 234. 2 Finch 351.

cut down the Copſes upon the Land, which is a Point of Profit. So that a Grant of the Occupation and Profits amounts to a perfect Leaſe of the Land for the Time. [a] And hereupon it was ſaid that in 5 *H.* 7. it is taken that if a Man will plead in an Action of Treſpaſs that the Plaintiff licenſed him to enter and occupy the Land for the Space of a Month, this Plea is not good, but he ought to ſay that the Plaintiff leaſed the Land to him for that Time, and not that he licenſed him to enter, for the Matter purſuant does not prove a Licenſe but a Leaſe, to which the Court there agreed. And if the Law be ſo where there is but one Word. *viz.* a Licenſe to *occupy*, *a fortiore* it ſhall be ſo where there are Words to have the *Occupation* and *Profits*. And in the principal Caſe in 5 *H.* 7. above cited it was taken, that if A. pledges a Chain of Gold to B. for Money delivered at the ſame Time, and afterwards A. brings an Action of Treſpaſs againſt B. for the Chain, B. cannot plead that A. licenſed him to take the Chain, and to retain it until he had repayed him the Money, but he ought to ſay that A. pledged the Chain to him, for the Matter amounts to as much; but the Doubt which aroſe in that Caſe was, becauſe the Money was not delivered at the ſame Time, for the Plaintiff licenſed the Defendant to take and retain the Chain. [b] So, it was ſaid, if a Man makes a Leaſe for Life, and that after the Death of the Leſſee the Land ſhall return or ſhall deſcend to a Stranger and to his Heirs, this ſhall be pleaded as a Remainder. [c] And in a *Formedon* in Remainder the Party ſhall ſay that the Land ſhall remain to him after the Death of the Leſſee for Life, for the Words have the Subſtance of a Remainder. [d] And ſo a Grant of the Nomination of an Advowſon is in Subſtance a Grant of the Advowſon, for the Profit and Effect of the Advowſon conſiſts only in the Nomination. So that Words which are equivalent to Words commonly uſed ſhall be of the ſame Force with uſual Words. And ſo in our principal Caſe the Deviſe of the Occupation and Profits of the Leaſe is a Deviſe of the Leaſe itſelf for the Time.

[a] M. 5 H. 7. 1. Bro. Leaſe 30. Licenſe 19. Ante 154 (c). and ſee the other Books there cited.

[b] S. P. Ante 29 (a). and 170 (r). and ſee the Books there cited.

[c] See Ante 159.

[d] See Ante 157 (p). 529 (b).

A Legatee has no Remedy at the Common Law for any Legacy of Goods or a Profit *a prendre* bequeathed to him, but only in the Spiritual Court, and if he is alſo Executor, then in neither Place Poſt 543.

Another Cauſe was alledged why the Deviſe to the Wife ought to be taken as a Deviſe of the Thing itſelf, and not of the Profits only, and that was, becauſe if it ſhould be a Deviſe of the Profits, as of a Profit *a prendre*, then the Wife ſhould not have any Action or Remedy at the Common Law to obtain the Occupation and Profits, if they were kept from her, or if ſhe was ouſted of them; for ſhe could not have an Aſſize for ſuch Profits, becauſe ſhe had no Eſtate of Freehold in them, nor could ſhe have an Action of [e] Account, becauſe her Deforceor took the Profits to his own Uſe, and no Action of Debt or other Remedy could ſhe have at the Common Law. [f] *And Note, ſhe could not have any Remedy in the Spiritual Court as for a Legacy, becauſe ſhe was Executrix herſelf, againſt whom the Suit ought to be brought to execute the Legacy.* And it cannot be preſumed that it was the Intent of the Deviſor to make a Deviſe of a Thing for which the Deviſee could have no Remedy, eſpecially if the Purpoſes for which the Deviſe was here made are conſidered. For the Words of the Will are, that it was the Deviſor's Intent that his Wife, with the Profits of his Lands and Leaſes, might educate his Iſſues, and ſee his laſt Will performed in all Points. Which Clauſe contains Matter of great Importance, and ſhews how dear his Iſſues were to him, and how deſirous he was that they ſhould be nouriſhed and educated, and that his laſt Will ſhould be performed, which are ſtrong Arguments that he meant that his Deviſe ſhould be of ſuch Effect that his Wife might have Remedy for the Things deviſed, which ſhe could not have, if ſhe was ejected out of them, unleſs the Deviſe be taken to enure as a Gift to her of an Eſtate and Intereſt in the Land. Wherefore if it ſhould be expounded a Deviſe of the Profits only, the Effect would be that he gave to his Wife a Thing which ſhe could never have nor take by his Will, which cannot reaſonably be preſumed to be his Intention.

Nota bene.

[e] For againſt a Diſſeizor, or other wrong Doer no Account lies, Co. Litt. 172. a.

[f] S. P. Poſt 543 (f).

Where the Poſſeſſion and Eſtate of the Land comes to him who has the Profits thereof, it merges the Profits *a prendre* for the Time.

And further it is to be obſerved, that it could not be the Intent of the Deviſor that the Wife ſhould only have a Profit *a prendre* out of the Land until the Son came to his full Age, for in whom muſt the Poſſeſſion and Eſtate of the Term be until the full Age of the Son? Certainly it ought to be in the Wife as Executrix, for the Son ought not to have it delivered to him until his full Age, and then if this be ſo, the Profit *a prendre* out of the Land was merged by the Poſſeſſion and Eſtate of the Land itſelf which the Wife had in the mean Time.

Diverſity between the Deviſe of the Uſe or Occupation of a perſonal Chattle, and the Deviſe of the Occupation and Profits of Land or a Chattle real. See 1 Finch 151. 2 Finch 172.

[g] But the Caſe in 37 *H.* 6. differs much from this Caſe: For there the Caſe was, that A. being poſſeſſed of a Book called the *Grail*, deviſed it to B. one of his Executors, to have the Occupation of it during his Life, and that after his Death C. ſhould have it in the ſame Manner for his Life, and that after his Death it ſhould be diſpoſed of by his Executors to the Uſe of a Church, and died, and B. took the ſaid Book, and kept it by Force of the Deviſe, and delivered it to the Wardens of the ſaid Church, and died, and C. took the Book, and the Church-Wardens brought an Action of Treſpaſs againſt him; and it was the clear Opinion of the Court that the Action was maintenable, becauſe the Book was never delivered to C. by the Executors, and the Occupation or Poſſeſſion of B. was no Execution of the Legacy to C. becauſe nothing was deviſed to B. but the Occupation, and the like to C. for the Deviſe proves in itſelf that the Property of the Book was always in the Executors to the Uſe of the Teſtator, to the Intent that they ſhould diſpoſe of it to the Uſe of the Church, and the Occupation is a diſtinct Thing from the Property, and the Occupation of one is not the Occupation of another, for their Occupations differ from each other, and are ſeveral Things derived out of the Principal, for which Reaſon the Occupation of B. was no Execution of the Occupation of C. For, the Apprentice ſaid, in ſome Things the Occupation, Profit, or Uſe is a diſtinct Thing from the Property. As one may have the Occupation or Uſe of a Glaſs to look at himſelf in it, and another may have the Property of it. So one may have the Uſe of a Map or of a Globe, and another the Property. And ſo one may have the Uſe of a Fire, and another the Property. And ſo alſo of a Book, one may have the Occupation or Uſe of it to read in it, and the Property may be in another. So that in Things of this Kind the Uſe, Occupation, or Function is diſtinct from

[g] T. 37 H. 6. 30. Fitz. Deviſe 6. Bro. 13. Lane 60, 61. 1 P. Wms. 3. 1 Finch 151. 2 Finch 172. Ante 521 (f). Vin. Abr. tit. Deviſe E. a. pl. 6.

from the Property. But otherwiſe in the Caſe of Land, for there he who has the Occupation and Uſe of it has the Property of it for the Time. And ſo here the Wife who had the Occupation and Profits of the Land had the Property thereof for the Time. Wherefore they concluded that for theſe Cauſes the Deviſe to the Wife of the Occupation and Profits of the Houſe and Park during the Nonage of the Son was a Deviſe of the Thing itſelf for that Time, and not of any diſtinct Profit *a prendre* out of it. And of this Opinion was the whole Court.

And as to the Execution of the Legacy in the Wife, it was objected on the Part of the Defendants that the Legacy ought not to be taken to be executed in her any more than in the Son, for it is to be conſidered that ſhe was Executrix, and if the Term had been deviſed to another, it ſhould firſt have been in her as Executrix, for ſhe ſhould have had Poſſeſſion in Deed before any Entry by him or any other, And by the ſame Reaſon when ſhe is Executrix and Legatory it ſhall be firſt in her as [a] Executrix, and if ſhe will have it as Legatory, [b] then ſhe ought to claim it, or to do ſome other Act which may prove that ſhe will accept it as a Legacy, (for the Leaſe ſhall not be in her [c] againſt her Will, but ſhe may diſagree to the Deviſe, and claim it as Executrix), and if ſhe does not claim it as Legatory, but does ſome Act afterwards as Executrix, ſuch Act will manifeſt her Intent, and ſhall be a Diſagreement to the Legacy from the Beginning. And here ſhe hath done ſuch Act which argues her Diſagreement to it from the Beginning, for ſhe has granted the whole Term to her Siſter, to have and to hold during all the Years in the Leaſe which were to come. By which Grant of all the Years to come, ſhe aſſumed upon herſelf to have all the Years in the Leaſe which were to come, and that ſhe could not have as Legatory, but as Executrix ſhe had them. So that ſuch Grant is a Diſagreement to the Legacy, and a Claim to have the Leaſe as Executrix.

Another Reaſon they alledged why ſhe ſhould not be ſaid to have any Part of the Term as Legatory, viz. becauſe it is found that 100 l. owing by the Teſtator was unpaid, for the Payment of which ſhe might alien the Term, for ſhe might apply what Part of the Teſtator's Effects ſhe pleaſed to the Payment of it. Alſo it appears by the Will, which is found by the Jury *verbatim*, that the Teſtator gave 600 l. to his Daughter, and deviſed divers other Sums to other Perſons, and it is not found that any of theſe were paid, and therefore it ſhall be intended that they were not paid, in which Caſe the Executrix might alien the whole Term in order to raiſe Money for the Payment of ſuch Legacies. So that in the mean time the Law cannot adjudge the Part of the Leaſe given to the Wife to be executed as a Legacy in herſelf, and the Remainder in *Thomas* the Son, for then perhaps none of the other Legacies would be paid. And this is another Cauſe to delay the Execution of the Legacy.

A third Reaſon alledged by them againſt the Execution of the Legacy was, becauſe the Occupation and Profits were deviſed to the Wife, to the Intent that ſhe therewith might educate his Iſſues, and ſee his laſt Will performed in all Points. And the Education of his Iſſues can but be looked upon as a Legacy to the Iſſues, and then the main Intent of the Teſtator in the Deviſe to the Wife was, to ſee his laſt Will performed, which Purpoſe is not ſufficient to make it a good Legacy or Deviſe to the Wife. [d] For if I give all my Goods to my Executor to perform my Will, this is no Deviſe at all, nor ſhall he have any Thing more from it than he ſhould have had without it, for if I had ſaid nothing, the Law would have given him my Goods to perform my Will, ſo that I have done no more than the Law itſelf would have done without ſuch Saying, and therefore the Deviſe is void.

For which Cauſes, they ſaid, there is no Execution here of any Deviſe to the Wife, and by the ſame Reaſon no Execution of the Leaſe to the Son in Remainder, and then the Grant which the Wife made to *Wilgfort* is good for all the Years, and the Title of *Thomas* the Son is void, and conſequently that of the Plaintiff, who claims under him, falls to the Ground.

On the other Hand it was ſaid by the Counſel for the Plaintiff, that the Term here given to the Wife during the Minority of the Son ought to be adjudged executed in the Wife, and the Remainder executed in the Son. [e] For if a Leſſee for Years deviſes his Term to a Stranger, the Stranger may ſue the Executor of the Teſtator in the Spiritual Court to execute the Legacy, [f] but if the Deviſe is made to the Executor himſelf, he cannot ſue himſelf for it, and becauſe he cannot do ſo, the Operation of the Law ſhall be of the ſame Effect to him as Suit and Execution ſhould be to a Stranger, ſo that the Thing, if it is certain, ſhall be thereby adjudged in the Executor, and the Property of it ſhall be altered and transferred from the Teſtator to the Executor. As if a Man has Right to Land by Force of an Entail, or otherwiſe, and the Land deſcends to him, or eſcheats to him, or is caſt upon him by Remainder, or other ſuch Means, he ſhall be remitted by the Law, altho' his Entry was taken away before, becauſe there is none againſt whom he may bring his Action, for which Reaſon the Law gives him the like Advantage as if he had brought his Action againſt a Stranger, and had recovered, and had Execution: So that the Operation of the Law is equivalent to a Recovery, and as beneficial to him as a Recovery ſhould have been. [g] And ſo if A. is indebted in 20 l. to B. and he makes B. his Executor, and dies poſſeſſed of Goods to the Value of 20 l. the Property of theſe Goods is preſently changed, and they are become the proper Goods of B. becauſe he could not ſue himſelf, for which Reaſon the Law gives him the like Advantage as he ſhould have had by Suit. So in the principal Caſe inaſmuch as it was better for the Wife to have the Leaſe during the Son's Minority to her own Uſe than to the Uſe of the Teſtator, the Law ſays that the Leaſe was her's, and that it was executed in her as a Legacy.

3 Point. For the Defendants. Where an Executor is alſo Legatee, the Property of the Legacy is immediately upon the Death of the Teſtator altered and transferred to the Executor by Operation of Law, and he ſhall be adjudged to have it as a Legacy before any Act done by him one Way or other, with this Condition that he may afterwards diſagree to it, if he will: for his Title as Legatee is more beneficial to him than as Executor. S. P. held Cro. E. 223, *Truſloe v. Ewer.* 2 Brownl. 173, *arguendo*. But ſee to the contrary many Authorities cited Ante 520 (h) in the Margin. Vide Swinb. 91, 92. Godolph. Orph. Leg. 31, § 3.

[a] See the Books cited Ante 520 (f).

[b] Ante 520 (h).

[c] Ante 520 (c).

[d] Godolph. Orph. Leg. 461. Wentw. Off. of Exec. 253. Poſt 543 (e). L. P. Dy. 331. pl. 21.

E contra for the Plaintiff.

[e] Swinb. 19, 22. Vin. Abr. tit. Deviſe W. d. pl. 3.

[f] Ante 542 (f) by the Reporter.

[g] S. P. adjudged Ante 185, *Woodward v. Darcy.*

And for the clearer Apprehenſion of this Matter, it is to be conſidered what the Wife has done. And, Sir, it is found that ſhe (having taken upon her the Burden of the Teſtament) entered into the Houſe and Park. By which Acceptance of the Charge of the Teſtament it is to be underſtood that all particular Things requiſite to the Performance thereof were accepted and done. And then the Wife thereby aſſumed upon herſelf and bound herſelf to perform all the Legacies of the Teſtator according to his Intent. And it is to be underſtood alſo that ſhe proved the Will, whereby it is included that ſhe took an [a] Oath to perform it, becauſe it is uſual for Executors ſo to do. And if ſhe bound herſelf to perform the Will, and was ſworn thereunto, and one Part of the Will is that all Legacies ſhall be performed, and the Part of the Term given to her is a Legacy, therein (as the Law ſaith) ſhe accepted the Term deviſed to her as a Legacy executed: So that by the Acceptance of the Executorſhip ſhe performed this one Legacy. Wherefore the Law, before any Thing done one Way or other, gives it's Judgment that ſhe had the Term deviſed to her executed as a Legacy, and not to the Uſe of the Teſtator. Nevertheleſs it ſhall be adjudged executed in her as a Legacy knit with a Condition, viz. that ſhe may diſagree to it afterwards if ſhe pleaſes, for the Law will not compel any Man againſt his Will to accept of a Thing which another gives or limits to him, but until her Diſagreement is ſhewn by Words or Act, the Legacy ſhall be adjudged in Law to be executed.

[a] S. P. 1 Finch 409. 2 Finch 171. Wentw. Off. of Exec. 51.

If a Legacy is bequeathed to an Executor for the Education of the Teſtator's Children, and he accordingly educates them, this makes an Election to have the Thing as Legatee and not as Executor. S. P. Moor 493. 2 Brownl. 173. Swinb. 25. Godolph. Orph. Leg. 148. Wentw. Off. of Exec. 224. Vin. Abr. tit. Deviſe D. a. pl. 11. tit. Executors L. b. pl. 1.

Then it remains to be conſidered whether or no the Wife firſt diſagreed to the Legacy, (as the Counſel on the other Side would infer that ſhe did by her Grant to her Siſter) or if there is any Matter found to prove her Agreement to the Legacy before the ſaid Grant to her Siſter. And as to this, the Leaſe was deviſed to the Wife during the Minority of the Son, to the Intent that ſhe with the Profits thereof might educate the Iſſues of the Teſtator; and the Jury have found that all the Time after the Death of the Teſtator, and before the Grant to *Wilgfort*, ſhe had educated the Iſſues; ſo that ſhe had performed the Charge annexed to the Legacy, and that in Reſpect of the Legacy, and it was an Aſſent to the Legacy, ſeeing it was done in Execution of the Intent which the Teſtator had in the Legacy. [b] As if a Leſſee for Years deviſes his Leaſe to his Executor, upon Condition that he ſhall pay 10 l. to a Stranger, which he pays accordingly, this Payment is an Election in him, and an Aſſent to take the Leaſe as a Legacy, and it is in Law an Execution of the Legacy for ever. For he who performs the Charge of a Thing, thereby claims the Benefit annexed to the Charge. As if a Man has an Office of Charge and a Benefit for it, as a Stewardſhip, and a Fee for the Exerciſe of it, there if another keeps the Courts, it is a Diſſeizin of the Fee, for the doing of the Things of Labour is a Claim of the Benefit for the Labour. So here the Education and Nouriſhment of the Iſſues is an Argument and Proof that the Wife aſſented to take the Leaſe appointed for that Purpoſe as a Legacy, and it is the End of her Election, and her Grant to her Siſter afterwards is an Argument of her Inconſtancy, but does not invalidate her Election firſt made. Wherefore we ſee that the Execution of the Legacy, (which the Law firſt adjudged by her intermeddling with the Charge of the Adminiſtration of the Will, and by her Oath to perform it) is now confirmed by her Act in the Education of the Iſſues.

[b] S. P. held to be a ſufficient Aſſent, upon Evidence at *Niſi prius*, Strange 70, *Young v. Holmes*.

Leſſee for Years is indebted in 100 l. and deviſes his Term to his Executor, and dies, leaving Aſſets of other Goods to pay the 100 l. and his funeral Expences, this Debt being unpaid ſhall be no Cauſe to hinder the Term from being immediately executed in the Executor as a Legacy, becauſe the Term cannot be ſold for the Payment of the Debt.

And as to what has been ſaid againſt the Execution of the Legacy, that 100 l. due by the Teſtator was not paid at the Time of the Grant made to *Wilgfort*, for the Payment whereof (it has been ſaid) the Leaſe might be ſold; Sir, the Jury have found that at the Time when the Wife made the Grant to *Wilgfort*, ſhe had in her Hands ſufficient Goods and Chattles of the Teſtator, beſides the ſaid Leaſe, to pay all the Debts and funeral Expences of the Teſtator, in which Caſe the ſaid other Goods and Chattles ſhall be chargeable to the Payment of the 100 l. in Judgment of Law, and not this Leaſe, nor could this Leaſe have been ſold for the Payment of it. For if this Leaſe might have been ſold for the Payment of the 100 l. then this Legacy of the Leaſe, which is a Legacy certain, could not have been performed, and ſo the whole Will would never have been performed; whereas as well the Legacies as the Debts ought to be paid, and the Executrix ought to pay the Debts and funeral Expences with the other Goods which are ſufficient, and not with this Leaſe, for the Sale of the Leaſe to others would be a Breach of the Will, and the Wife by ſuch Sale would violate her Duty as well as her Oath in not performing this Legacy, and ſo would commit Perjury. But for the clearer Apprehenſion of this Matter, let us ſuppoſe that ſome other had been Legatory, and not the Executrix, and put the Caſe thus, [c] a Man is indebted in 100 l. and has a Leaſe for Years, and makes his Teſtament, and gives the Leaſe to his Son, and has Goods to the Value of 100 l. over and above paying his funeral Expences, and he makes his Wife his Executrix, and dies, and the Wife proves the Will, and takes an Oath to perform it, now the Wife has *Aſſets* to perform the whole Teſtament, for ſhe has 100 l. wherewith to pay the Debts over and above the Legacy of the Leaſe, and therefore if ſhe will alien the Leaſe to pay the 100 l. thereby ſhe violates the Will of the Teſtator in taking the Legacy from him who ought to have it, and is not that a Breach of her own Duty as well as of her Oath? Certainly it is, and ſhe deſerves to be puniſhed for it. So that there the Law will not account the Leaſe to be chargeable with the Payment of the Debt. And ſo here when the Executrix is Legatory, the Law will not ſet up the Debt as an Impediment to the Execution of the Leaſe deviſed to her, becauſe the Debt cannot well be paid by the Sale of the Leaſe. And if the Wife would in Fact have diſagreed to the Deviſe of the Leaſe to her during the Minority of her Son, then the Son ſhould have had the Leaſe preſently, and her Diſagreement could not have defeated the Deviſe of it to the Son. [d] But if the Deviſe had not been of a Thing certain, as if the Teſtator had deviſed to his Wife Executrix 20 l. and was indebted to another 40 l. and died, having

[c] See Godolph. Orph. Leg. 146, § 6. 352.

[d] See Wentw. Off. of Exec. 32, 89.

having Horſes to the Value of 20 l. and Oxen to the Value of 20 l. and Plate to the Value of 20 l. there the Law could not ſay of what Thing the Property was altered before the 40 l. was paid, for the Wife might alien which of them ſhe pleaſed to pay the 40 l. and before that was done the Law could not appoint the certain Property of any of the Goods to the Wife. But otherwiſe it is where the Legacy is of a Thing certain, as it is here, and ſo is the Diverſity. Wherefore the Non-payment of the Debt of 100 l. could not delay the Execution of the Deviſe of the Leaſe here.

Leſſee for Years deviſes his Term to his Executor, and alſo divers pecuniary Legacies to others, and dies, the Deviſe to the Executor ſhall be adjudged executed in him preſently, notwithſtanding the other Legacies remain unpaid, and there are not Aſſets to pay them, for all are but Legacies, in which Caſe the Executor ſhall have the Preference before others. But *Nota bene*, if it had been a pecuniary Legacy which was deviſed to the Executor, and not a ſpecifick Legacy, it ſeems that he could not have paid himſelf before the others, becauſe in ſuch Caſe all the Legatees ſhall be paid in Proportion, where there is a Deficiency of Aſſets, 3 Chan. Rep. 54. 1 Vern. 31. 1 P. Wms. 422, 495, 679, 680. Yet it is clear that the Court had no ſuch Diſtinction in View here, but meant to give the Executor a Preference to other Legatees in all Legacies bequeathed to him.

And as to what has been ſaid, that the Teſtator deviſed 600 l. to his Daughter, and divers other Sums to other Perſons, which are contained in the Will found by the Jury *verbatim*, and it is not found that they were paid at the Time when the Wife made the Grant to her Siſter, nor that ſhe had Aſſets in her Hands to pay them, but it is only found that ſhe had Aſſets in her Hands to pay the Debts and funeral Expences, without any Mention of Aſſets to pay the pecuniary Legacies alſo; as to this, it may be that theſe Legacies were paid, inaſmuch as it is not found that they were not paid; but admitting it ſhould be taken that they were not paid, but remained payable, yet this ſhall be no Cauſe to delay the Execution of the Deviſe of the Leaſe; nor will the Law ſuffer the Leaſe to be ſold for the Payment of them, for ſuch Sums are but Legacies, and the Leaſe deviſed to the Executrix is a Legacy alſo, and then in Legacies it is reaſonable that the Executors ſhould be preferred before others. And the Law itſelf gives them the Preference to any others, [a] for if a Man deviſes to A. 20 l. and to B. 20 l. and to C. 20 l. and makes his Executor, and dies, leaving Goods but to the Value of 20 l. now the Executor has Election to which of theſe three he will pay the 20 l. and to which ever he pays it, the other three can ſay nothing againſt it, nor have they any [b] Remedy for their Legacies; and by the ſame Reaſon if one of theſe three was made Executor to the Teſtator, [c] the Law would certainly allow him to retain the 20 l. in Satisfaction of his own Legacy, for it is but reaſonable that he ſhould be neareſt to himſelf, and have Regard to himſelf before others, according to the old Saying, *Charity begins at home.* [d] And this is the Reaſon of the Caſe in 12 *H.* 4. where in Debt upon an Obligation againſt the Heir, he pleaded that the Plaintiff was Executor to his Anceſtor, whoſe Deed he ſhewed forth, and that he adminiſtred certain Goods and Chattles to the Value of the Debt, and more, and retained that Sum to himſelf in the Name of Payment, and he demanded Judgment *ſi actio*, and there *Hull* ſaid, if he did not retain to himſelf, but might have retained, and did not, he ſhall be barred, for a Man is bound to be neareſt to himſelf, *et hæc fuit opinio quorundam*, wherefore he there pleaded that he adminiſtred no Goods after the Death of the Teſtator, whereupon Iſſue was taken. And for the ſame Reaſon the Law adjudges in our Caſe that the Execution of the Deviſe of the Term ſhall not be delayed for the Non-payment of the Legacies to others.

And as to what has been ſaid that the Deviſe to the Wife ſhall be void, becauſe it was made to the Intent that ſhe with the Profits of the Leaſe might educate his Iſſues, and ſee his laſt Will performed, which latter Point is no more than the Executor ſhould have done, if no Deviſe had been made; Sir, true it is that [e] if a Man gives his Executor all his Goods, to the Intent that he may perform his Will with them, this is no Deviſe at all, for the Executor ſhould have had them to ſuch Purpoſe without ſuch Gift, and when a Thing is given to one by Words which he ſhould have had to the ſame Purpoſe without ſuch Words, the Gift is void. [f] As if a Man deviſes his Land to his Son and Heir in Fee-ſimple, and dies, the Deviſe is void, for if no ſuch Deviſe had been made, the Son ſhould have had the Land at the ſame Inſtant that the Deviſe would take Effect. And ſo a Man cannot preſcribe to diſtrain for Rent-ſervice, or to drive his Cattle, for which he has Common appendant, out of the Land, wherein he has Common, to his own Houſe, for he may do it without Preſcription. But that is not the Point here, for there is another Cauſe of the Deviſe, viz. the Education of his Iſſues, which is not a Thing teſtamentary, nor a [g] Legacy to the Iſſues, but it is an Intent annexed to the Deviſe made to the Wife. And alſo the Teſtator has not here deviſed to the Wife the whole Eſtate which he had in the Leaſe, but only Part of it, viz. during the Minority of the Son, and the Reſidue to the Son, ſo that it is a different Eſtate from that which the Law would have given her without the Deviſe. [h] For if a Man deviſes his Land to his Son and Heir, to have to him and to his Heirs of his Body, this is a good Deviſe, becauſe it is another Eſtate than he ſhould have had by Deſcent. So is it in the principal Caſe. Wherefore none of the Exceptions moved on the other Side are ſufficient to delay the Execution of the Deviſe to the Wife, but when ſhe entered, ſhe had the Eſtate deviſed to her as Legatory.

[a] Swinb. 227. Wentw. Off. of Exec. 434.

[b] *Quære*, for by the common Juſtice of the Court of Chancery the Legatee who is paid ſhall be made to refund, 1 Vern. 31, 94. 1 P. Wms. 495. 2 P. Wms. 447. 2 Vent. 358, 360. Wentw. Off. of Exec. 251.

[c] See the contrary 3 Chan. Rep. 54, *cauſa qua ſupra.* [d] P. 12 H. 4. 21. pl. 11. Fitz. Bar 188. Bro. Debt 68. Executors 59. Ante 185 (g). [e] Ante 543 (d). [f] S. P. Hob. 30. 1 Rol. Abr. 626. J. pl. 1. Cro. E. 833. pl. 2. Style 148, 149. Godb. 412. Vaugh. 271. Gouldſb. 141. pl. 53. 2 Sid. 53, 80. Crompt. J. C. 116. a. Salk. 241, 242. Bac. Max. reg. 21. Godolph. Orph. Leg. 311. 476, § 119. Nelſ. Lex. Teſtam. 483. Law of Teſtaments, &c. 149. Gilb. Law of Deviſes 110. 2 Bac. Abr. 79. Mich. 33 Geo. 2. B. R. *Hurſt v. the Earl of Winchelſea*, this agreed to be a poſitive Rule of Law; and the Reaſon hereof (as *Norton* arguendo ſaid) is not in Favour of the Heir, that he may be in of his better Title, but in Favour of third Perſons, viz. of the Lord, for the Preſervation of the Tenure, (which was a valuable Thing before the Statute of *Marlbridge*) and of Creditors, for the Preſervation of their Debts; which was granted by Lord *Mansfield* C. J. who alſo ſaid that the great Principle, upon which the Law is grounded in this Point, is that which is laid down by *Baldwin* C. J. in Dy. 12. pl 54. where he ſays that a Man cannot give another what he has already, for when he does ſo, *nihil operatur.* As if the Tenant in Tail enfeoffs the Donor, it is no Diſcontinuance. [g] Godolph. Orph. Leg. 352. [h] S. P. Gouldſb. 88. pl. 14, *per Anderſon.* Crompt. J. C. 116. a. Hob. 29, *Counden v. Clerk.* Godolph. Orph. Leg. 461. 2 Bac. Abr. 80. So if a Man deviſes his Land in Fee to his two Daughters, being his Heirs, the Deviſe is good, becauſe it gives the Land to them in another Degree than the Common Law would have given it them, for by the Common Law they ſhould take as Coparceners, but by the Deviſe they ſhall take as Jointenants, Cro. E. 431. pl. 36. Gouldſb. 88. pl. 14. 141. pl. 53. Bac. Max. reg. 21. 2 Bac. Abr. 80 2 Sid. 79. 3 Lev. 127, 128.

4 Point.

Leſſee for Years deviſes the Occupation and Profits of his

And further it was ſaid, that the Execution of the Legacy to the Wife was alſo an Execution of the Remainder to the Son, inaſmuch as it was one Deviſe, altho' the Eſtates were ſeveral. [i] As if a Reverſion is granted for Life, the Remainder in Fee, and the particular Tenant attorns to

Leaſe to A. for Part of the Term, the Remainder of the Term to B. the Executor's Aſſent to the firſt Deviſee is an Aſſent to him in Remainder alſo. S. P. Wentw. Off. of Exec, 234. 1 Finch 151. 2 Finch 172. Swinb. 25. Godolph. Orph. Leg. 149. [i] Temp. Ed. 1. Fitz. Attornment 22. P. 9 Ed. 2. Fitz. Ibid. 18. Co. Litt. 310. a. 312. b. Wentw. Off. of Exec. 234.

the

the Grantee for Life, this ſhall enure to him in Remainder. So if Tenant in Fee-ſimple makes a Leaſe for Life, the Remainder in Fee, and the Tenant for Life gives Notice to the Lord, this ſhall ſerve for him in Remainder, ſo that the Lord ſhall be compelled to avow upon him in Remainder, if the Tenant for Life dies. And ſo if an Infant makes a Leaſe for Years, the Remainder for Years to a Stranger, rendering Rent, and at his full Age he accepts the Rent of the firſt Tenant for Years, this is an Aſſent to the Remainder, and he ſhall never ouſt him afterwards. So here the Eſtate deviſed to the Wife and to the Son in Remainder is but one Legacy, altho' it is diſtinct in Parts, and the Execution of it in the Wife is of the ſame Effect as if her Eſtate had been deviſed to another, with the Remainder over to the Son, and as if ſhe had given her Aſſent to the firſt Deviſee to enter. Wherefore the Entry of the Son after the Death of the Wife, and his Grant to the Plaintiff at his Age of 23 Years, was good. And of this Opinion was the whole Court.

Nota bene by the Reporter. *And Note, the finding that the Reverſion was in the Queen was (as it ſeems) at the Requeſt of the Defendants, to the Intent that if the Plaintiff's Title had not been good, the Poſſeſſion which he had might not be ſufficient to maintain the Action of Treſpaſs. And as to this, it ſeems to me that if the King is ſeized in Fee of Land, and a Stranger enters claiming it as his own, and continues in Poſſeſſion a Year and a Day, and another does a Treſpaſs upon the Land,* [a] *the Stranger ſhall not puniſh ſuch Treſpaſſor in an Action of Treſpaſs, for if he ſhould puniſh him, then the Treſpaſſor would be doubly puniſhed, for the King would alſo puniſh him, and an Intruder cannot gain ſuch Poſſeſſion againſt the King upon which he may have an Action of Treſpaſs.* [b] *And in* 19 Ed. 4. *in Treſpaſs for entering into his Cloſe and taking the Graſs, the Defendant pleaded that it was found by Office that the Land was eſcheated to the King, and there* Choke *ſaid that as to ſuch Things as ariſe out of the Land the Action is gone, becauſe the King ſhall be anſwered for them.* [c] *But in our Caſe inaſmuch as there is a Leaſe in* eſſe, *altho' the Plaintiff had not the true Intereſt thereof, yet ſuch Poſſeſſion as the Plaintiff had ſeems ſufficient to maintain an Action of Treſpaſs againſt a Stranger. For the Leſſee ſhall puniſh the Plaintiff by Action of Treſpaſs with* continuando, *whereby he is anſwerable to him who is the true Proprietor of the Leaſe for all the Profits, and therefore it ſeems that he ſhall puniſh a Stranger, altho' he cannot by his Entry gain any* [d] *Eſtate in reſpect of the Freehold which irremovably reſts in the Crown.* [e] *And in no Caſe can the King in Intruſion alledge Continuance abſolutely, for that ſhall be ſuppoſed againſt none but him who can gain an Eſtate by Wrong, yet the King may alledge Continuance* diverſis diebus et vicibus, *but not otherwiſe. But here inaſmuch as the Plaintiff's Title was good, this other Matter was out of Queſtion.*

[a] Hardr. 422. Plowd. Quær. § 373.

[b] M. 19 Ed. 4. 2. pl. 5. Ante 489 (a).

[c] See Ante 431 (b).

[d] Plowd. Quær. § 373.

[e] 1 Finch 241. Plowd. Quær. § 373.

And after theſe Arguments, in the End of this preſent *Hillary* Term in the 21ſt Year of the Reign of Queen *Elizabeth*, the Apprentice demanded Judgment for the Plaintiff. And *Wray* Chief Juſtice ſaid, I and my Companions have conferred together upon this Matter, and we take it that notwithſtanding the whole Term was firſt deviſed to the Son, the Deviſe afterwards to the Wife is good, and in Senſe and Intent ſhall precede the Deviſe to the Son, and that the Deviſe to the Wife of the Occupation and Profits is in Subſtance a Deviſe of the Houſe and Park itſelf, and that the Occupation of the Wife, and her Education of the Iſſues all the Time after the Death of the Teſtator until the Grant made by her to her Siſter, was an Execution as well of the Eſtate given to her as of the Remainder given to the Son, and that the Entry and Grant of the Son to the Plaintiff after his full Age is good. For which Reaſon you ſhall have Judgment. And he commanded Judgment to be entered for the Plaintiff, which was accordingly done, and it was as follows.

The Judgment. At which Day before the Lady the Queen at *Weſtminſter* came as well the aforeſaid *Richard Paramour* in his own proper Perſon, as the aforeſaid *Raphael* and *George* by their Attorney aforeſaid, whereupon all and ſingular the Premiſſes being ſeen, and by the Court of the ſaid Lady the Queen now here more fully underſtood, and mature Deliberation being thereupon had, it is conſidered that the aforeſaid *Richard Paramour* recover againſt the aforeſaid *Raphael Yardley* and *George Smart* his Damages aforeſaid by the Jurors aforeſaid in Form aforeſaid aſſeſſed, and alſo 13 l. for his Coſts and Charges by him about his Suit in this Behalf expended, to the ſame *Richard Paramour* by the Court of the ſaid Lady the Queen now here with his Aſſent of Increaſe adjudged. Which ſaid Damages in the whole amount to 34 l. And the aforeſaid *Raphael Yardley* and *George Smart* be taken, &c.

A brief

A brief Report of the Arguments made in the Exchequer, *and of the Reſolution of the Barons, and of the Judgment afterwards given thereupon, in* Hillary *Term in the* 15*th Year of the Reign of Queen* Elizabeth, *in a Caſe upon a Bill of* Intruſion *exhibited in* Hillary *Term in the* 11*th Year of the Reign of the ſaid Queen by the Queen's Attorney, againſt* Thomas Walſingham *Eſquire, and* John Gillibrand, *for an Intruſion ſuppoſed to be made by them the firſt Day of the Reign of the ſaid Queen into one Meſſuage and certain Parcels of Land, Parcel of the Manor of* Eaſt-Peckham *in the County of* Kent, *late Parcel of the Poſſeſſions of Sir* Thomas Wyat *Knight, who was lately attainted of High Treaſon. Which Judgment was given againſt the ſaid Defendants, who thereupon afterwards brought a Writ of Error in the* Exchequer-Chamber, *where the Judgment was affirmed, in* Eaſter *Term in the* 21*ſt Year of the Reign of Queen* Elizabeth, *by Sir* Thomas Bromley *Knight, Chancellor of* England, *and Sir* William Cecil *Knight, Lord* Burleigh, *and Lord Treaſurer of* England, *the Report of which Judgment in the* Exchequer-Chamber *follows after the Report of the Arguments made before the firſt Judgment, which were digeſted and written, after the ſame was given, in the ſame Manner as they were then collected and taken. And the Record appears among the Records of* Hillary *Term* 11 Eliz. Rot. 212. *and was as follows.*

Kent. *BE it remembered*, that *Gilbert Gerard* Eſquire, Attorney-General of the Lady the Queen now, who proſecutes for the ſame Lady the Queen, being preſent here in Court the 20th Day of *January* in this ſame Term in his proper Perſon, for the ſame Lady the Queen gave the Court here to underſtand and be informed, that whereas one Meſſuage or Tenement called the *Curtelage* of *Eaſt-Peckham* otherwiſe called *Great-Peckham*, 120 Acres of Land, 16 Acres of Meadow, 30 Acres of Wood with the Appurtenances in *Eaſt-Peckham* aforeſaid, late in the ſeveral Occupations of *Anthony Weldon* Eſquire, *Thomas Cocks*, and others, and one Meadow called *Multon-Mead* in *Eaſt-Peckham* aforeſaid, late Parcel of the Lands and Poſſeſſions of *Thomas Wyat* Knight, late of High Treaſon attainted, the 17th Day of *November* in the 1ſt Year of the Reign of the ſaid Lady the Queen now, and long before, and always afterwards in the Hands and Poſſeſſion of the ſaid Lady the Queen now were, and of Right ought to be, by Reaſon of the Attainder aforeſaid, in Right of her Crown of *England*, as in many Records, Rolls, and Remembrances of this Exchequer more fully appears of Record: Nevertheleſs one *Thomas Walſingham* Eſquire and *John Gillibrand*, the Laws of the ſaid Lady the Queen now not fearing, but intending and contriving the Diſinheritance of the ſame Lady the Queen, with Force and Arms, &c. in and upon the Poſſeſſion of the ſaid Lady the Queen of the Premiſſes entered, intruded, and made Ingreſs, and the Iſſues and Profits thereof ariſing to their own proper Uſes perceived and had, and yet do perceive and have; that Treſpaſs from the ſame 17th Day of *November* hitherto and yet continuing, in Contempt of the ſaid Lady the Queen now, and againſt her Laws. Wherefore the aforeſaid Attorney of the Lady the Queen for the ſame Lady the Queen prays the Advice of the Court in the Premiſſes, and that the aforeſaid *Thomas Walſingham* and *John Gillibrand* may come here to anſwer to the ſaid Lady the Queen in the Premiſſes.

Plea. And now, viz. came here the aforeſaid *Thomas Walſingham* and *John Gillibrand*, viz. the ſaid *Thomas Walſingham* by *John Marwood* his Attorney thereunto by the Grace of the Court ſpecially admitted, and the aforeſaid *John Gillibrand* in his proper perſon. And they pray *Oyer* of the Information aforeſaid, and it is read to them. Which being heard and underſtood, they complain that they by Colour of the Premiſſes in the ſaid Information ſpecified ſhall be grievouſly vexed and diſquieted, and that by no Means juſtly, becauſe by proteſting that the Information aforeſaid is inſufficient in Law, to which they have no Neceſſity, nor are by the Law of the Land bound to anſwer, for Plea nevertheleſs as to the coming with Force and Arms, or whatſoever that is againſt the Peace, or in Contempt of the ſaid Lady the Queen, and alſo of the whole further Treſpaſs and Contempt by them above ſuppoſed to be done, they the ſame *Thomas Walſingham* and *John Gillibrand* ſay that they are not guilty thereof, nor is either of them guilty thereof, and of this they the ſame *Thomas* and *John* put, and each of them puts, himſelf upon the Country, and the aforeſaid Attorney, &c. likewiſe, &c. And as to the Entry, Intruſion, and Ingreſs into the aforeſaid one Tenement and all and ſingular other the Premiſſes within the Manor of *Peckham* otherwiſe *Eaſt-Peckham* in the Information aforeſaid ſpecified, they the ſame *Thomas* and *John* ſay, that long before the aforeſaid 17th Day of *November* in the ſaid Information ſpecified, and before the aforeſaid Lady the Queen or any of her Progenitors had any Thing of or in the aforeſaid Meſſuage and other the Premiſſes, and long before the Treaſon by the aforeſaid *Thomas Wyat* Knight in the Information aforeſaid named, committed or perpe-

trated, one *George Moulton* Eſquire was ſeized of and in the aforeſaid Meſſuage and other the Premiſſes in *Peckham* aforeſaid otherwiſe *Eaſt-Peckham* in the Information aforeſaid ſpecified in his Demeſn as of Fee. And the aforeſaid *George* being ſo thereof ſeized, he enfeoffed thereof one *Edmund Walſingham* Knight, to have and to hold the aforeſaid Meſſuage, and all and ſingular other the Premiſſes in *Peckham* otherwiſe *Eaſt-Peckham* aforeſaid in the Information aforeſaid ſpecified, to him, his Heirs and Aſſigns for ever. By Virtue of which ſaid Feoffment the aforeſaid *Edmund Walſingham* Knight into the aforeſaid Meſſuage and other the Premiſſes in *Peckham* otherwiſe *Eaſt-Peckham* aforeſaid in the Information aforeſaid ſpecified entered, and was thereof ſeized in his Demeſn as of Fee. And the aforeſaid *Edmund* being ſo thereof ſeized, he the 9th Day of *February* in the 4th Year of the Reign of Lord *Edward* late King of *England* the *Sixth* of ſuch his Eſtate died thereof ſeized, after the Death of which ſaid *Edmund* the Tenement aforeſaid and all and ſingular other the Premiſſes in *Peckham* otherwiſe *Eaſt-Peckham* aforeſaid in the Information aforeſaid ſpecified deſcended to the aforeſaid *Thomas Walſingham* Eſquire, as Son and Heir of the aforeſaid *Edmund*. By Reaſon whereof he the ſame *Thomas Walſingham*, long before the aforeſaid Time when, &c. into the aforeſaid Tenement and other the Premiſſes entered, and was thereof ſeized in his Demeſn as of Fee. And the aforeſaid *Thomas Walſingham* in his own proper Right, and the aforeſaid *John Gillibrand* as Servant of the aforeſaid *Thomas Walſingham* and by his command, the Iſſues and Profits of all and ſingular the Premiſſes in the aforeſaid Information ſpecified perceived and had, and yet perceive and have, as it was and is lawful for them; without that that they the aforeſaid *Thomas Walſingham* and *John Gillibrand* in and upon the Poſſeſſion of the ſaid Lady the Queen of the Tenements aforeſaid and other the Premiſſes in the Information aforeſaid ſpecified, or of any Parcel thereof, intruded, or either of them intruded, in Manner and Form as by the Information aforeſaid above is ſuppoſed; and without that that the aforeſaid Tenement and other the Premiſſes in the Information aforeſaid ſpecified, the ſaid 17th Day of *November* in the ſame Information ſpecified, or ever before or after, were in the Hands and Poſſeſſion of the ſaid Lady the Queen, in Manner and Form as by the Information aforeſaid above is ſuppoſed· * With this that they the ſame *Thomas Walſingham* and *John Gillibrand* will aver and ſay, that *George Wyat* the Son of the ſaid *Thomas Wyat* of High Treaſon attainted is alive, viz. at *Oxford* in the County of *Oxford*. All and ſingular which they the ſame *Thomas Walſingham* and *John Gillibrand* are ready to verify as the Court, &c. Wherefore they pray Judgment, and that they as to the Premiſſes from this Court may be diſmiſſed, and either of them be diſmiſſed.

* See Heath's Max. 163. Poſt 564.

Replication. And the aforeſaid Attorney-General of the Lady the Queen now, who proſecutes for the ſame Lady the Queen in this Behalf, by proteſting not acknowledging any Thing by the aforeſaid *Thomas Walſingham* and *John Gillibrand* above alledged to be true, for Plea for the ſame Lady the Queen ſays, that the Tenements aforeſaid with the Appurtenances in the Information aforeſaid ſpecified are, and at the aforeſaid Time of the Entry and Intruſion aforeſaid made, and alſo from Time whereof the Memory of Man is not to the contrary, were, Parcel of the Manor of *Peckham* otherwiſe *Eaſt-Peckham* in the aforeſaid County of *Kent*. And that long before the aforeſaid *George Moulton* had any Thing in the Tenements aforeſaid with the Appurtenances in the Information aforeſaid ſpecified, Lord *Henry* late King of *England* the *Eighth*, the Father of the ſaid Lady the Queen now, was ſeized of and in the aforeſaid Manor of *Peckham* otherwiſe *Eaſt-Peckham* with the Appurtenances whereof, &c. in his Demeſn as of Fee, in Right of his Crown of *England*. And the ſame late King being ſo thereof ſeized, he by his Letters-Patent ſealed under his great Seal of *England*, bearing Date at *Weſtminſter* in the County of *Middleſex* the 20th Day of *November* in the 31ſt Year of his Reign, in Conſideration of the good, true, and faithful Service which one *Thomas Wyat* Knight to the ſame late King before then had done and performed, of his ſpecial Grace, and of his certain Knowledge, and meer Motion had given and granted, and by the ſame Letters-Patent gave and granted, to the ſame *Thomas Wyat* the Manor aforeſaid with the Appurtenances among other Things, by the Name of his Manor of *Eaſt-Peckham*, with its Rights, Members, Appurtenances, and other Commodities whatſoever in his County of *Kent*; to have and to hold the Manor aforeſaid with the Appurtenances among other Things to the aforeſaid *Thomas Wyat*, and to his Heirs Males of his Body lawfully begotten, to their proper Uſe, to hold of the ſaid late King, his Heirs and Succeſſors, in chief, by the Service of the twentieth Part of a Knight's Fee, as by the ſame Letters-Patent more fully appears. By reaſon of which ſaid Letters-Patent the ſame *Thomas Wyat* into the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things, entered, and was thereof ſeized in his Demeſn as of Fee-Tail, by the Form of the Gift aforeſaid. And the ſame *Thomas Wyat* being ſo thereof ſeized, of ſuch his Eſtate thereof died ſeized, after whoſe Death the Manor aforeſaid with the Appurtenances whereof, &c. amongſt other Things deſcended to the aforeſaid *Thomas Wyat* Knight, as Son and Heir Male of the Body of the aforeſaid *Thomas Wyat* the Father lawfully begotten, whereby the ſame *Thomas Wyat* the Son

into

into the Manor aforeſaid with the Appurtenances whereof, &c. entered, and was thereof ſeized in his Demeſn as of Fee-Tail, by the Form of the Gift aforeſaid, &c. the Reverſion thereof belonging to the aforeſaid late King *Henry* the *eighth*, his Heirs and Succeſſors. And the ſaid *Thomas Wyat* the Son of the Manor aforeſaid with the Appurtenances whereof, &c. being ſo ſeized, the Reverſion thereof in form aforeſaid belonging to the ſaid late King *Henry* the *eighth*, his Heirs and Succeſſors, the ſame late King *Henry* the *eighth* of ſuch his Eſtate thereof died ſeized, after whoſe Death the Reverſion of the Manor aforeſaid with the Appurtenances whereof, &c. deſcended to Lord *Edward* the *ſixth* late King of *England*, as Son and Heir of the ſaid late King *Henry* the *eighth*, whereby the ſame late King *Edward* the *ſixth* was of the Reverſion of the Manor aforeſaid with the Appurtenances whereof, &c. ſeized as of Fee and Right, in Right of his Crown of *England*. And the ſame late King *Edward* the *ſixth* of the Reverſion aforeſaid in Form aforeſaid being ſeized, and the aforeſaid *Thomas Wyat* the Son of the Manor aforeſaid with the Appurtenances whereof, &c. in Form aforeſaid being ſeized, the ſame *Thomas Wyat* the Son gave the Tenements aforeſaid with the Appurtenances in which, &c. to the aforeſaid *George Moulton*, to have and to hold to the ſame *George* and to his Heirs for ever. By Virtue of which Gift the ſame *George Moulton* was of the Tenements aforeſaid with the Appurtenances ſeized to him and to his Heirs, according to the Force and Effect of the Feoffment aforeſaid, the Reverſion thereof, for Default of Heirs Males of the Body of the ſaid *Thomas Wyat* the Son, to the aforeſaid late King *Edward* the *ſixth*, his Heirs and Succeſſors, in Form aforeſaid belonging. And the ſame *George* being ſo thereof ſeized, gave the ſaid Tenements with the Appurtenances to the aforeſaid *Edmund Walſingham* Knight, to have to him and to his Heirs for ever. By virtue of which Gift the ſame *Edmund* was thereof ſeized of ſuch Eſtate as by the Gift aforeſaid to the aforeſaid *George* made to the ſame *George* paſſed, the Reverſion thereof in Form aforeſaid belonging. And the ſame *Edmund* being ſo thereof ſeized, of ſuch his Eſtate died ſeized, having Iſſue the aforeſaid *Thomas Walſingham*, who was his Heir; after the Death of which ſaid *Edmund*, the ſame *Thomas Walſingham* into the Tenements aforeſaid with the Appurtenances entered, and was thereof ſeized of ſuch Eſtate as by the Gift aforeſaid to the aforeſaid *George* made to the ſame *George* paſſed, the Reverſion thereof in Form aforeſaid belonging. And the ſame *Thomas Walſingham* being ſo thereof ſeized, the Reverſion thereof, for Default of Heirs Males of the Body of the aforeſaid *Thomas Wyat* the Son, to the ſaid late King *Edward* the *ſixth* in Form aforeſaid belonging, the ſame late King *Edward* the *ſixth* of ſuch his Eſtate thereof died ſeized, after whoſe Death the Reverſion in Fee-Simple of the Tenements aforeſaid with the Appurtenances amongſt other Things deſcended to Lady *Mary* late Queen of *England*, as Siſter and Heir of the aforeſaid late King *Edward* the *ſixth*; whereby the ſame late Queen was ſeized of the Reverſion of the Tenements aforeſaid with the Appurtenances as of Fee and Right, in Right of her Crown of *England*. And the ſame late Queen being ſo thereof ſeized, and the aforeſaid *Thomas Walſingham* of the Tenements aforeſaid with the Appurtenances in Form aforeſaid being ſeized, the Reverſion thereof, for Default of Heirs Males of the Body of the ſame *Thomas Wyat* the Son, to the ſaid late Queen *Mary* in Form aforeſaid belonging, by a certain Inquiſition taken at *Weſtminſter* in the County of *Middleſex* the 13th Day of *February* in the 1ſt Year of the Reign of the ſaid Lady late Queen *Mary* before *William Peter* Knight, one of the chief Secretaries of the ſaid late Queen, and *Thomas Bromley* Knight, Chief Juſtice of the ſaid late Queen aſſigned to hold Pleas before the ſaid late Queen herſelf, and his Companions, by Virtue of the Letters-Patent of the ſaid late Queen to them thereupon directed, to enquire by the Oath of good and lawful Men of the County of *Middleſex*, as well within Liberties as without, by whom the Truth of the Matter might be better known, of whatſoever Treaſons, Miſpriſions of Treaſons, Inſurrections, Rebellions, unlawful Aſſemblies, unlawful Conventicles, ſpeaking of Words, Confederacies, falſe Allegiances, Contempts, Falſities, Negligences, Concealments, Oppreſſions, Riots, Routs, Murders, Felonies, and other Offences whatſoever, and alſo the Acceſſaries of the ſame, in the ſame County perpetrated and committed, and the ſame Treaſons and other the Premiſſes according to the Law and Cuſtom of the Realm of *England* to hear and determine aſſigned, by the Oath, &c. it was found that the aforeſaid *Thomas Wyat* the Son, by the Name of *Thomas Wyat* of *Allington* in the County of *Kent* Knight, and other falſe Traitors and Rebels againſt the ſaid late Queen, not having God before their Eyes, nor conſidering their due Allegiances, but ſeduced by the Inſtigation of the Devil, imagining, endeavouring, and compaſſing to deprive the ſaid late Queen their Sovereign of the regal Eſtate, Title, Government and Power of her Realm of *England*, and to change and alter the Government of the ſame Realm after their own Will and Pleaſure, with Force and Arms, viz. with Standards diſplayed, Swords, Spears, Lances, Bows, Arrows, Coats of Mail, Shields, Iron Helmets, Engines or Fire-Arms commonly called Sawker and Hand-guns, and with other Arms as well defenſive as offenſive in warlike Manner armed and arrayed, the 7th Day of *February* in the 1ſt Year of the Reign of

the ſaid late Queen, at the Town of *Brandford* in the County of *Middleſex*, to execute and perform their moſt wicked Intention aforeſaid, falſly, rebelliouſly, and traiterouſly, with a great Multitude of Rebels and public Enemies of the ſaid late Queen and of her Realm of *England*, to the Number of 3000 Men, aroſe, met, aſſembled, and joined themſelves together, and a moſt cruel War againſt the ſaid late Lady the Queen at *Brandford* aforeſaid then falſly, hoſtilely, rebelliouſly, and traiterouſly prepared and levied, and being ſo armed and arrayed, going, riding, and marching from *Brandford* aforeſaid towards the City of *London* (the ſaid late Queen then being and reſiding at her Palace in the City of *Weſtminſter* in the aforeſaid County of *Middleſex*) a moſt fierce and terrible War, at *Charing Croſs* within the Pariſh of *St. Martin's* in the Fields in the City of *Weſtminſter* in the ſaid County of *Middleſex*, againſt the ſaid late Queen then and there falſlely, hoſtilely, rebelliouſly, and moſt traiterouſly made, ſtruck, and perpetrated, againſt their due Allegiances, to the great Danger of the royal Perſon of the ſaid late Queen, and of the Subverſion of her Realm of *England*, and againſt the Peace of the ſaid late Queen, her Crown and Dignity, and alſo againſt the Form of divers Statutes in ſuch Caſe made and provided, &c. And afterwards, viz. on *Thurſday* the 15th Day of *March* in the 1ſt Year aboveſaid, before *William* Marquiſs of *Wincheſter* Treaſurer of *England*, *Henry* Earl of *Arundel* Lord Steward of the Houſhold of the ſaid late Queen, and his Companions, Juſtices of the ſaid late Queen aſſigned by the Letters-Patent of the ſame late Queen to them directed, reciting that whereas *Thomas Wyat* late of *Allington* in the County of *Kent* Knight, otherwiſe called *Thomas Wyat* late of *London* Knight, together with others, before *William Peter* Knight, *Thomas Bromley* Knight, *Richard Morgan* Knight, *John Baker* Knight, *William Portman* Knight, *Edward Saunders* one of the Juſtices of the ſaid late Queen of the Bench, Juſtices of the ſaid late Queen lately aſſigned to enquire in the County of *Middleſex*, amongſt other Things, of whatſoever Treaſons, Miſpriſions of Treaſons, Rebellions, unlawful Aſſemblies, unlawful Conventicles, ſpeaking of Words, Confederacies, falſe Allegiances, Contempts, Falſities, Negligences, Concealments, Oppreſſions, Riots, Routs, Murders, Felonies, Treſpaſſes, or other Offences whatſoever, and the Acceſſaries of the ſame, within the County of *Middleſex* aforeſaid, by whomſoever and howſoever had, done, perpetrated, or commited, and by whom or to whom, when, how, and in what Manner, and of other Articles and Circumſtances the Premiſſes and every of them, or any of them, or otherwiſe howſoever concerning, more fully the Truth, of divers High Treaſons by him committed and perpetrated had ſtood indicted for the ſame, and the ſame late Queen the ſame Marquiſs, Earl, and their Companions Commiſſioners before named, and four of them in that Behalf aſſigned, and by the ſame Letters-Patent among other Things to the ſame Marquiſs and Earl and the other Commiſſioners aforeſaid, or four of them, full and ſufficient Power and Authority and ſpecial Command gave and granted, the Indictment aforeſaid concerning the ſame *Thomas Wyat*, whereby the ſame *Thomas Wyat* alone or together with others of any Treaſons within the County of *Middleſex* aforeſaid ſtood indicted, with all Things touching it, from the aforeſaid *William Peter* Knight, *Thomas Bromley* Knight, and the other Commiſſioners before named, or from any of them before whom it was taken, and in whoſe Cuſtody it then remained, to receive, and it to inſpect, and at certain Days and Places which they ſhould appoint for that Purpoſe to meet at *Weſtminſter* or elſewhere in the ſaid County of *Middleſex*, in a convenient Place, and the ſaid *Thomas* to call before them, and him thereupon to hear and examine, and to compel him to anſwer, and at a due End to try and adjudge, and alſo ſo many and ſuch good and lawful Men of the County of *Middleſex* aforeſaid, by whom the Truth of the Matter in that Behalf might be better known, at the Days and Places aforeſaid for the Cauſe and Cauſes aforeſaid before them to compel to appear, and the Truth thereof being found, to give Judgment thereupon by them in that Behalf according to the Laws and Statutes and Cuſtoms of the Realm of *England*, and againſt the aforeſaid *Thomas Wyat* to proceed, give Sentence, and adjudge, and Execution thereof to command to be done, and all and ſingular other Things which in that Behalf ſhould appertain and be requiſite to do, exerciſe, and execute.

* Here is a Chaſm in the Record.

* At *Weſtminſter* aforeſaid came the aforeſaid *Thomas Wyat* the Son by *John Gage* Knight of the moſt noble Order of the Garter, Conſtable of the ſaid late Queen of her Tower of *London*, by Virtue of the Writ of the aforeſaid late Queen, and of the Precept of the Juſtices aforeſaid to the Bar there brought; and the ſame *Thomas Wyat* the Son of the High Treaſons aforeſaid on him above charged being then and there aſked how he would thereof acquit himſelf, ſaid that he could not deny, nor but that he of the Treaſons aforeſaid was guilty, and then there expreſly confeſſed the Treaſons aforeſaid on him above charged, and put himſelf thereof into the Hands of the ſaid late Queen. Whereupon then and there the Serjeant of the ſaid late Queen, and the Attorney of the ſaid late Queen, for that the aforeſaid *Thomas Wyat* the Treaſons aforeſaid on him in Form aforeſaid charged expreſly confeſſed, according to the due Form of Law prayed againſt

the ſaid *Thomas Wyat* the Son Judgment and Execution thereupon for the ſaid late Queen to be had. Whereupon Judgment thereof then and there by the aforeſaid Marqueſs and Earl and their Companions was given, viz. * that the aforeſaid *Thomas Wyat* ſhould be carried by the aforeſaid Conſtable to the aforeſaid Tower of *London*, and from thence ſhould be drawn thro' the middle of the City of *London* unto the Gallows of *Tyburn*, and there be hanged up, and cut down alive to the Ground, and that his Entrails ſhould be taken out of his Belly, and be burnt, he living, and that his Head ſhould be cut off, and his Body be divided into four Parts, and that the Head and thoſe Quarters ſhould be put where the ſaid late Queen would appoint. And afterwards the aforeſaid *Thomas Wyat* the Son was put to Death, according to the Judgment aforeſaid, at *Eaſt-Smithfield* in the County of *Middleſex*. † And afterwards, viz. at a Parliament of the Lord *Philip* and Lady *Mary* late King and Queen of *England* holden at *Weſtminſter* in the County of *Middleſex* the 12th Day of *November* the 1ſt and 2d Years of the Reign of the aforeſaid late King and Queen, amongſt other Things it was enacted in Manner and Form following, viz. that whereas *Henry* Duke of *Suffolk* late of *Brodegate* in the County of *Leiceſter*, *John Grey* of *Brodegate* Knight, *Thomas Grey* late of *Brodegate* in the County of *Leiceſter* Knight, and *Thomas Wyat* late of *Allington* in the County of *Kent* Knight, together with others in the ſame Statute named, had committed, perpetrated, and done many deteſtable and abominable Treaſons, to the moſt fearful Danger of the Deſtruction of the royal Perſon of the ſaid late Queen, and to the very great Loſs, Diſheriſon, and Deſolation of the Realm of the Lady the late Queen of *England*, if God of his infinite Goodneſs in ſeaſonable Time had not revealed to the ſaid late Queen the treaſonable Minds and Intentions of the ſame, for which Treaſons it plainly and manifeſtly appeared that the aforeſaid Duke and the other Perſons aforeſaid lawfully and juſtly, according to the due Form of Law, had been convicted and attainted, as by the Records thereof more fully appeared; that the ſaid Convictions and Attainders of the Offenders aforeſaid and of every of them ſhould be approved and confirmed by the Authority of the Parliament aforeſaid; and that the aforeſaid Duke, *John Grey*, *Thomas Grey*, and *Thomas Wyat*, and the others of the Treaſons aforeſaid ſo attainted, ſhould loſe and forfeit to the ſaid late Queen, her Heirs and Succeſſors, all their Honours, Manors, Meſſuages, Lands, Tenements, Rents, Reverſions, Remainders, Poſſeſſions, Offices, Rights, Conditions, Hereditaments, Goods and Chattles, of whatſoever Names, Natures, or Qualities they were, which they or any of them had the ſaid Day of their ſeveral Treaſons by them committed, or at any Time afterwards; and that all thoſe their Honours, Manors, Meſſuages, Lands, Tenements, Rents, Reverſions, Remainders, Poſſeſſions, Offices, Rights, Conditions, Hereditaments, Goods, and Chattles by Authority of the ſame Parliament ſhould be veſted and adjudged in the actual and real Poſſeſſion of the ſaid late Queen, without any other Office or Inquiſition thereof from thenceforth to be taken or found: Saving to all and all Manner of Perſons, and Bodies politic and corporate, and to their Heirs, Aſſigns, and Succeſſors, and to every of them, others than the aforeſaid Duke and the other Perſons attainted, and their Heirs, and the Heirs of every of them, and of every Perſon and Perſons claiming to the Uſe or Uſes of them or of any of them, or to the Uſe of any Heir of the ſame, all ſuch Right, Title, Uſe, Poſſeſſion, Intereſt, Reverſion, Remainder, Entry, Condition, Fee, Office, Rent, Commodities, Commons, Titles, Entries for Conditions then broken or from thenceforth to be broken, given or grown, or from thenceforth to be given or to grow by Reaſon of any Condition made before the Treaſons aforeſaid committed, and all other Commodities and Hereditaments whatſoever, which they or any of them might or ought to have had, if the aforeſaid Act of Parliament had never been had or made, any Thing in the ſame Act ſpecified to the contrary notwithſtanding. And further the ſame Attorney of the Lady the Queen ſays, that the aforeſaid *Thomas Wyat* in the Indictment aforeſaid named, and the aforeſaid *Thomas Wyat* in the Act aforeſaid named, and the aforeſaid *Thomas Wyat* the Son in the Information aforeſaid ſpecified are one and the ſame Perſon, and not others nor divers. By Reaſon of which ſaid Attainder and Act the ſaid late King and Queen *Philip* and *Mary* were ſeized of the Tenements aforeſaid with the Appurtenances in their Demeſn as of Fee, in Right of the ſaid late Queen. And they being ſo thereof ſeized, the ſame late Queen of ſuch her Eſtate thereof died ſeized, after whoſe Death the Tenements aforeſaid with the Appurtenances among other Things deſcended to the ſaid Lady the Queen now, as Siſter and Heir of the ſaid late Queen *Mary*; whereby the ſame Lady the Queen now was and yet is ſeized of the Tenements aforeſaid with the Appurtenances in her Demeſn as of Fee, until the aforeſaid *Thomas Walſingham* and *John Gillibrand* the aforeſaid 17th Day of *November* in the 1ſt Year aboveſaid, with Force and Arms, &c. in and upon the Poſſeſſion of the ſaid Lady the Queen now of and in the Tenements aforeſaid with the Appurtenances entered, intruded, and made Ingreſs, in Manner and Form as by the Information aforeſaid for the ſaid Lady the Queen is ſuppoſed. And this the ſame Attorney for the ſame Lady the Queen is ready to verify as the Court, &c. Wherefore he prays Judgment, and that the aforeſaid *Thomas Walſingham* and *John Gillibrand* of the Intruſion aforeſaid may be convicted, &c.

* See Ante 387.

† See Ante 387, 388.

Demurrer to the Replication.

And the aforeſaid *Thomas Walſingham* and *John Gillibrand* for Replication ſay, and each of them for himſelf ſaith, that the Replication aforeſaid, and the Matter in the ſame contained are inſufficient in Law to charge them the ſame *Thomas* and *John* or either of them of or with the Intruſion and Contempt aforeſaid; wherefore for the Inſufficiency of the ſame Replication they the ſame *Thomas Walſingham* and *John Gillibrand* pray Judgment as before, &c.

Joinder.

And the Queen's Attorney rejoined to the Demurrer, &c.

THE CASE.

Tenant in Tail of the Gift of the Crown makes a Feoffment in Fee, the Reverſion being ſtill in the Crown, and afterwards is attainted of High Treaſon, the Right of the Intail is forfeited to the Crown; for no more paſſes by the Feoffment than for the Life of the Tenant in Tail, ſo that there remains in him a Right of the Intail to be forfeited; and tho' the Tenant in Tail himſelf againſt his own Feoffment can claim no Right at the Time of the Treaſon, but as any Benefit which he himſelf can claim from it, the Intail is put in Abeyance, during his Life, by ſuch for the Benefit of

THE Caſe was thus. King *Henry* 8. in the 31ſt Year of his Reign gave the Manor of *Eaſtpeckham*, whereof the Premiſſes are parcel, to Sir *Thomas Wyat* Knight, and to his Heirs Males of his Body begotten, who died ſeized, leaving Iſſue Sir *Thomas Wyat* Knight, who entered, and in the Time of King *Edward* 6. made a Feoffment of the ſaid Manor to one *George Moulton* and to his Heirs, who made a Feoffment thereof to Sir *Edmund Walſingham* Knight and to his Heirs, who died thereof ſeized in the 4th Year of the Reign of King *Edward* 6. leaving Iſſue *Thomas Walſingham* the Defendant, who entered into the Premiſſes. And afterwards in the 1ſt Year of the Reign of Queen *Mary* the ſaid Sir *Thomas Wyat* the Son was attainted by his own Confeſſion of High-treaſon done in the ſaid 1ſt Year of her Reign, and was put to Death. And afterwards by an Act of Parliament made in the 1ſt and 2d Years of the Reign of King *Philip* and Queen *Mary* the ſaid Attainder was confirmed, and further it was enacted that the ſaid Sir *Thomas Wyat* the Son ſhould forfeit to the ſaid Queen, and to her Heirs and Succeſſors, all his Manors, Lands, Tenements, Reverſions, Remainders, Poſſeſſions, Rights, Conditions, and Hereditaments, of whatſoever Name, Nature, or Quality they were, which he had the Day of the Treaſons committed, or at any Time afterwards; and that all thoſe Manors, &c. by the Authority of the ſaid Parliament ſhould be veſted and adjudged in the actual and real Poſſeſſion of the ſaid late Queen, without any Office or Inquiſition thereof afterwards to be found: Saving to all Perſons and their Heirs, others than the ſaid Sir *Thomas Wyat* and his Heirs, all ſuch Right, Title, Uſe, Poſſeſſion, and Intereſt which they had or ſhould have had if the Act had not been made. And the Queen's Attorney ſued forth a Bill of Intruſion againſt the ſaid *Thomas Walſingham* and *John Gillibrand* his Servant: And all the above Matter was pleaded, and it was averred by the Defendants that the ſaid Sir *Thomas Wyat* who was attainted had Iſſue alive one *George Wyat* his Son. And on the Part of the Queen it was ſhewn that the Reverſion in Fee-ſimple continued always in the Crown. And upon this Matter the Defendants and the Queen's Attorney demurred in Law.

Feoffment, yet ſince it would have continued ſtill in him for the Benefit of the Heir, if he had not been attainted, it ſhall likewiſe continue in him the King. S. P. adjudged Cro. C. 427 *Stone v. Newman.* 1 H. H. P. C. 242, 243. 2 Hawk. P. C. 453, § 24. 2 Bac. Abr. 580. Sed vide Hob. 341.

Mich. Term 13 & 14 *Eliz.*

And the Matter was argued at large in *Michaelmas* Term in the 13th and 14th Years of the Reign of Queen *Elizabeth* by *Bullock* and Serjeant *Manwood* on the Part of *Walſingham*, and by an Apprentice of the Middle-Temple and *Barham* Queen's Serjeant on the Part of the Queen. And the principal Point argued was, what Eſtate, Right, or Intereſt of the Land was in Sir *Thomas Wyat* the Son at the Time of the Treaſon committed or afterwards. For the Statute of 26 *H.* 8. *cap.* 13. ordains *that thoſe who are attainted of Treaſon ſhall forfeit to the King all Lands, Tenements, or Hereditaments which they have of any Eſtate of Inheritance in Uſe or Poſſeſſion by any Right, Title, or Means.* And the Statute *of* 33 *H.* 8. *cap.* 20. ordains *that the King ſhall have as great Benefit and Advantage by Attainder of Treaſon as well of Uſes, Rights, Entries, and Conditions, as of Poſſeſſions, Reverſions, Remainders, and all other Things, as if it had been made and declared by Authority of Parliament.* And this private Act which confirms the Attainder of Sir *Thomas Wyat* ordains *that he ſhall forfeit to the Queen all his Manors, Lands, Tenements, Reverſions, Remainders, Poſſeſſions, Rights, and Hereditaments which he had the Day of the Treaſon committed or afterwards.* In each of which Acts there is a Saving of the Rights and Intereſts of Strangers. So that if Sir *Thomas Wyat* at the Time of the Treaſon committed or at any Time afterwards had nothing in the Land in Poſſeſſion or in Reverſion, nor any Right or Title to it, then he could not forfeit any Thing by the Common Law, nor by the Words or Intent of any of the Statutes. But *Thomas Walſingham* the Defendant who came to the Land by Deſcent, whoſe Father came in by *Moulton*, who came in by the Feoffment of Sir *Thomas Wyat*, has his Right and Poſſeſſion ſaved to him by the Saving of each of the Statutes, and therefore he ought to retain the Land. So that it is to be conſidered what Eſtate and Right Sir *Thomas Wyat* had after the Feoffment, and at the Time of the Treaſon committed, or at any Time afterwards.

Tenant in Tail, the Reverſion in the King, makes a Feoffment, this does not diſcontinue nor deveſt the Reverſion out of the King. Vide Godb. 314. Poſt 562 agreed.

And as to this, firſt it was confeſſed by the Counſel who argued on both Sides, that by the Feoffment which Sir *Thomas Wyat* made to *Moulton* the Reverſion in Fee-ſimple which the King had was not diſcontinued nor touched. [a] For the King is a Body politic of himſelf, of all others moſt high and worthy, to whom no Freehold nor Eſtate of Inheritance can be given or conveyed by Matter in Deed, or otherwiſe, but by Matter of Record, and by the ſame Reaſon no Eſtate of Freehold or Inheritance can be taken or deveſted out of him by Matter in Deed, or otherwiſe,

[a] See Ante 213 (i) and the Books there cited.

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wiſe, but by Record only. And therefore no Freehold or Inheritance can be taken from him by Diſſeizin, which is Matter in Deed, no more can it by Feoffment, which is alſo Matter in Deed, for which Reaſon the Feoffment of Sir *Thomas Wyat*, who was Tenant in Tail, did not take away nor deveſt the Reverſion in Fee-ſimple out of the King, becauſe the Feoffment was but Matter in Deed. [b] And by the Common Law a common Recovery againſt the King's Tenant in Tail was not ſufficient to take the Reverſion out of the King, altho' the [c] Iſſue in Tail was bound, and he ſhall not falſify by Reaſon of a Recovery in Value, for he who has no Right cannot take an Eſtate out of the King without his Will. [d] And hereupon the Caſe in 25 *Ed.* 3. was cited, where upon Default of Tenant for Life, the King who was in the Reverſion prayed to be received by his Attorney and his Serjeants, and ſent his Writ to the Juſtices for that Purpoſe, and he could not be received; for if he ſhould be received, the Demandant ſhould count againſt the King as Tenant, which he cannot do, [e] for the Subject is driven to his Petition againſt the King, and ſhall not implead him nor count againſt him as Tenant in any Caſe. So that altho' the King was not there received, yet he was at no Prejudice, for if the Demandant's Title is faint, he ſhall not gain the Reverſion againſt the King by ſuch Recovery, [f] but if the Demandant's Title is good, it ſeems that by his Recovery againſt the Tenant for Life he ſhall deveſt the Fee-ſimple out of the King who is in Reverſion or Remainder, as well where the Tenant for Life does not pray in Aid of the King, and *Procedendo* is not granted, as where he does pray in Aid of the King, and *Procedendo* is granted in *Loquela* and *Ad judicium*. So that the Reverſion or Remainder ſhall not be taken out of the King by Matter in Deed without good Title, nor by Matter of Record without making him Privy.

b S. P. 32 H. 8. Bro. Diſcontinuance de Poſſeſſion 32. 33 H 8. Bro. Recovery in Value 31. Tayle 41. Aſſurance 6. B. N. C. § 145. 177, 224. Dy. 32. pl. 1. Co. Litt. 335. a. 372. b. Cro. Car. 430. Pig. on Recov. 85, 86, 87.

c 11 Co. 39. b. Poſt 554 (1) T. Raym. 347, 348. But now by the Statute of 34 & 35 *H.* 8. *cap.* 20. ſuch Recovery ſhall not bind the Iſſue in Tail.

d M. 25 Ed. 3. 48. Fitz. Reſceipt 28. Ante 241 (f) and (h).

e See Ante 241 (g) and the Books there cited.

f S. P. Co. Litt. 241. a. 354. b. 2 Co. 53. a. 1 Rol. R. 214. Pig. on Recov. 87. As if a Diſſeizor makes a Leaſe for Life, the Remainder to the King, and the Diſſeiſee recovers againſt the Tenant for Life, the King's Remainder ſhall be thereby deveſted.

But the Apprentice ſaid that ſometimes the Reverſion ſhall be deveſted out of the King by Matter in Deed and in Law together, without making him Privy. [g] As if Tenant in Tail of the Gift of a common Perſon makes a Feoffment in Fee, the Feoffee gives the Land in Fee-ſimple to the King by Deed enrolled, the King gives the Land by his Letters patent to the firſt Donee in Tail, to have and to hold to him and to his Heirs of his Body begotten, and he has Iſſue, and dies, the Iſſue enters, now he is remitted to the firſt Tail, and thereby the Reverſion in Fee-ſimple is deveſted out of the King, and reſtored to the firſt Donor, for here there is a former Right, and the former Right, and Matter in Deed, and Matter in Law all concur together. [h] So perhaps, he ſaid, ſhould it be if a Man makes a Leaſe for Life, upon Condition that if the Tenant for Life does ſuch an Act, he ſhall have the Fee, and the Leſſor grants the Reverſion by Deed enrolled to the King, there if the Tenant for Life afterwards performs the Condition, he ſhall have the Fee thereby, and ſhall deveſt the Reverſion out of the King, for the Reverſion was bound with the Condition, and foraſmuch as the Condition is older than the Title of the King, this elder Title, and the Matter in Deed, and the Operation of the Law thereupon ſhall take the Reverſion out of the King without Suit or other Circumſtance, for the Fee-ſimple ought to veſt in the Tenant for Life at the ſame Inſtant that he performs the Condition or never. [i] But no tortious Act can take the Reverſion out of the King.

Where the Reverſion in the Crown may be deveſted by Matter in Deed and in Law together, without making the King Privy.

g See the like Point upon the ſame Ground Ante 489 (g).

h See like Point *Nichols v. Nichols* Ante 489, where A. made a Leaſe for Life to B. upon Condition that if the Leſſor died without Iſſue, the Leſſee ſhould have Fee, and the Leſſor was attainted of Treaſon, and died without Iſſue, and there it was held by ſome of the Judges, that admitting that the Reverſion was actually veſted in the King by the Attainder, yet when the Leſſor died without Iſſue, at which Time the Condition was performed, the Leſſee ſhould have the Fee, and the Reverſion ſhould be deveſted out of the King by Operation of Law by Force of the Condition, without *Monſtrans de droit*, or other Matter of Record.

i Co. Litt. 354. b.

[k] And as to the Caſe in 45 *Aſs. pl.* 6. (which had been cited) where by an Office returned into the Chancery it was found that King *Henry* 3. gave a Manor to the Earl of *Cornwal* and to his Heirs of his Body iſſuing, and that the Earl was dead without Heir of his Body in the Time of King *Edward* 1. and one M. came and pleaded that the Earl by his Charter ſhewn forth gave the Manor in Fee with Clauſe of Warranty to one W. by whom the ſame M. claimed, in Exchange for another Manor, and he ſaid that the Earl was Anceſtor to King *Edward* 1. and that Aſſets deſcended to the ſaid King *Edward* 1. viz. the Manors of A. B. and C. and upon Search it was found true that the Aſſets were deſcended to him, and it was there adjudged that the ſaid M. ſhould have Reſtitution; from whence (it had been ſaid) it ſeems that the Gift of the Earl deveſted the Reverſion out of the King; to this it was anſwered, that the Caſe does not prove that the Gift of the Earl deveſted the Reverſion out of the King, but it ought to be underſtood there that the Gift of the Earl to W. was before the Statute *de donis conditionalibus*, at which Time there was no Reverſion, but the Earl had a Fee-ſimple conditional, ſo that what the Reporter of the Caſe calls a Reverſion could not be a Reverſion, but it was a [a] Poſſibility of a Reverſion; for the Caſe is there reported, that King *Henry* the Great-grandfather of King *Edward* 3. gave the Manor to the Earl of *Cornwal*, and to the Heirs of his Body iſſuing, ſaving the Reverſion to him and to his Heirs for Default of Iſſue, in which Caſe the Reporter miſtakes the Law where he terms it a Reverſion, for at that Time there was no Reverſion of an Eſtate-tail, but the whole was a Fee-ſimple conditional, for the Eſtate of the Fee-ſimple was not divided from the Eſtate-tail until the 13th Year of the Reign of King *Edward* 1. at which Time the Statute *de donis con-*

k 45 Aſs. pl. 6. Fitz. Garranty 68. Bro. 52. Aſſets per Deſcent 31. Prerogative 52. Tayle 34. Ante 234 (f).

a Pig. on Recov. 85.

ditionalibus

ditionalibus was made, which firſt divided the Fee-ſimple from the Eſtate-tail, ſo that the Report, as it is made, does not ſtand with the Law, and in order to make the Caſe agree with the Law, it ſhall be intended that the Earl of *Cornwal* aliened the Manor with Warranty before the Statute *de donis conditionalibus*, in which Caſe the King had no Reverſion, and the Warranty was collateral, [b] ſo that there was no Need then to have Aſſets, altho' the Aſſets might better ſatisfy the King in Reaſon. Wherefore that Caſe does not prove that the Feoffment of Tenant in Tail of the Gift of the King (which is but Matter in Deed) can deveſt the Reverſion out of the King. And ſo in the principal Caſe it was agreed by the Counſel on both Sides, that the Feoffment of Sir *Thomas Wyat* did not take away nor deveſt the Reverſion out of the King, but that the Reverſion continued in the King after the Feoffment as it was before.

[b] Vide Co. Litt. 374. b.

For the Defendants.

Nevertheleſs *Bullock* and *Manwood* ſaid, that by the Feoffment in Fee with Livery of Seizin made by Sir *Thomas Wyat* to *George Moulton* the whole Eſtate and Intereſt which *Wyat* had paſſed, and nothing was left in *Wyat* to be afterwards forfeited by him. For when a Man gives Land to one and to his Heirs, and makes Livery, all that he has in the Land ſhall paſs, whether it be a Right, Rent, Common, or other Intereſt, and to ſuch Purpoſe is the Livery made, which is a Ceremony made Uſe of to ſhew the voluntary Demiſe of all that the Party has in the Thing delivered by him, and the Receipt of the Livery is a Teſtimony of the other's voluntary Acceptance of all that is demiſed to him, and the Law ratifies the Intention which the Parties had in the Act, and gives it's Judgment that the Act ſhall be taken moſt ſtrongly againſt him that does it, and moſt beneficially for him to whom it is done. From whence it follows that nothing remained in Sir *Thomas Wyat* after the Livery, viz. neither an Eſtate nor Right, [c] for there cannot be a Right in any one (as *Manwood* ſaid) but where a Wrong was done before, and no Wrong was done here, for the Tenant in Tail might give the Land to another during his own Life without Prejudice to any, for the Reverſion was not touched by the Feoffment of *Wyat*, but it remained as it was before, and no Wrong was done to the Iſſue by the Feoffment, for he might have entered, and no Wrong was done to *Wyat* himſelf, for he voluntarily parted with the Eſtate which paſſed. So that there was no Eſtate nor Right in *Wyat* when he committed Treaſon, and conſequently the Statutes, which provide that *Wyat* who was attainted ſhould forfeit all his Hereditaments and Rights, do not affect *Wyat* as to the Land in Queſtion, becauſe he had no Inheritance nor Right in it.

[c] 2 Finch 106.

But perhaps it may be objected that the Eſtate-tail which *Wyat* had in the Land did not paſs to *Moulton* by his Feoffment, and therefore that it continued in *Wyat*; to this it may be ſaid, true it is that the Eſtate-tail did not paſs to *Moulton*, nevertheleſs the Eſtate-tail did not remain in *Wyat*, for he gave the Land to *Moulton* and to his Heirs, and contrary to that Gift he did not nor could retain his Eſtate-tail in the Land, nor could *Moulton* take an Eſtate-tail. [d] From whence it follows that if *Wyat* himſelf after his Feoffment had not the Eſtate-tail, nor any other Perſon had it, then the Eſtate-tail muſt be in Abeyance during the Life of *Wyat*. And it ſeems by *Littleton* that an Eſtate-tail once made may be in Abeyance, [e] for, he ſays, if Tenant in Tail grants all his Eſtate to another, the Reverſion in Tail is not in the Tenant in Tail, nor ſhall he have an Action of [f] Waſt, becauſe he has not the Reverſion in him, as *Littleton* ſays; and if he has not the Reverſion there, *a fortiore* he has it not here where he gave the Land to one and to his Heirs; but (*Littleton* ſays) the Tail ſhall be in Abeyance. [g] As if Land is given to one for Life, the Remainder to the right Heirs of the Body of *J. S.* who is alive, there the Tail is in Abeyance during the Life of *J. S.* and after his Deceaſe it ſhall veſt in his Iſſue. So here the Eſtate-tail was in Abeyance during the Life of *Wyat*, for he could not retain it againſt his own Feoffment in Fee.

[d] Vide 2 Rol. R. 322 Poſt 563.

[e] Lit. § 650. 3 Co. 84. b. Lit. R. 122, 322. Cart. 210. See Poſt 556 (b), 561 (c).

[f] See Poſt 556 (f).

[g] Ante 25 (o), and See the Books there cited.

And perhaps it may be aſked what Eſtate paſſed to *George Moulton* if the Eſtate-tail did not paſs to him; to this it may be anſwered that the Land was given to him and to his Heirs, in which Limitation the Tail could not be given, and a greater Eſtate than for Life was given, and ſuch an Eſtate was given as ſhould deſcend to the Heir of *Moulton*, which muſt be an Eſtate of Inheritance; from whence it ſeems that the Eſtate given was a Fee-ſimple, that is, a Fee-ſimple determinable upon the Eſtate-tail, or a Fee-ſimple until the Iſſue of *Wyat* had avoided his Eſtate, which he might well enough avoid by Entry or *Formedon*. [h] For before the Act of 26 *H.* 8. Tenant in Tail ſhould not forfeit his Eſtate by Attainder of Treaſon, for the Statute *de donis conditionalibus* preſerved the Eſtate-tail to the Iſſue until the Statute of 26 *H.* 8. was made, by which it is ordained *that he who is attainted of Treaſon ſhall forfeit to the King all his Hereditaments*, and the ſpecial Act of Confirmation of the Attainder of *Wyat* adds further, *that he ſhall forfeit all his Rights*, and if *Wyat* after the Feoffment had no Inheritance nor Right in the Land, he could not forfeit it, and then there was no Obſtacle to the Iſſue of *Wyat* but that he might enter upon *Moulton* or his Aſſigns after the Death of *Wyat* who was attainted, and in the mean Time *Moulton* and his Aſſigns had a Fee-ſimple, (but that was determinable or defeaſible as is ſaid before) and the King had another Fee-ſimple, that is, he retained his ancient Fee-ſimple which he had before the Feoffment made by *Wyat*, ſo that there were two Fees-Simple of one and the ſame Land at one and the ſame Time, as there ſhall be in many Caſes. [i] For *Manwood* ſaid, if before the Statute of 34 & 35 *H.* 8. Tenant in Tail of the Gift of the King had ſuffered a common Recovery, the Iſſue in Tail ſhould have been bound for ever by Reaſon of the Recom-

[h] Ante 237 (b), and ſee the Books there cited.

Where there may be two Fees-Simple of the ſame Land in ſeveral Perſons at one and the ſame Time.

[i] Ante 553 (b). and (c) and the Books there cited.

Recompence in value, [b] and in that Caſe the Recoveror ſhould have had a Fees Simple determinable upon the Eſtate-Tail, and the King ſhould have had his ancient Fee-Simple alſo. [c] And he ſaid further, if one makes a Gift in Tail, the Remainder in Tail to J. S. and afterwards J. S. levies a Fine in Fee-Simple of his Remainder with Proclamations, and dies leaving Iſſues, and afterwards the firſt Tenant in Tail dies without Iſſue, now he to whom the Fine was levied ſhall have a Fee-Simple determinable upon the Death of all the Iſſues of J. S. and the Donor has another Fee-Simple, ſo that there are two Fees-Simple of one and the ſame Land, as *Manwood* ſaid. [d] And, it was ſaid, if A. is ſeized in Fee, and makes a Gift in Tail at this Day to B. to the Uſe of C. in Fee, now the *Ceſtuy que Uſe* who has the Land by the Statute of 27 *H.* 8. has one Fee-Simple in the Land determinable upon the Eſtate-Tail, and the Donor has another. [e] *But note (Reader) that a Uſe cannot be limited upon an Eſtate-Tail, as it was adjudged in* 24 H. 8. *in the Title of* Feoffments to Uſes *in the Abridgment of the Lord* Brook *which is now in Print.* [f] And ſo *Bullock* cited the Caſe in 15 *Ed.* 4. where a Man granted a Rent charge in Tail out of his Land, and the Tenant in Tail ſuffered a common Recovery with Voucher, there the Recoveror had a Fee-Simple determinable, and yet he had no Fee-Simple of the Thing. [g] So if the Lord of a Villain enters into the entailed Lands of his Villain, he has one Fee-Simple, which is determinable upon the Eſtate-Tail, and the Donor has another Fee-Simple. And ſo in many other Caſes there may be two Fees-Simple of one and the ſame Land at one and the ſame Time. So here in the principal Caſe the King had one Fee-Simple which continued in the Crown, and by the Feoffment *Moulton* had an Eſtate which was deſcendible to his Heirs, which is and may be called a Fee-Simple, which Eſtate he gave to *Edmund Walſingham*, who died ſeized, and the Land deſcended to *Thomas Walſingham* the Defendant, after which Time *Wyat* committed Treaſon, and was attainted and executed, and nothing can come to the Crown by his Attainder but that which was in him, and he had not in him any Eſtate of Freehold or Inheritance, nor any Right or Title to the Land contained in the Information, for which Reaſon the Queen cannot impeach the Defendants of the Intruſion. And many other Things were ſaid by them to enforce this Opinion.

b Cro. C. 430. Poſt 558 (f).
c Poſt 558 (g).
d S. P. Bacon's Read. on Statute of Uſes 347. *Nota bene* by the Reporter.
e 24 H. 8. Bro. Feoffments al Uſes 40. B. N. C. § 60. Co. Litt. 19. b. 2 Co. 78. a. 2 Rol. Abr. 780. C. pl. 2, 3. 2 And. 87, 136. 1 Rol. R. 333, 385. 3 Bulſt. 184, 186. 3 Leon. 190. Jenk. Cent. 195. pl. 1. Gilb. Law of Uſes 11, 205, 206. Vin. Abr. tit. Uſes C. pl. 2, 3, in Margine.
f M. 15 Ed. 4. 8. Contra Poſt 557 (d).
g Co. Litt. 18. a. 1 Keb. 407, 408. Cro. Car. 430. Ld. Raym. 773. Vide 2 Rol. Abr. 735. H. pl. 2. Poſt 557 (b).

On the other Hand it was argued for the Queen, that by the Feoffment of Sir *Thomas Wyat* to *Moulton* no other Eſtate than for the Life of *Wyat* only paſſed. And here it is not ſo much to be conſidered what Eſtate *Wyat* limited by Words upon his Feoffment to *Moulton*, as what Eſtate the Law will ſuffer to paſs, and inaſmuch as it is confeſſed that by the Feoffment the Fee-Simple was not diveſted out of the King, from thence it follows in a Manner conſequentially that no Fee-Simple paſſed to *Moulton*, for none can give to another that which he himſelf has not nor can have, and in every Gift there ought to be a Donor and Donee, and a Thing which may be given, and although in the principal Caſe there was a Donor and Donee, yet there was no Fee-Simple in *Wyat* which he could give, for the Fee-Simple reſted irremoveably in the Crown; yet *Wyat* had the Land, but the Land itſelf is one Thing, and the Eſtate in the Land is another Thing, for an Eſtate in the Land is a Time in the Land, or Land for a Time, and there are Diverſities of Eſtates, which are no more than Diverſities of Time, for he who has a Fee-Simple in Land has a Time in the Land without End, or the Land for Time without End, and he who has Land in Tail has a Time in the Land or the Land for Time as long as he has Iſſues of his Body, and he who has an Eſtate in Land for Life has no Time in it longer than for his own Life, and ſo of him who has an Eſtate in Land for the Life of another, or for Years. Then when *Wyat* had but an Eſtate in the Land for a Time as long as there was any Iſſue of the Body of his Father, and after the Failure of ſuch Iſſue the King had a Time in the Land without End, or the Land for Time without End, which is termed a Fee-Simple, the Words of *Wyat* upon his Livery could not take that away from the Crown, nor give it to *Moulton*, and the Law does not meaſure the Gift of *Wyat* according to his Words, but according to his Ability, and here he was diſabled to give the Land for a greater Time than he had, for which Reaſon no Fee Simple could paſs.

E contra for the Queen.

Tenant in Tail makes a Feoffment in Fee, no more paſſes than for the Life of the Tenant in Tail. Poſt 561 (d), *per Curiam.* 562, *arguendo.*

And the Eſtate-Tail could not paſs to *Moulton*, for none can poſſibly be Tenant in Tail but he only who is comprehended in the Intent of the Donor, and who is within his Limitation. For Eſtates-Tail are made by the Act of *Weſtminſter* 2. and the effectual Words of the Statute, upon which Eſtates-Tail are founded, are theſe, *The Lord the King hath ordained that the Will of the Giver, according to the Form in the Deed of his Gift manifeſtly expreſſed, from henceforth ſhall be obſerved*; and it was the Will of the King, who gave the Eſtate-Tail here, that Sir *Thomas Wyat* the Father and the Heirs Males of his Body begotten ſhould have the Land, and no other; and therefore *Moulton*, who was of another Blood, was not comprehended in his Will, nor expreſſed in the Form of the Gift, for which Reaſon it is impoſſible that *Moulton* could be Tenant in Tail, or that the Eſtate-Tail which was in *Wyat* could be transferred to him.

That by ſuch Feoffment the Eſtate Tail cannot paſs, becauſe the Feoffee is not comprehended in the Intent of the Donor. Poſt 561 (b), *per Curiam.* 562, agreed.

Further, an Eſtate for Term of the Life of *Moulton* could not paſs to *Moulton* by the ſaid Feoffment, becauſe *Wyat* had no Power to give the Land to him for ſo long, for he had but to do with the Land during his own Life only, and if he might convey the Land to *Moulton* for his Life, then might he diſcontinue the Reverſion in Fee, and diveſt it out of the King, and as he could not make a Feoffment in Fee of the Land to *Moulton*, ſo for the ſame Reaſon he could not make an Eſtate to him for the Term of his Life, for thereby the Fee-Simple which was in the Crown would be touched as well as by a Feoffment, for which Reaſon *Wyat* was diſabled to make the one Eſtate as well as the other, and therefore the Feoffment could not give an Eſtate to *Moulton* for his Life. And if neither a Fee-Simple, nor an Eſtate-Tail, nor an Eſtate for the Life of *Moulton* could paſs, then ſuch Eſtate as *Wyat* was able to give paſſed, and that was only an

That by ſuch Feoffment an Eſtate for the Life of the Feoffee cannot paſs. Poſt 562 (c).

Eſtate for the Life of *Wyat*, for ſuch Eſtate he might lawfully give, but no greater Freehold. And then when *Wyat* was put to Death, the Eſtate of *Thomas Walſingham* the Defendant was determined, and he by his Occupation afterwards became an Intruder, and ſo puniſhable.

Where Tenant in Tail makes a Feoffment in Fee, the Eſtate-Tail is not in Abeyance during the Life of the Tenant in Tail, (againſt the Opinion of *Littleton*) but it remains in the Tenant in Tail. Poſt 561 (e), *per Curiam.* 563, *arguendo.*

And where it was ſaid on the other Side that a greater Eſtate than for Life paſſed by the Feoffment to *Moulton*, for that the Eſtate-Tail was in Abeyance, to prove which [a] *Littleton* was cited, the Apprentice and *Barham* [b] denied the Law to be ſo in the ſaid Caſe in *Littleton* where Tenant in Tail grants his Eſtate, for, they ſaid, Tenant in Tail cannot by any Means give the Eſtate-Tail to another, becauſe none but he who is comprehended in the Intent of the Donor ſhall be Tenant in Tail, and if by the Grant of Tenant in Tail of all his Eſtate no other could ever have his Eſtate, to what Purpoſe ſhould the Eſtate be in Abeyance? For Things ſhall be in Abeyance to the Intent that another may have them afterwards, and not immediately, but in Time to come, and they ſhall be in Abeyance until they can veſt in the other. [c] As in the Caſe of a Leaſe for Life, the Remainder to the right Heirs of the Body of J. S. who is alive, there the Tail ſhall be in Abeyance until the Death of J. S. and then it ſhall veſt in his Iſſue, becauſe it could not veſt before, and to this Purpoſe of veſting afterwards it was in Abeyance. But in the principal Caſe the Eſtate-Tail ſhall never veſt in any Stranger, and therefore to make that to paſs out of one which ſhall never veſt in another is idle and to no Purpoſe, and quite foreign to the Intent and Conſideration of the Law in allowing Things to be in Abeyance. Wherefore *Littleton* has miſtaken the Law in this Point, and he has put in his Book divers Caſes which impugn his Opinion in the other Caſe. [d] For he ſays that if Tenant in Tail makes a Leaſe for Years, and afterwards releaſes to the Leſſee all the Right which he has in the Land, to have and to hold to the Leſſee and to his Heirs for ever, by Force of this Releaſe nothing paſſes but for the Term of Life of the Tenant in Tail. [e] So he ſays that if Tenant in Tail makes a Leaſe for his own Life, and afterwards releaſes to the Leſſee and to his Heirs all the Right which he has in the Land, the Eſtate of the Leſſee is not enlarged by Force of ſuch Releaſe, becauſe when the Leſſee had an Eſtate in the Land for the Term of Life of the Tenant in Tail, then he had all the Right which the Tenant in Tail could lawfully grant or releaſe, ſo that by ſuch Releaſe no Right paſſes, inaſmuch as his Right was gone before. Theſe are the Words of *Littleton*, in which Caſes every one ought to take it that the Releaſe of all the Right is of as much Effect as a Grant of all his Eſtate, and therefore theſe Caſes impugn the Reaſon of the other Caſe abovementioned.

a Litt. § 650.

b So is it alſo denied Poſt 561 (c) *per Curiam.* 563 (e) *arguendo.* See the ſame impeached Hob. 339. Hetl. 156. 2 Rol. R. 506.

c See ante 25 (o), and the Books there cited.

d Litt. § 606. Bro. Releaſes 82. 3 Co. 84. b. Ante 161 (g).

e Litt. § 612. Cart. 210.

The Reaſon why Tenant in Tail ſhall not have an Action of Waſt againſt the Grantee of his Eſtate. Vide 3 Co. 84. b.

And as to what is ſaid in *Littleton*, [f] that the Tenant in Tail ſhall not have an Action of Waſt againſt the Grantee of his Eſtate, they agreed that the Law was ſo, but the Reaſon thereof is not becauſe he has a greater Eſtate than for the Life of the Tenant in Tail, but becauſe the Eſtate of the Tenant in Tail was diſpuniſhable of Waſt, and he might lawfully do Waſt, and therefore when he granted over his Eſtate to another, therein he granted his Privilege to do Waſt, which was annexed to his Eſtate, and it was as much as if he had made a Leaſe for his own Life without Impeachment of Waſt. [g] And the Apprentice reſembled this to the Caſe in 42 *Ed.* 3. where a Man releaſed for himſelf and his Heirs to his Leſſee for Life all the Right which he had in the ſame Lands, and alſo that he and his Heirs ſhould not demand any Right, Claim, or Challenge for the Term of Life of the Tenant, and in an Action of Waſt brought by the Son of him who releaſed, the Leſſee pleaded the ſaid Deed, and there it ſeems to be the better Opinion that the Waſt was diſpuniſhable, for the Clauſe in the Deed was equivalent to a Clauſe of Diſpuniſhment of Waſt. And ſo the Grant of the whole Eſtate of the Tenant in Tail is equivalent to Words of Diſpuniſhment of Waſt, which is a Privilege contained in the Eſtate of the Tenant in Tail. But that Caſe in *Littleton* does not prove that the Tail is out of the Tenant in Tail, or that the other has a greater Eſtate than for the Life of the Tenant in Tail.

f Litt. § 650. Ante 554 (f).

g M. 42 Ed. 3. 23. pl. 7. Fitz. Waſt 73.

An Eſtate to a Man and his Heirs during the Life of J. S. is not an Inheritance, but a deſcendible Freehold during the Life of *Ceſtuy que vie*, and *(Heirs)* in that Caſe are added to prevent an Occupancy. S. P. Co. Litt. 239. a. 1 Co. 140. b. 10 Co. 98. a. 1 Bulſt. 135. 1 Finch 102. Poſt 562.

And as to what has been ſaid on the other Side, that the Eſtate given to *Moulton* was ſuch as ſhould deſcend, to this it was agreed that ſo it ſhould, becauſe the Land was given to *Moulton* and to his Heirs, in which Caſe the Words *(his Heirs)* ſhall make the Eſtate (although it be but for the Life of the Tenant in Tail) deſcendible during the Life of the *Ceſtuy que vie*, viz. of *Wyat*. [h] For *Littleton* ſays in his Chapter *of Warranty* that if one leaſes Land to a Man and to his Heirs during the Life of another, and the Leſſee dies, living *Ceſtuy que vie*, and a Stranger enters, the Heir of the Leſſee may ouſt him, and that by Reaſon of the Limitation of the Leſſor; ſo that the Eſtate there is deſcendible, and yet it is not an Eſtate of Inheritance, but only of Freehold, [i] for the Heir ſhall not have an Aſſize of *Mortdanceſtor* there, [k] nor ſhall the Wife of the Father be endowed, [l] and if the Heir commits Waſt, he ſhall be puniſhed in an Action of Waſt. So that although by the Limitation it is made deſcendible, yet it is only a Freehold, and the Reverſion remains in the Leſſor. [m] And hereupon the Apprentice cited the Caſe in 27 *Aſſ. pl.* 31. where the Iſſue of Tenant by the Curteſy brought an Aſſize, and the Tenant ſaid that the Tenant by the Curteſy, who is yet alive, leaſed his Eſtate to the Anceſtor of the Tenant, who died ſeized of his Eſtate, after whoſe Death he (the Tenant) was in as Son and Heir, and he demanded Judgment if the Demandant might have the Aſſize, and it was held a good Bar, for the Reverſion was confeſſed to be in the Demandant, in which Caſe inaſmuch as the Tenant ſaid that he was in as Son and Heir, it is to be underſtood that the Grant was made to his Anceſtor and to his Heirs. And it is to be obſerved that the Reaſon why the Bar was held good was, for that the Reverſion was confeſſed to be in the Demandant, ſo that the Reverſion was always in him who had it, notwithſtanding ſuch Deſcent and Entry, and ſuch is but in effect an Occupant. And he alſo ſaid that in 17 *Ed.* 3. a Woman who was endowed of an Advowſon granted it to one and to his Heirs during her own Life, and there he in the Reverſion made Title to it by the Preſentation of the Heir of the Grantee as Tenant for Life to him, as a Thing done duly

h Litt. § 739.

i 1 Bulſt. 136.

k M. 22 Ed. 3. 19. b. *Per Shard.* 1 Bulſt. 135, 136. 2 Bac. Abr. 125.

l Co. Litt. 41. b. 54. a. 6 Co. 37. b. 10 Co. 98. a. 2 Inſt. 301. 2 Rol. Abr. 826. pl. 3.

m 27 Aſſ. pl. 31. Fitz. Bar 303. Bro Aſſize 272.

duly by his particular Tenant, and yet in Effect he was but an Occupant. [a] And he alſo cited the Caſe of *Stowel* in 11 *H.* 4. in a *Formedon*, where Lands were leaſed by Fine to divers Perſons and to their Heirs during the Life of the Lady *Hillary*, the Remainder in Fee to others, and it ſeems by the Book that upon Default of the Leſſees they in Remainder ſhould be received, for the Limitation to the Heirs of the Leſſees during the Life of the Lady did not give an Eſtate in Fee, but thereby the Heirs might have the Land during the Life of the Lady. So here although the Eſtate which *Wyat* gave to *Moulton* and to his Heirs was deſcendible during the Life of *Wyat* by Reaſon of the Limitation to the Heirs, yet this is no Proof that a greater Eſtate than for the Life of *Wyat* paſſed out of *Wyat*, and the Eſtate Tail remained always in *Wyat*. [b] And ſo is it, he ſaid, in the Caſe which has been put on the other Side where the Lord enters upon his Villain being Tenant in Tail, for the Lord ſhall not have the Eſtate-Tail, nor a Fee-Simple determinable, nor any other Eſtate but only for the Life of his Villain, for when the Law authorizes the Lord of the Villain to enter, it does not authorize him to take the Reverſion out of the Donor, for if ſo, it would do Wrong, and the Lord of the Villain cannot be Tenant in Tail; from whence it follows that if he ſhall not have a Fee-Simple, nor a Fee-Tail, he ſhall only have an Eſtate for the Life of the Villain, [c] for if after his Entry he will manumiſe the Villain, and afterwards the Villain hath Iſſue, and dies, the Iſſue ſhall be free, and is inheritable to the Tail, and may ouſt the Lord. [d] And ſo in the Caſe of 15 *Ed.* 4. before cited, if the Recoveror will avow for the Rent, he ought to aver the Life of the Tenant in Tail, for he cannot have a greater Eſtate in the Rent, in which he had no Fee-Simple, than for the Life of the Tenant in Tail. So that in all theſe Caſes neither the Recoveror, nor the Lord of the Villain, nor the Heirs who have the Freehold which is deſcended to them, nor *Moulton* in the principal Caſe, have any Fee Simple, for their Eſtates cannot be termed a Fee-Simple, inaſmuch as they have no Inheritance of Continuance.

[a] H. 11 H. 4. 42. Fitz. Counterplea de Reſceit 3. Bro. Reſceit 38.

[b] Vide Ante 555 (g).

[c] 2 Rol. Abr. 735. H. pl. 2.

[d] M. 15 Ed. 4. 8. Ante 553 (f).

Neverthleſs the Apprentice ſaid that he would confeſs there are three ſeveral Eſtates of Inheritance which may be called Eſtates in Fee. [e] The firſt is, a Fee-Simple, and that is, where Lands are given to a Man and to his Heirs abſolutely without any End or Limitation put to the Eſtate, for (*Fee*) is an Inheritance, as *Littleton* ſays, and (*ſimple*) is that which is pure and perpetual, ſo that inaſmuch as he has an abſolute Eſtate of Perpetuity in the Land, ſuch Eſtate is properly termed a Fee-Simple.

Three Sorts of Eſtates in Fee. Vide Co. Litt. 1. b. 1 P. Wms. 74, 75. Ld. Raymond 1148. 1ſt Fee-Simple abſolute.

[e] Litt. § 1.

Another Fee there is, which may be called a Fee-Simple determinable, [f] as if Land is given to a Man and to his Heirs as long as J. S. ſhall have Heirs of his Body, there he to whom the Land is given has a Fee-Simple, but his Eſtate is determinable upon the Death of J. S. without Iſſue, for then the Fee is ended, and the Feoffor ſhall have the Land again. So if Land is given to a Man and to his Heirs as long as he ſhall pay 20s. annually to A. or as long as the [g] Church of *St. Paul* ſhall ſtand, his Eſtate is a Fee-Simple determinable, in which Caſe he has the whole Eſtate in him; and ſuch Perpetuity of an Eſtate which may continue for ever, though at the ſame Time there is a Contingency which when it happens will determine the Eſtate (which Contingency cannot properly be called a Condition, but a Limitation) may be termed a Fee-Simple determinable.

2dly, Fee-Simple determinable.

[f] Ld. Raym. 1148. 1 P. Wms. 74, 75. But ſee Co. Litt. 19 a.

[g] Ld. Raym. 1148. So if it be limited as long as ſuch a Tree ſhall grow, M. 27 H. 8. 29. pl. 20. 11 Co. 49. a. 1 Rol R. 101. Hardr. 149.

The third Eſtate in Fee may be called a baſe Fee, and that is, where A. has a good and abſolute Eſtate of Fee-Simple in Land, and B. has another Eſtate of Fee in the ſame Land, which ſhall deſcend from Heir to Heir, but which is baſe in reſpect of the Fee of A. as being younger than the Fee of A. and not of abſolute Perpetuity as the Fee of A. is; [h] as if a Man at this Day makes a Gift in Tail, and the Donee is attainted of Treaſon, the Queen and her Heirs ſhall have the Land as long as there are any Heirs of the Body of the Donee, and in that Caſe there are two Fees, for the Donor has his ancient Fee, which is a Fee-Simple, and the Queen has another Fee in the ſame Land, which is ſuch a Fee as ſhall deſcend, and ſuch as the Queen may grant to another in Fee, and ſuch whereof the Wife of the Grantee ſhall be [i] endowed, and if it deſcends to his Heir, it ſhall be Aſſets to the Heir in Debt, or to render in Value for the Warranty of his Father, but yet it is but a baſe Fee, for it is younger in Time than the Fee of the Donor, and it ſhall not endure longer than there continue to be Heirs of the Body of the Donee, and if ſuch Heirs fail, this Fee is gone, whereas the Fee of the Donor ſhall never periſh, ſo that the one is pure and perpetual, and the other is but baſe and temporary, and nothing more than an Inheritance upon the Caſe. [k] So if at this Day Tenant in Tail by Indenture enrolled bargains and ſells the Land to another and to his Heirs, the Bargainee has a Fee in the Land as he had in the Uſe, for the Uſe is a new Thing which may be derived in Fee, as a Rent-Charge may out of Land in Tail, and by the Words of the Act which conveys the Land to the Uſe, and makes the Bargainee to have a Fee in the Land as he had in the Uſe, he has a Fee in the Land, but that is only a baſe Fee, and the Donor has the pure Fee, viz. the Fee-Simple, for the Cauſes aforeſaid. [l] And in 40 *Aſſ. pl.* 36. it is put that if there is Tenant in Tail, and the Land in Tail is recovered in Value, and put in Execution by Reaſon of a Warranty in Fee which the Tenant in Tail made of other Land, he who has recovered in Value ſhall have a Fee-Simple in this Land, and the Donor ſhall retain his Fee-Simple: Which Caſe was put by *Barham*. [m] And ſo is it, the Apprentice ſaid, in the Caſe of 29 *Aſſ. pl.* 61. where Tenant in Tail was bound in a Statute-Merchant, and had Iſſue, and the Iſſue was outlawed for Felony, and obtained a Charter of Pardon in the Life of the Father, the Father died, the Iſſue entered, and the Conuſee ſued Execution of the Land, and the Heir brought an Aſſize, and whether or no the Aſſize was maintenable was there debated, and the principal Point argued was, what Eſtate the Iſſue had, for if he had an Eſtate-Tail, then the Aſſize was maintenable, for then he was remitted to his Eſtate-Tail, in which Caſe Execution could not be ſued againſt him, and if the Iſſue had a Fee-Simple, or any other Eſtate than an Eſtate-Tail, then the Aſſize was not maintenable; and there it appears

3dly, Baſe-Fee.

[h] Cro. C. 430.

[i] 2 Bac. Abr. 125.

[k] S. P. 10. Co. 96. a. *Seymour's* Caſe.

[l] 40 Aſſ. pl. 36. Poſt 559 (b).

[m] 29 Aſſ. pl. 61. Bridgm. 27. Strange 337.

that the Outlawry for Felony ſo diſabled him in Blood that he could not take by Deſcent the Land in Tail any more than Land in Fee-Simple, notwithſtanding the Charter of Pardon, which could not [a] reſtore his Blood to its former Purity, from whence it follows that when the Father died, the Land could not [b] revert to the Donor, becauſe the Donee had Iſſue, and the Iſſue could not take by [c] Deſcent by Reaſon of his Diſability, ſo that upon the Death of the Father the Freehold in Deed or in Law was in none, but *in nubibus*, as it is where [d] Tenant *pur auter vie* dies in the Life of *Ceſtuy que vie*, and none enters, in which Caſe every Man in the World has an equal Title to the Land, and therefore when the Iſſue in Tail entered, he was but an [e] Occupant, for in ſuch Caſe the Land *conceditur occupanti*, and he could not be an Occupant of an Eſtate-Tail, for none ſhall have the Eſtate-Tail but the Iſſues of the Donee who ſhall take by Deſcent, and ſuch an Occupant ought to have a greater Eſtate than an Occupant of a Freehold, for it ſhall deſcend to his Heir, for which Reaſon it ſeems that in that Caſe the Iſſue had a baſe Fee, and the Donor had his Fee, viz. the Fee-Simple, and ſo there were two Fees of one and the ſame Land at one and the ſame Time; and becauſe the Eſtate of the Iſſue was ſubject to the Execution, the Iſſue was nonſuited in the Aſſize. So that, he ſaid, there may be two Fees of one and the ſame Land at one and the ſame Time. But it ſeemed to ſome that in that Caſe the Iſſue ſhould only have an Eſtate for his own Life as Occupant. And he ſaid that there ſhall be a baſe Fee in the Caſes which have been put, [f] where a Recovery was had againſt the King's Donee in Tail before the Statute of 34 *H.* 8. and where [g] Tenant in Tail in Remainder levies a Fine with Proclamations, in which Caſes there are two Fees, as before has been ſaid.

[a] Co. Litt. 391. b.
[b] 3 Bac. Abr. 19.
[c] Ibid.
[d] Co. Litt. 41. b.
[e] Litt. R. 322. 3 Bac. Abr. 19. Vide Comy. 220. Strange 362.
[f] Ante 555 b.
[g] Ante 555 (c).

That where Tenant in Tail makes a Feoffment in Fee, no Fee paſſes, but only an Eſtate for the Life of Tenant in Tail, and the Reverſion of the Tail remains in him. Poſt 561 (a), *per Curiam*.

Wherefore it appears from theſe Caſes that there are three Eſtates in Fee, viz. Fee-Simple-abſolute, Fee-Simple determinable, and a baſe Fee, the laſt of which is, where a Man has Land to him and to his Heirs during the Inheritance which another had. But in the principal Caſe *Moulton* had no Fee by the Feoffment, viz. neither a Fee-Simple abſolute, nor a Fee-Simple determinable, nor a baſe Fee, for a baſe Fee is where a Man has Land to him and to his Heirs during an Eſtate of Inheritance which another had. But the Eſtate of *Moulton* was only an Eſtate for the Life of *Wyat*, ſo that the Reverſion of the Tail remained in *Wyat*. [h] And to prove this the Caſe in 18 *Ed.* 3. was cited, where the King gave Land to the Earl Marſhal and to his Heirs of his Body begotten, ſaving the Reverſion to himſelf, and the Earl by the King's Licenſe leaſed the Land to one *Adam Brown* for his Life, ſaving the Reverſion to the Earl and to his Heirs of his Body begotten, and for Default of Iſſue, to the King, the Earl died, having Iſſue two Daughters, one of which was within Age, the Tenant for Life being impleaded made Default after Default, and the Daughters and their Huſbands prayed to be received, and becauſe one of the Daughters was within Age they prayed that the Parol might demur, and there it was touched whether the Reverſion upon the Leaſe for Life could be reſerved in Tail, and whether the Daughters ſhould be received, inaſmuch as the Tenant was their Deforceor; and afterwards they were received by the Award of the Court, and the Parol was put without Day for the Nonage of the one. From which Caſe it appears that they were received in reſpect of the Tail which was in them, and that the Parol demurred in reſpect that that Eſtate was deſcended to them, for the Earl could not gain a Fee-Simple by the Leaſe, becauſe the Fee-Simple remained in the King, which could not be diveſted by the Leaſe for Life, nor could he gain a Fee-Simple determinable, nor a baſe Fee by the Leaſe, for ſuch Eſtates are not to be gained but by other Acts, and if the Eſtate-Tail ſhould be there retained, ſo ſhall it alſo be here upon the Feoffment of *Wyat* to *Moulton*, for a greater Eſtate than a Freehold could not paſs by the Feoffment. But it ſeemed to ſome in the ſaid Caſe of 18 *Ed.* 3. that if the Land could not paſs to *Adam* for his own Life, but for the Life of the Earl Marſhal, then by the Death of the Earl the Eſtate of *Adam* was ended, and he became Tenant at Sufferance, or rather he was in as an Intruder, and ſo it was admitted by the Action brought againſt him by the Demandant, whereby the Demandant made him Tenant of the Freehold, and if he was ſo, it is all one as to that Point, for an Intruder or Diſſeizor in ſuch Caſe could but have an Eſtate for the Lives of the two Daughters in Tail, ſo that the Reverſion in Tail was in them by Deſcent, by Reaſon whereof they were receivable, and the Parol ſhould demur for the Nonage of the one: And there *Shard* and *Wilby* ſaid, "heretofore the Heir was "receivable by Reaſon of a Reverſion as well of Fee-Tail as of Fee-Simple," from whence, it ſeems, they took it that the Reverſion was in Tail.

[h] P. 18 Ed. 3. 12. pl. 2.

When Tenant in Tail, the Reverſion in the Crown, makes a Feoffment, though the Intail be in Abeyance as to any Benefit, which the Tenant in Tail himſelf can claim from it againſt his own Feoffment, yet for the Benefit of the Crown the Intail ſhall be ſaid to continue in him, as the Reverſion continues in the Crown. S. P. Poſt 564, *arguendo*.

But, it was ſaid, howſoever the Law be as to the Tenant in Tail himſelf, viz. as to *Wyat*, and though it ſhould be admitted that he ſhall not ſay, againſt his own Feoffment, that the Eſtate-Tail continued in him, yet Queen *Mary* might ſay that as to her the Eſtate-Tail continued in *Wyat*, for if the Feoffment could not diveſt the Reverſion in Fee out of the Crown, by the ſame Reaſon no Act in Deed which *Wyat* could do ſhould take away the Benefit which the Crown ſhould have by the Reverſion; and if there are any Advantages incident to the Reverſion in reſpect of the Eſſence or Continuance of the Eſtate-Tail in the Line of the Tail, the Crown cannot be deprived of them, and in Reſpect of them the King ſhall ſay that, as to him, the Eſtate-Tail continues, as the Reverſion in Fee continues in him; and as the King ſhall ſay that, notwithſtanding any Feoffment of the Tenant in Tail, he ſhall have againſt the Iſſues in Tail his Services reſerved, Homage, Fealty, Rent, Aid to marry his Daughter, and Aid to make his Son a Knight, and the Wardſhip of the Bodies of the Iſſues, by the ſame Reaſon he ſhall have all the Commodities of the Land itſelf which the Continuance of the Tail will bring to the Crown. And for the having of theſe the Eſtate-Tail and the Poſſeſſion ſhall be adjudged in Law to continue in the Line of the Tail, as to the King, for it was the King's Intent in the original Creation and Gift of the Eſtate-Tail that the Land ſhould continue in the Line, and that he ſhould have all the Benefits incident to the Reverſion, and therefore all Feoffments made by the Tenant in Tail are nul and void againſt the King. [i] And in Proof of this Matter the Caſe in 21 *Aſſ. pl.* 15. was cited, where it was found by Office that the Father Tenant of the King had aliened the Land by Licenſe to

[i] 21 Aſſ. pl. 15. 1 Co. 44. a.

two

two Chaplains in Fee, and took back an Eſtate by Fine to himſelf for Life, the Remainder to his Son and Heir who was within Age, and to his Wife, and to the Heirs of the Son, and that the Father was dead, and upon this Office the Son and his Wife had Livery, and afterwards an ancient Fine was found in the Treaſury, by which the Father had but a Fee-tail, and the Tranſcript was ſent by Writ which iſſued out of the Chancery, and out of that iſſued a *Scire facias* againſt the Son and his Wife to know why the Land ſhould not be re-ſeized into the King's Hands according to the Statute of *Lincoln*, which wills that if after Livery it be found by Record that the King hath Right to ſeize, then the Party ſhall be warned to know if he can ſay any Thing why the Land ſhould not be re-ſeized, and they came and ſaid that they had their Warranty againſt the Chaplains, which they ſhould loſe if that Suit was maintenable, and there it was ſaid that the King was not appriſed of his Eſtate, ſo that he was deceived in the Grant of the Licenſe, and as to the Warranty, the King ſhall but have the Land for a Time, *viz.* during the Non-age of the Infant, ſo that the Warranty ſhall not be totally loſt, wherefore the Court awarded that the Land ſhould be re-ſeized into the King's Hands, and that at the full Age of the Infant he who had the Right thereof ſhould ſue for it againſt the King. In which Caſe it is to be underſtood by certain Words therein that the Fee-ſimple was in the King, whereupon it appears that the Alienation did not take away the Reverſion out of the King, and that the Tail was in *eſſe* as to the King, and that by the Feoffment he ſhould not be deprived of any Benefit or Profit of the Land. [a] And to the like Purpoſe the Caſe in 40 *Aſs. pl.* 36. was cited, which was thus, the Lord *Clifford* Tenant in Tail of the Gift of the King purchaſed a Licenſe to enfeoff certain Chaplains of the ſame Land, and to take back an Eſtate to him and to his Wife in Tail, the Remainder to his own right Heirs, and he died, and his Wife took another Huſband, againſt whom a *Scire facias* iſſued to know if he could ſay any Thing why he ſhould not make Reſtitution of the Iſſues of the Land for the Time that he occupied the ſame Land in the Life of his Wife during the Non-age of the Lord *Clifford* then being within Age, who came and ſaid that the Chaplains were enfeoffed by the firſt Huſband, by Force whereof the Wife was warranted, and that the Iſſue had Aſſets by Deſcent, in which Caſe he was diſinherited by Reaſon of the Warranty: And the King's Serjeants ſaid that the Licenſe was purchaſed in Deceit of the King, who did not perceive his Right, which could not diſcontinue the Reverſion of the King, and conſequently he had Cauſe to have the Wardſhip, and ſo to be anſwered for the Iſſues: [b] And it was there ſaid by *Fitz-John*, that if the Lands in Tail had been rendered in Value by Reaſon of a Warranty made by Tenant in Tail, he who recovered them in Value ſhould have had a Fee-ſimple in them, and yet the Reverſion was in the King, but for the Life of the Iſſues the King ſhould have had no Advantage thereof; to which *Ludd.* there ſaid that the King ſhould have the Wardſhip of the Iſſues in Tail in that Caſe: And afterwards it was awarded by the Advice of all the Juſtices, that he ſhould be charged in Right of two Parts of the Land for the Time that he occupied them, and that he ſhould be diſcharged in Right of the third Part whereof the Wife had Cauſe to have Dower. From which Judgment it appears that by the Feoffment of the Land the Reverſion was not taken out of the King, and that ſuch Feoffment was no Obſtacle to the King but that he might enter into the Land, and have the meſne Profits, for if nothing paſſed by the Feoffment but an Eſtate for the Life of the Lord *Clifford* who made the Feoffment, then the Eſtate given by the Feoffment, and the Eſtate taken back, was determined by the Death of the Lord *Clifford* the Feoffor, and the Wife at beſt could but be Tenant at Sufferance, and ſuch ſhe could not be, for if the King had entered, the Poſſeſſion of the Wife afterwards ſhould have been an Intruſion, and his Latches of Entry made no Difference in that Reſpect, for Latches of Entry ſhall not hurt the King, *quia nullum tempus occurrit regi*, ſo that his Non-entry is equivalent to an Entry, and therefore every one that meddles with the Land after the King's Title is an Intruder, and ſhall anſwer for the Iſſues of the Land to the King. And as it was in that Caſe, ſo ſhall it alſo be here as to the Eſcheat of the Eſtate-tail, for after the Attainder and Death of Sir *Thomas Wyat*, *Thomas Walſingham* the Defendant (notwithſtanding the Feoffment and Deſcent to him) could not have as good an Eſtate as Tenant at Sufferance, for his Eſtate is of ſuch Sort as if an Entry in Deed had been made by the Queen, and he had afterwards intruded upon her, (inaſmuch as no Office is requiſite in this Caſe of Attainder of Treaſon by Reaſon of the Statutes aforeſaid) and therefore he ſhall be adjudged an Intruder, and the Eſtate-tail which Sir *Thomas Wyat* had is merely extinct.

[a] 40 Aſs. pl. 36. Bro. Alienation 13. Diſcontinuance de Poſſeſſion 16. Tayle 41.

[b] Ante 557 (l).

No Tenant at Sufferante of the King's Land. S. P. Hardr. 25.

And this laſt Matter was made a diſtinct Point by the Apprentice, *viz.* whether the Tail ſhould be ſaid to be extinct, and the Queen ſhould have the Land by Way of Reverter, or by Way of Forfeiture. And he ſaid that the Queen ſhall have it by Way of Reverter, and to all Purpoſes as if all the Iſſues begotten of the Body of Sir *Thomas Wyat* the firſt Donee had been dead. And ſuch is the Intent of the Statute of 26 *H.* 8. *cap.* 13. which enacts *that all Perſons attainted of Treaſon ſhall loſe and forfeit to the King, his Heirs and Succeſſors, all Lands and Tenements which ſuch Offender ſhall have of any Eſtate of Inheritance at the Time of the Treaſon committed, or at any Time afterwards, ſaving to all others and their Heirs (others than the Offenders in Treaſon, their Heirs and Succeſſors) all their Rights, and Poſſeſſions, Leaſes, and other Profits which they had the Day of the Treaſon, or afterwards.* [c] By which general Words *(that they ſhall loſe and forfeit all Lands and Tenements which they had of any Eſtate of Inheritance)*, and by the Excluſion of the Heir in the Saving, Lands in Tail ſhall be forfeited; and how ſhall they be forfeited to the King and to his Heirs, where he had the Fee-ſimple before? [d] For he cannot have the Land to him and to his Heirs by the Forfeiture, where he had the Fee-ſimple of it to him and to his Heirs before, for if he ſhould have another Fee-ſimple determinable upon the Eſtate-tail, then he would have two Fees-ſimple in one and the ſame Land at one and the ſame Time. And then if the King ſhould make a Leaſe for 50 Years, and afterwards the Iſſues of the Tenant in Tail attainted ſhould die, ſo that there were none remaining to inherit the Tail, if it had not been forfeited, what would become of the Leaſe? Should it be good or not? And ſhould the Leaſe be derived out of the one Fee-ſimple or out of both?

Where Tenant in Tail, the Reverſion in the King, commits Treaſon, the King ſhall have the Land in Nature of a Reverter, and not by Way of Forfeiture, as he ſhall have it where the Reverſion is in a common Perſon. Vide 2 Rol. R. 322. 3 Bac. Abr. 316. Hob. 345, 346.

[c] Vide Godb. 324.

[d] Co. Litt. 18. a.

And is the one Fee ſimple a Reverſion to the other? And how can that be? And can there be two Fees in one and the ſame Perſon at one and the ſame Time, as there may be an Eſtate-tail in one, and a Fee-ſimple expectant upon it in the ſame Perſon? [a] No, Sir, it would be inconvenient to have two Eſtates in Fee in one and the ſame Perſon at one and the ſame Time, although there may be two Fees in ſeveral Perſons at one and the ſame Time, and to expound it ſo as to make two Fees in one and the ſame Perſon at one and the ſame Time would beget Confuſion, and would be inconſiſtent with the Rules of our Law. [b] And it is held in 9 *Ed.* 4. that if Tenant in Tail enfeoffs the Donor in Fee, this is no Diſcontinuance, but the Iſſue in Tail may well enter, [c] for it is not a Diſcontinuance but where the Reverſion is diſcontinued, and there the Alienation is made to him who had the Fee; and alſo by this Feoffment made to the Donor and to his Heirs the Donor ſhall not have a Fee, for then he would have two Fees-ſimple in one Land, which cannot be, for the Fee which he had before continues always in him, for which Reaſon he cannot have a new Fee, ſo that this Eſtate in him is but for the Term of Life of the Tenant in Tail; and it was there ſaid that this Caſe had been ſo adjudged. From which Caſe here recited *verbatim* it appears that one and the ſame Perſon cannot have two Fees in the ſame Land at the ſame Time. And it was the Intent of the Legiſlature, when they enacted that Eſtates-Tail ſhould be forfeited to the King and to his Heirs, that if the King had the Fee-ſimple before, he ſhould retain the ſame Fee-ſimple, and that the Eſtate-tail ſhould be extinct and determined in the ancient Fee-ſimple, inaſmuch as it excludes the Heirs in Tail, ſo that he ſhall retain his ancient Fee-ſimple diſcharged of the Eſtate-tail, for inaſmuch as the King Donor ſhall have the Land again, and not the Iſſues, it is all one in Subſtance as if the Iſſues had been dead, for the Title and Right of the Iſſues is taken away by the Act, which, in the Intent of the Legiſlature, is equivalent to a total Failure of Iſſue, ſo that it ſhall come to the King by Way of Reverter. And therefore all Leaſes which ſuch Tenant in Tail makes, although they be according to the Act of 32 *H.* 8. and all Grants of Rents made by the Tenant in Tail ſhall be void, as to the King, after the Attainder which makes the Reverter, for his ancient Fee-ſimple which he ſhall retain is diſcharged of them. And if the King ſhould hold the Lands charged with Rents-charge or with Leaſes granted or made by the Tenant in Tail, which might be made for a great Number of Years, without any Reſervation, then no Benefit would accrue to the King by ſuch Reverter, which could never be the Intention of the Legiſlature; for inaſmuch as the Reverſion of the King was void of ſuch Charges, and the King, after the Attainder, ſhall have the Land as Land reverting to the Fee-ſimple, and ſhall enjoy it in Reſpect of his ancient Fee-ſimple, it is reaſonable that the King ſhould hold the Land diſcharged of ſuch Incumbrances. But if the Reverſion had been to a common Perſon in Fee, then the King has the Land only by Way of Forfeiture, and he ſhall hold it charged with all the ſaid Incumbrances, but otherwiſe it is where the King himſelf had the Reverſion in Fee before. And to prove this a Caſe was cited which was adjudged in the Exchequer in the Time of Queen *Mary* upon a Bill of Intruſion againſt *William Auſtin*, which Caſe is entered in *Mich.* 1 & 2 *Philip* and *Mary*, *Roll* 147, on the Side of the Queen's Remembrancer there, and was as follows. [d] Sir *Thomas Wyat* the Father being Tenant in Tail to him and to his Heirs Males of his Body begotten, of the capital Meſſuage of the Manor of *Eaſtſarleigh*, and of the Lands belonging to it, in the County of *Kent*, by the Gift of King *Henry* 8. made to him by his Letters-patent bearing Date the 20th Day of *November* in the 31ſt Year of his Reign, leaſed the ſame by Indenture the 6th Day of *December* in the 33d Year of the Reign of the ſame King, to *William Auſtin* and to *Stephen Auſtin* his Father for 36 Years next following the Feaſt of *St. Michael* the Archangel then laſt paſt, rendring a certain Rent, the Leſſees entered, and afterwards Sir *Thomas Wyat* the Father died, and afterwards *Stephen Auſtin* died, and afterwards Sir *Thomas Wyat* the Son accepted the Rent incurred after the Death of his Father by the Hands of the ſaid *William Auſtin*, and afterwards the ſaid Sir *Thomas Wyat* the Son committed Treaſon, and was attainted, and put to Death, leaving a Son named *Arthur Wyat* alive, and all this Matter was diſcloſed in Pleading, and the Reverſion in Fee was confeſſed to continue always in the Crown, and thereupon the Attorney of the King and Queen demurred in Law: And the Matter was well debated at the Bar, and afterwards it was argued by all the Barons of the Exchequer, and at laſt it was adjudged that *Auſtin* was an Intruder, becauſe his Leaſe, which was made good againſt Sir *Thomas Wyat* the Son by his Acceptance of the Rent, was determined by the Attainder as fully as if the Tail had been ended for Want of Iſſues; [e] and the Saving of Leaſes in the Acts of Parliament was taken to be of other Leaſes than of thoſe which are contrary to the Reverter, for if the Eſtate-tail is ended, the Leaſe derived out of it is alſo ended. And a Copy of the Record of the ſaid Caſe was ſhewn to the Court, and the Matter itſelf was alſo well remembered by them. And ſo, it was ſaid, in the principal Caſe the Queen ſhall have the Land in Nature of a Reverter, diſcharged of all Incumbrances made by any Iſſue in Tail, which Incumbrances, if they were contrary to the Point of Reverter, were not ſaved by the Saving in the Acts. But *Manwood* ſaid that there is a Diverſity between *Auſtin*'s Caſe and the principal Caſe, for in *Auſtin*'s Caſe the Freehold came to the King, and therefore it was reaſonable that the Freehold ſhould be diſcharged of the Leaſe as an Incumbrance, but in the principal Caſe, he ſaid, the Freehold ſhall not come to the King, and ſo there is a Diverſity between the Caſes. But this Difference was not allowed.

Mich. Term 14 & 15 Eliz. Curia.

And after theſe Arguments the Court took Advice for the Space of a Year, and the laſt Day of *Michaelmas* Term in the 14th and 15th Years of the Reign of Queen *Elizabeth*, the Counſel of both the Parties being at the Bar, and *Baron Frevil* being abſent, *Saunders* Chief Baron ſaid, I and my Companions have often conferred together upon this Matter, and we are all unanimouſly of Opinion that Judgment ought to be given for the Queen. And I ſhall briefly ſhew the Reaſon of our Opinion, and that which I now ſpeak is agreed by us all, and therefore though it is ſpoken by me alone, accept it as if ſpoken by all of us. Then he made a Diſcourſe upon the Matter, in which

[a] Ante 248 (b), and ſee the Books there cited.

[b] T. 9 Ed. 4. 24. b. *Per Littleton.* Fitz. Diſcontinuance 28. Bro. 24. Litt. § 625. Dy. 10. pl. 32. 12. pl. 54. Plowd. Quær. § 342. Mich. 33 Geo. 2. B. R. *Hurſt v. the Earl of Winchelſea, per Lord Mansfield* C. J.

[c] Poſt 562 (b).

Tenant in Tail, the Reverſion in the King, makes a Leaſe according to the Act of 32 *H.* 8. or grants a Rent-charge, and afterwards is attainted of Treaſon, the King ſhall avoid the Leaſe or Rent. S. P. Godb. 311. 1 H. H. P. C. 254. Salk. 338. 3 Bac. Abr. 316. Vide Dy. 107. pl. 6. Plowd. Quær. § 353.

[d] See this Caſe Dy. 115. pl. 65. S. C. cited Hob. 324. Godb. 324. 346. Bridgm. 27. 3 Bac. Abr. 316. 2 Rol. R. 491. Plowd. Quær. § 353.

[e] Poſt 565.

which he ſaid that they took the Law to be, [a] that the Intail and the Right thereof remained in Sir *Thomas Wyat* notwithſtanding his Feoffment to *Moulton*, [b] and that the Intail was not given to *Moulton* by that Feoffment, nor could it be given to any other, for Sir *Thomas Wyat* had no Power to give it away at all, becauſe none could have it but he who was comprehended in the Intent of the Donor, and therefore the Eſtate-tail was not out of Sir *Thomas Wyat*. And, he ſaid, they were all unanimouſly agreed that the Diverſity of [c] *Littleton* is not Law, for when Tenant in Tail grants over all his Eſtate to another, and when he makes a Leaſe for his own Life, it is one and the ſame Thing, for the Leſſee has but the Land for the [d] Life of the Tenant in Tail, and the Intail is not out of the Tenant in Tail in the one Caſe more than in the other, but it remains in him equally in both the Caſes; and there is no ancient Book which warrants the ſaid Opinion of *Littleton*, viz. that the Intail ſhall be in Abeyance by the Grant of his Eſtate, nor is there any Reaſon why it ſhould be in [e] Abeyance in that Caſe any more than where the Tenant in Tail makes a Leaſe for his own Life, and afterwards releaſes all his Right to the Leſſee. And that the Right of the Intail is not given out of the Tenant in Tail by his Feoffment, he ſaid, it is proved by the common Declaration in a *Formedon* in Deſcender, which is, [f] that *the Right deſcended* to the Demandant from the Feoffor *by the Form of the Gift aforeſaid*, and if the Right deſcended from him, conſequently it was in him at his Death. [g] And he cited *Trebony's* Caſe in 48 *Ed.* 3. that notwithſtanding the Feoffment of Tenant in Tail, the Donor ſhall avow upon him for Homage, Fealty, and Rent due to him, becauſe he is in Right his Tenant as to the Avowry: And in ſuch Caſe if the Iſſue in Tail be Plaintiff in Replevin againſt the Donor, he ſhall compel him to avow upon him for the Services reſerved, and he ſhall abate the Avowry made upon the Feoffee, which proves that the Right of the Intail remains in him as to himſelf and as to the Donor. And he ſaid that the Caſes before cited of 18 *Ed.* 3. and 21 *Aſſ.* and 40 *Aſſ.* prove ſtrongly in this Caſe that the Reverſion in the Crown was not touched by the Feoffment of *Wyat*, and that no Prejudice came to the Crown by ſuch Feoffment, but that the Queen ſhall have all Advantages as fully as if the Feoffment had not been made, and therefore he ſaid that the Eſtate tail was extinct in the Fee-ſimple which Queen *Mary* had in her, in the ſame Manner as an Office, which is granted to one in Fee, who is afterwards attainted, ſhall be extinguiſhed in the Crown. And he ſaid that the Record before mentioned againſt *Auſtin* well warranted them to maintain the Judgment here given, for in that Caſe Queen *Mary* had the Land in Nature of a Reverter, whereby all Eſtates and Incumbrances made after the Tail by the Iſſues in Tail were diſcharged and avoided. And in his Diſcourſe he approved of the ſaid Term and Difinition of a baſe Fee. And for theſe Cauſes, he ſaid, it ſeemed to them that the Eſtate-tail was ended in Nature of a Reverter, and therefore that the Defendants ſhould be adjudged Intruders. And at the End he ſaid that although they were all of Opinion againſt *Walſingham* upon the Matter in Law, and that his Perception of the Profits was an Injury to the Crown, yet they would defer their Judgment until the next Term, and then they would give Judgment according to their Opinion aforeſaid.

[a] Ante 558, *arguendo.*

[b] Ante 555, *arguendo.* Poſt 562, agreed.

[c] Litt. § 650: See Ante 556(b), *arguendo.* Poſt 564(e) *arguendo.*

[d] Ante 555, *arguendo.* Poſt 562, *arguendo.*

[e] Ante 556, 563, *arguendo.*

[f] S. P. Hob. 337. 2 Rol. R. 322. Cro. C. 428. 2 Hawk. P. C. 453, § 24.

[g] H. 48 Ed. 3. 8. b. Fitz Avowry 83. Bro. 31. 2 Rol. R. 336, 337. Hob. 337. Cro. C. 428.

And Note, in the ſaid Caſe of Auſtin *after Judgment given againſt him, Proceſs was awarded againſt him to make a Fine. And it further appears in the Record there as follows*, viz. " And the aforeſaid *William Auſtin* here in Court at the ſaid Octave of *St. Michael* being found, and of the Premiſſes by the Barons here aſked, of the Treſpaſs and Contempt aforeſaid whereof, *&c.* is committed to the ſaid Priſon of the *Fleet*, there to tarry until, *&c.* And becauſe it is given to the Court here to underſtand, that the ſaid *William Auſtin* from the Poſſeſſion of the ſaid Site of the Manor aforeſaid and other the Premiſſes according to the Tenor of the Judgment aforeſaid himſelf hath not amoved, but the Poſſeſſion thereof yet hath and keeps, contrary to the Tenor of the Judgment aforeſaid, it is agreed that the Sheriff of the ſaid County of *Kent* be commanded, that the ſaid *William Auſtin* and his Aſſigns from the Poſſeſſion of the ſaid Site of the Manor aforeſaid and other the Premiſſes and of every Parcel thereof he amove and cauſe to be amoved, according to the Tenor of the Judgment aforeſaid, and the ſaid Site of the Manor aforeſaid and other the Premiſſes into the Hands of the ſaid Lord the King and Lady the Queen take, and ſafely, *&c.* ſo that of the ſame Site and other the Premiſſes to the ſame Lord the King and Lady the Queen he may anſwer, at the Will of the ſaid King and Queen, *&c.*" *By which it appears to be the Practice of the Exchequer, that when a Man is convicted in the Exchequer of an Intruſion into any Lands of the Crown, upon a Bill of Intruſion there exhibited, where the Title of the Crown appears to be good, and the Title of the Party to be inſufficient, although ſuch Suit is but a perſonal Suit, and in Effect nothing more than Treſpaſs, yet the Party ſhall be removed and put out of Poſſeſſion by a Writ formed in the Caſe.*

Nota bene by the Reporter.

When a Perſon is convicted in the Exchequer of an Intruſion into the Lands of the Crown, upon a Bill of Intruſion there brought, the Practice is to put him out of Poſſeſſion by a ſpecial Writ of *Amoveri facias*. S. P. 1 Finch 241.

Bill of Intruſion but a perſonal Suit, and in Effect no more than Treſpaſs. S. P. 1 Finch 241.

And afterwards in the ſaid next Term, *viz.* in *Hillary* Term in the 15th Year of the Reign of Queen *Elizabeth*, Judgment was given by the Barons for the Queen and againſt the Defendant. Which Judgment was as follows.

Hill. Term 15 Eliz.

At which Day they the ſame *Thomas* and *John* came here as at firſt. And the aforeſaid Attorney General of the Lady the Queen now, who proſecutes for the ſame Lady the Queen, being preſent here in Court at the ſame Day in his proper Perſon, for the ſame Lady the Queen prays Judgment as at firſt. And the Premiſſes being ſeen by the Barons, and mature Deliberation being thereupon had amongſt them, becauſe it ſeems to them that the aforeſaid Plea of the aforeſaid *Thomas Walſingham* and *John Gillibrand* by them in Manner and Form above pleaded is inſufficient in Law to diſcharge the aforeſaid *Thomas* and *John* from the Intruſion, Treſpaſs, and Contempt aforeſaid, it is conſidered by the ſame Barons that the aforeſaid *Thomas Walſingham* and *John Gillibrand* of the Intruſion, Treſpaſs, and Contempt aforeſaid be convicted. And the Sheriff is commanded that the ſaid *Thomas* and *John* he attach, *&c.*

The Reſt of the Record.

NOTE,

NOTE, upon this Judgment the Defendants afterwards brought a Writ of Error in the Exchequer Chamber, to which they were moved by Reaſon of a Judgment upon Demurrer which was given in the Common Pleas to the contrary of the foregoing Judgment. And the Caſe there adjudged was thus: * The ſaid *George Moulton*, the ſame Day that the ſaid Sir *Thomas Wyat* the Son had enfeoffed him of the ſaid Tenements in *Eaſtpeckham*, which was in 35 *Hen.* 8. enfeoffed the ſaid Sir *Thomas Wyat* the Son of the Manor of *Hunton* in the County of *Kent* in Fee, upon Condition that if the Tenements in *Eaſtpeckham* or any Parcel thereof ſhould be evicted or taken from the ſaid *Moulton*, his Heirs or Aſſigns, then it ſhould be lawful for the ſaid *Moulton* and his Heirs to re-enter into the ſaid Manor of *Hunton*. Which Manor of *Hunton* came by the Attainder of *Wyat* to Queen *Mary*, who gave it in Fee to Sir *John Baker* Knight, from whom it came by Deſcent to *Richard Baker* his Son and Heir, who made a Leaſe of Part of it to *Roger Coveney*, upon whom the ſaid *George Moulton* entered, ſuppoſing that the Condition was broken, becauſe the ſaid Tenements in *Eaſtpeckham* were lawfully taken by the Queen from *Walſingham* his Aſſignee, according to the Judgment of the Barons of the Exchequer, and *Coveney* ouſted him, whereupon *Moulton* brought an Action of Treſpaſs in the Common Bench, and all the above Matter was diſcloſed in Pleading, and the Parties demurred thereupon. And the Caſe was argued both at the Bar and at the Bench. And all the Juſtices agreed that the Tenements in *Eaſtpeckham* were not lawfully evicted from *Walſingham* the Aſſignee of *Moulton* by the Attainder of *Wyat* and the Entry of the Queen, and therefore they awarded that the ſaid *Moulton* ſhould take nothing by his Writ, as it appears by the Record of the Caſe which is entered in *Michaelmas* Term 16 & 17 *Elizabeth*, *Roll* † 816.

* See the Caſe N. Bendl. 260. pl. 272.

† In N. Bendl. 260 (where S. C. is reported) it is ſaid to be *Roll* 840.

Which Judgment was in the Point contrary to the foregoing Judgment in the Exchequer, by Reaſon whereof the ſaid Sir *Thomas Walſingham* now Knight, and the ſaid *Gillibrand* brought a Writ of Error in the Exchequer Chamber before Sir *Nicholas Bacon* Knight Keeper of the Great-Seal, and before *William Cecil* Knight Lord *Burghley* Lord Treaſurer of the Exchequer, who called to their Aſſiſtance all the four Juſtices of the King's Bench, before all whom the foregoing Judgment in the Exchequer was canvaſſed, and it's Validity or Infirmity laid open, in *Trinity* Term in the 20th Year of the Reign of Queen *Elizabeth*, by *Henry Beaumond* the younger on the Part of *Walſingham* and *Gillibrand* Plaintiffs in Error, and by *Flowredew* Apprentice on the Part of the Queen Defendant in Error; and in *Hillary* Term in the 21ſt Year of the Reign of Queen *Elizabeth* by *Gawdy* Serjeant on the Part of the ſaid Plaintiffs in Error, and by an Apprentice of the Middle Temple on the Part of the Queen.

Trin. Term 20 *Eliz.*

Hill. Term 21 *Eliz.*

Before the Statute *de donis Conditionalibus* there was but one Eſtate of Inheritance, *viz.* Fee-ſimple. S. P. Ante 235 (d), and ſee the Books there cited.

And the Counſel who argued on both Sides agreed in three Points. Firſt, that before the Statute *de donis conditionalibus* there was no other Eſtate of Inheritance but a Fee-ſimple, which was of two Sorts, *viz.* conditional and abſolute, and what the conditional was, appears by the ſame Act *de donis conditionalibus*. And by that Act there was another Eſtate made which was not at the Common Law, *viz.* a Fee-tail, which is leſs than the Fee-ſimple before was, and the Fee ſimple remains and continues in the Donor. So that ſince the ſaid Act there are two Eſtates, a greater and a leſs, where before there was but one, and the Alienation before the Act of him who had an Eſtate of Inheritance, and the Alienation, after the Act, of him who has an Eſtate tail, is all of the ſame Force and Effect, from whence it follows that inaſmuch as there are two Eſtates of Inheritance ſince the Act, *Wyat* the Tenant in Tail here had the one, and the King the other.

Tenant in Tail makes a Feoffment, the Eſtate-tail does not paſs. Ante 555, *arguendo*, 561 (b), *per Curiam*.

The ſecond Point was, that the Eſtate of Inheritance, which Sir *Thomas Wyat* had at the Time of the Feoffment, was not given to *Moulton* by the Feoffment, nor was he Tenant in Tail by ſuch Feoffment, for none ſhall be Tenant in Tail but he who is comprehended in the Limitation of the Gift by the Donor, the Donor's Will being the Warrant of Eſtates-tail, and ſuch was not *Moulton* here.

Tenant in Tail, the Reverſion in the King, makes a Feoffment, this does not diſcontinue the Eſtate-tail, becauſe it cannot diſcontinue the Reverſion in the King. Ante 553.

The third Point agreed was, that the Eſtate-tail was not diſcontinued nor confounded by the Feoffment to *Moulton*, becauſe the Fee-ſimple in the King could not be taken or deveſted out of the King by the Feoffment. [a] For the King is a body politic of all others moſt high and worthy, out of whoſe Perſon no Eſtate of Inheritance or Freehold can paſs or be removed without Matter of Record. And the Feoffment of *Wyat* to *Moulton* was but Matter in Deed, which was not ſufficient to take the Reverſion out of the King. [b] And if the Reverſion in Fee is not taken away or diſcontinued, the Eſtate-tail cannot be diſcontinued, as it appears in *Littleton* and alſo in 9 *Ed.* 4.

[a] Ante 213 (i). [b] Litt. § 625. T. 9 Ed. 4. 24. b. Ante 560 (c).

For the Queen, Defendant in Error.

Tenant in Tail makes a Feoffment in Fee, no more paſſes than for the Life of the Tenant in Tail. Ante 555 *arguendo*. 561 (d) *per Curiam*.

And then (it was ſaid on the Part of the Queen) if the Eſtate-tail, which *Wyat* had at the Time when he made the Feoffment to *Moulton*, was not given to *Moulton*, nor diſcontinued, *ergo* neither a Fee-ſimple nor an Eſtate for the Life of *Moulton* paſſed to *Moulton*, [c] for an Eſtate for the Life of *Moulton* could not paſs to him without diſcontinuing the Reverſion, and alſo *ergo* no other Eſtate could paſs to *Moulton* but an Eſtate for the Life of *Wyat*, and ſuch an Eſtate muſt paſs, becauſe Livery of Seizin was made. And herein, the Apprentice ſaid, he would purſue the Method of Argument which *Littleton* [d] makes in his Chapter *of Eſtates upon Condition*, where he ſpeaks of a Gift of Lands to Huſband and Wife during the Coverture, for, he ſaid, there are but four Eſtates of Freehold, *viz.* Fee-ſimple, Fee tail, for Term of one's own Life, and for Term of another Man's Life, and here the Eſtate which *Wyat* gave to *Moulton* was not an Eſtate in Fee-ſimple, nor an Eſtate in Tail, nor an Eſtate for *Moulton*'s own Life, *ergo* it was an Eſtate for another Man's Life, *viz.* for the Life of *Wyat*; and in this Argument the *Major* is true, and ſo is the *Minor*, and conſequently the *Concluſion* alſo is true.

[c] Ante 555, *arguendo*.

[d] Litt. § 380, 381.

But

But although no Eſtate paſſed to *Moulton* than for the Life of *Wyat* only, yet that Eſtate was deſcendible during the Life of *Wyat*, becauſe the Eſtate which paſſed was given to *Moulton* and to his Heirs, which Words made the Eſtate deſcendible, although in Subſtance it was but an Eſtate for another Man's Life. * And the like Matter appears in *Littleton* in his Chapter of *Warranty*.

An Eſtate to a Man and to his Heirs during the Life of J. S. is a Freehold diſcendible during the Life of *Ceſtuy que vie*.

* Litt. § 739. Ante 556, *arguendo*,

And if no Eſtate paſſed to *Moulton* but for the Life of *Wyat*, then the Eſtate-tail did not paſs out of *Wyat*, but continued in him, and he had it at the Time of the Attainder. And if ſo be the Attainder before the Death of *Wyat* had not ended the Eſtate (as it ſhall do by the Rule of *Auſtin*'s Caſe), yet by the Death of *Wyat* the Eſtate given to *Moulton* was determined, for an Eſtate for another Man's Life cannot endure longer than the Life of *Ceſtuy que vie*; and ſo the Queen ſhall have the Land by Way of Reverter, or at leaſt by Way of Forfeiture.

But it was ſaid on Behalf of the Plaintiffs in Error, that altho' it be admitted that nothing paſſed to *Moulton* but for the Life of *Wyat*, yet the Eſtate-tail did not continue in *Wyat*, nor could it be in him againſt his own Feoffment, but it was in Abeyance according to the Opinion of [a] *Littleton*. And then if the Eſtate-tail was not in *Wyat* at the Time of the Attainder or afterwards, it ſhall not be forfeited, nor ſhall the Land revert to the King. And upon this Argument the Counſel on this Side much inſiſted.

E contra for the Plaintiffs in Error.

That upon the Feoffment of Tenant in Tail, the Eſtate tail is in Abeyance. Vide Ante 554.

[a] Litt. § 650.

Againſt which it was ſtrongly argued on the other Side by the Apprentice, who ſaid that this Caſe was not within the Intent or Conſideration of the Law in Caſes of Abeyance. For no Gifts ſhall make Things to be in Abeyance but ſuch as are to the Advantage of Strangers, and not ſuch as are to the Advantage of the Donors themſelves or their Heirs. As if a Man has a prodigal Son, who, he believes, will conſume all his Inheritance, if he lets it deſcend to him, there if the Father makes a Feoffment, and takes back an Eſtate for Life, the Remainder to divers of his Friends during the Life of his Son, the Remainder to the right Heirs of the Son, in that Caſe, for the Benefit of the right Heirs of the Son, the Remainder ſhall be in Abeyance, ſo that there are two Things obſervable herein, viz. the Intent of the Donor, and the Benefit of a Stranger, and the Law deſerves greatly to be commended for having deviſed ſuch a Way to preſerve the Inheritance. So if a Man give Land to his Son for Life who is unmarried, the Remainder for Life to her who ſhall be his Wife at the Time of his Death, now for the Benefit of the Wife the Law preſerves the Eſtate, altho' ſhe is not yet known, and in ſo doing it is greatly to be commended, for it ſatisfies the Intent of the Donor, and brings Benefit to a Stranger, and preſerves the Eſtate until it can veſt. So that in this Reſpect the Law is to be approved of, and to be deemed a good Law, for it is injurious to none, and beneficial to ſome. But in our Caſe if the Eſtate-tail ſhould go out of *Wyat*, and remain in Abeyance or *in nubibus*, then it would be out of him, and could never by any Poſſibility veſt in a Stranger, but it ſhould return to his Heir in Tail, and by ſuch Deceit he who was Tenant in Tail would avoid all Forfeitures for Treaſon which he might afterwards commit, or which he intended to commit, and in all Probability he might make the Feoffment for ſuch Purpoſe, ſo that by ſuch Contrivance the King, to whom Lands in Tail ought to come by Forfeiture for Treaſon at this Day, would be prejudiced, and other Miſchiefs would enſue from it.

E contra for the Queen.

That the Eſtate-tail is not in Abeyance in ſuch Caſe. Ante 556, *arguendo*. 561 (e) *per Curiam*.

1ſt, Becauſe Things are in Abeyance for the Benefit of Strangers, and not of the Donor or his Heirs, which would be the reverſe here.

And if the Eſtate-tail ſhould be ſuffered to be in Abeyance, a Principle of the Law would be broken thereby, for in every Gift which a Man makes of Land or Goods there ought to be a Donor, a Donee, and a Thing given. And here there is a Donor 'tis true, viz. *Wyat*, and there is alſo a Thing given, viz. the Land, but point to me out, if you can, a Donee, or tell me who it is to whom he has given the Eſtate-tail which he had? Moſt certainly there is no ſuch Perſon. [b] But where Land is given to one for Life, the Remainder in Fee to the right Heirs of *J. S.* who is alive, in that Caſe there is a Donee of the Fee, viz. the right Heir when he ſhall be known, and when he has ſurvived his Anceſtor, which may poſſibly be; ſo that there is a Donee mediate, altho' there is not an immediate Donee who can take the Eſtate at the ſame Inſtant that it was given, but foraſmuch as he may afterwards take it, therefore in Conſideration of Law he ſtands for a Donee, and ſo the Principle of the Law is preſerved and performed.

2dly, Becauſe it would violate a Principle of the Law.

[b] Ante 25 (o), and ſee the Books there cited.

But in the principal Caſe there is no Donee who can take the Eſtate-tail preſently or in Time to come, but (ſay the other Side) for that Reaſon the Eſtate-tail ſhall be in Abeyance for the Life of *Wyat*, and after his Death it ſhall return to the Heirs of the Body of *Wyat* again; then, I ſay, *Wyat* would thereby avoid his Forfeiture of the Land for Treaſon, and his Son would be ſure to have the Land after his Death; and if ſuch Doctrine was allowed, then a Man might prevent all Forfeitures to the Crown for Treaſon. For if he is Tenant in Tail of the Gift of the King, he may make a Feoffment of it, and afterwards commit Treaſon with Security, for he knows that his Son ſhall have the Land. And if he is Tenant in Tail of the Gift of a common Perſon, there the Caſe is the ſame, for then he may grant over all his Eſtate to another before the Treaſon committed, ſo that the Treaſon committed afterwards, and his Attainder thereupon, ſhall not hurt the Iſſue in Tail, but he ſhall have the Eſtate-tail, and may enter immediately after the Death of his Father. And if he is Tenant in Fee-ſimple, and grants over all his Eſtate to another, and afterwards commits Treaſon, and is attainted, in that Caſe alſo the King ſhall not have the Eſcheat, if the Law be ſo as *Littleton* and the Counſel on the other Side take it, for [c] *Littleton* puts the Caſe that Tenant in Tail grants all his Eſtate to another, in which Caſe, he ſays, the Tail ſhall be in Abeyance, and he does not put the Caſe that he grants his Eſtate to another and to his Heirs, but he leaves the Word (*Heirs*) out of the Grant, which he did not do thro' Careleſſneſs, (for he was a very circumſpect Man, and was not apt to make ſuch Miſtakes) but he omitted it as a Word not material, and then when Tenant in Fee-ſimple grants all his Eſtate

3dly, Becauſe it would tend to prevent all Forfeitures for Treaſon from coming to the Crown.

[c] Litt. § 650.

to another, the Grantee ſhall not have a Fee-ſimple for Want of the Word *(Heirs)*, but he ſhall only have an Eſtate for Life (tho' his Eſtate ſhall be without Impeachment of Waſt in that Caſe, as well as the Eſtate of the Grantee [d] of Tenant in Tail ſhall be), and the Fee-ſimple ſhall be *in nubibus* or in Abeyance as well as the Eſtate-tail ſhall be, and then if he commits Treaſon, and dies, the Fee-ſimple ſhall eſcheat to the common Lord of whom the Land is held, becauſe the Blood is corrupted between him and his Heir, ſo that his Heir cannot have it by Deſcent, and the King ſhall not have it as a Forfeiture for the Treaſon, becauſe he who committed the Treaſon had not the Fee at the Time of the Treaſon or afterwards. So that it is evident if ſuch Doctrine was allowed as is maintained by the Counſel on the other Side, it would tend to prevent all Eſcheats for Treaſon from coming to the Crown, the Inconvenience of which is an Argument that the Law is [e] not ſo as *Littleton* holds, and as the Counſel on the other Side affirm.

[d] Ante 556.

[e] See Ante 556 (b). 561 (c) *per Curiam.*

The Property of Goods and Chattles cannot paſs in Abeyance.

And if the Law will allow the Proprietor of an Inheritance in Land to convey his Inheritance in Abeyance, and by that Means to avoid any Forfeiture thereof, why does it not alſo allow the Proprietor of Goods or Chattles real and perſonal to deveſt the Property out of himſelf, and to convey them in Abeyance, ſo as to avoid all Executions and Forfeitures which may be had againſt him? For my own Part I can ſee no Difference between the Caſes, but there is as much Reaſon to allow the one as the other, and if the Law ſhould approve of either of them, it would be a very abſurd and unwiſe Law, and productive of much Miſchief and of no good. And, he ſaid, tho' in ſome Caſes the Law ſuffers a Fee-ſimple or Fee-tail to be *in nubibus*, (which, he ſaid, is only for the Benefit of Strangers) yet to ſuffer it in the preſent Caſe would be ſtraining the Law contrary to it's original Intent and Inſtitution.

And afterwards Authorities were cited as well on the one Side as on the other to prove the Effect and Operation of a Releaſe by Tenant in Tail of all his Right, or of his Eſtate. But the Counſel for the Queen ſaid that thoſe Caſes only and principally are material which concern the Acts of Tenant in Tail where the Reverſion is in the Crown, and to this the Caſe of [a] 18 *Ed.* 3. of Receipt was cited.

[a] P. 18 Ed. 3. 12. pl. 2.

Where Tenant in Tail, the Reverſion in the Crown, makes a Feoffment, tho' the Intail be in Abeyance as to any Benefit which the Tenant in Tail himſelf can claim from it againſt his own Feoffment, yet for the Benefit of the Crown the Intail ſhall be ſaid to continue in him, as the Reverſion continues in the Crown. S. P. Ante 558, *arguendo.*

Where a Matter is pleaded not in due Time, it ſhall be taken for nothing. S. P. 1 Finch 49. 2 Finch 68. Heath's Max. 169.

But it was ſaid on Behalf of the Queen, that whatſoever the Tenant in Tail himſelf may ſay after ſuch Acts done by him, yet the King ſhall ſay that the Reverſion is in him, and he ſhall have all the Benefits of the Poſſeſſion which the Reverſion draws to it or ought to have, and no Matter in Deed which the Tenant in Tail does or can do ſhall deprive him of ſuch Advantages. So that the Caſe is different between the Tenant in Tail himſelf who does the Act and the King who does no Act. For altho' the Tenant in Tail, where he has granted all his Eſtate to another, ſhall not have an Action of Waſt, or altho' it be admitted that he ſhall not be received upon Default of the Grantee, yet this does not prove but that the King ſhall ſay that the Eſtate-tail always continued in him, as to the King, and as to all Profits or Advantages which accrue to the King by Way of Reverter, or Forfeiture, or Wardſhip, or Aid to marry his Daughter, or otherwiſe. And upon this Difference between the King and the Tenant in Tail himſelf the Apprentice relied ſtrongly. And Caſes were cited to prove the ſeveral Points before touched, which Caſes I do not intend to recite here, becauſe they appear before in the Report of the Arguments in the firſt Suit upon which Judgment was given in the 15th Year of the preſent Queen.

And at the End the Apprentice ſaid that there was a Defect in the Pleading, which would prevent the Reverſal of the Judgment, let the Matter in Law turn out how it might, and the Defect was, that it is not effectually ſhewn that *Wyat* had Iſſue alive, for if he had not (as it ſhall be intended that he had not, if it is not ſhewn to the contrary) then without Queſtion the King ſhall be in as in his Reverter. And, Sir, the Information impeaches the preſent Plaintiffs in Error (who were the Defendants in the firſt Suit) of an Intruſion into the Lands in Queſtion lately parcel of the Lands and Poſſeſſions of Sir *Thomas Wyat* Knight late attainted of High Treaſon, and the Defendants pleaded in Bar that *George Moulton* was ſeized in Fee, and enfeoffed *Edmund Walſingham* in Fee, who died ſeized, and the Tenements deſcended to the ſaid *Thomas Walſingham* the Defendant below and now Plaintiff in Error, and ſo he and *Gillibrand* as his Servant juſtified, and traverſed the Intruſion, and averred that *George Wyat* the Son of the ſaid Sir *Thomas Wyat*, who was attainted, was alive. Now for any Thing that is yet ſhewn it is not material whether he had a Son alive or not, for it may be and ſhall be intended, for any Thing that is hitherto ſhewn, that Sir *Thomas Wyat* was ſeized in Fee, and therefore the Averment that he had Iſſue is vain and idle. But when the Queen's Attorney came and replied that Sir *Thomas Wyat* was ſeized in Tail of the Gift of the King, and that the Reverſion was in the Crown, then was the proper Time for the Defendants to ſhew by Way of Rejoinder that the Iſſue inheritable to the Tail was alive, to the Intent to inform the Court that the Land was not reverted to the Crown for Want of Iſſue, but as it is averred here it is in vain and immaterial, and juſt the ſame as if it had not been ſhewn at all. [b] As if a Man brings an Action of Debt upon an Obligation, and ſays that the Defendant was of full Age and made the Deed, the Defendant may ſay that he was within Age, without anſwering to the full Age, becauſe it is not effectually ſhewn, and therefore the Plaintiff may reply and ſay that the Defendant was of full Age, and not within Age, and ſo the Negative which ſerves for a Traverſe ſhall come in that Way. [c] So in Aſſize if the Tenant pleads a Feoffment of the Father of the Plaintiff without Condition, the Plaintiff may ſay that the Feoffment was upon Codition, for the Breach whereof he being Heir entered, and he ſhall not traverſe the Simpleneſs of the Feoffment without Condition alledged by the Tenant. So in the principal Caſe the Information and the Bar don't miniſter any Cauſe upon which the Averment ought to be taken, and therefore it is as if it had not been ſhewn, in which Caſe the Crown ſhall be adjudged in

[b] S. P. 1 Finch 49. 2 Finch 69. Heath's Max. 169.

[c] Heath's Max. 169.

in by Reverter for Default of Iſſue, and then there is no Error in the former Judgment, nor does the Matter in Law aforeſaid come in Queſtion. But he ſaid that he relied not only upon this Point, but upon the Matter before, which proves that the Crown ſhall be in by way of [a] Reverter, as in [b] *Auſtin*'s Caſe.

[a] See Ante 559.
[b] See Ante 560 (d).

And he ſaid that in *Auſtin*'s Caſe the Saving of all Leaſes to Strangers, which is as well in the private Act of Attainder of *Wyat* as in the Act of 33 *H.* 8. *cap.* 20. and of 26 *H.* 8. *cap.* 13. by which Tenant in Tail ſhall forfeit for Treaſon the Lands entailed, could not preſerve the Leaſe of *Auſtin*, as it was there held, becauſe the Eſtate-tail, out of which the Leaſe was made, was determined by Reverter, and when the principal Eſtate is ended, all particular Eſtates derived out of it are ended together with it, for when the Eſtate itſelf is no more, nothing can be ſaved out of it, becauſe there is nothing exiſting out of which any Thing ſhould be ſaved, for out of nothing nothing can be ſaved, and therefore ſuch Savings ought to be intended of other Leaſes than of thoſe which are derived out of the Eſtates determined. [c] And he reſembled theſe Sort of Savings to a Saving or *Proviſo* which is in the Act of 1 *Mary*, which declares that the pretended Act of Attainder of *Thomas* Duke of *Norfolk*, made in 38 *H.* 8. for certain Cauſes ſhewn in the ſaid Act of 1 *Mary* was no Act, but utterly void, in which Act of 1 *Mary* there is a *Proviſo* that the ſaid Act ſhall not extend to take from the Patentees of King *Hen.* 8. and of *Edw.* 6. any Lands or Tenements which thoſe Kings had by the Attainder of the ſaid Duke, and which they had granted to others, but that the Eſtate and Right of ſuch Patentees ſhall be ſaved, as if the ſame Act of 1 *Mary* had not been made. Which *Proviſo* and Saving ſerved to [d] pleaſe many of the ignorant Patentees who were Members of that Parliament, but in Fact it was utterly void, for if the ſuppoſed Act of Attainder was void, as the ſaid explanatory Act of 1 *Mary* declared it to be, then the Crown never had any of the Lands of the Duke by any Attainder of him, in which Caſe all Patents of ſuch Lands made by the ſaid Kings were void, and therefore the *Proviſo* or Saving was void, becauſe it could not ſave to them that which they had not, and he ſaid it was a [e] *flattering Proviſo, which ſerved to make Fools merry.* [f] And to the like Purpoſe he cited a Caſe between *Unton* and *Hyde*, which was in the King's Bench upon a Writ of Error in the Time of the preſent Queen, in which he himſelf argued, where in the Statute of 34 *H.* 8. *cap.* 5. of Explanation of laſt Wills of Land (in which it is declared that by the Act of 32 *H.* 8. *of Wills*, a Will ſhall be taken to be good for two Parts of the Land held by Knight's ſervice, altho' it be made of the whole) there is a *Proviſo* that the ſame Act of 34 *H.* 8. ſhall not extend to the Will of *Thomas Unton*, which was made after the firſt Act of 32 *H.* 8. and before the explanatory Act of 34 *H.* 8. and *Hyde* claiming the two Parts by the Will obtained Judgment in the Common Pleas in a Writ of Partition for the two Parts, whereupon Sir *Edward Unton* Knight being Heir to *Thomas Unton*, apprehending that the Will was void, becauſe it was made of the whole Land, and that he was at Liberty by the ſaid *Proviſo* to ſay ſo, brought a Writ of Error, and it was adjudged that it was not Error, and therefore that Error was marked in the Roll as of no Weight, (but other Errors delayed the Affirmance of the Judgment) for when the Act of 34 *H.* 8. explained and declared that Wills made of the whole Land after the Act of 32 *H.* 8. and after the ſame explanatory Act alſo ſhould be good for two Parts, the Judges could not ſay otherwiſe; from whence it follows that the *Proviſo* touching the Will of *Thomas Unton* could not be of any Avail to Sir *Edward*, nor gave him any Power to diſpute the Validity of the Will as to the two Parts, for to have diſputed that would have been flying directly in the Face of the Act. So by the ſame Reaſon in *Auſtin*'s Caſe the Act which hath made the Reverter hath deſtroyed the Force of the Saving. Wherefore it was prayed that the Judgment might be affirmed.

Tenant in Tail, the Reverſion in the Crown, makes a Leaſe for Years within the Statute of 32 *H.* 8. to A. and commits Treaſon, and is attainted, and his Land is given to the Crown by Act of Parliament, ſaving all Leaſes of Strangers, the Leaſe of A. cannot be ſaved; for the Eſtate-tail, out of which it is derived, is *ipſo facto* determined by the Attainder, and conſequently the Leaſe is determined, and the Saving ſhall be intended of other Leaſes than of ſuch as are derived out of the Eſtate determined. S. P. Litt. R. 44. Moor 309. Ante 560 (e).

[c] See 1 Co. 47. a. Moor 309. W. Jones 236. *Ex hoc nota* that a Saving in an Act of Parliament, which is repugnant to the Body of the Act, is void. Vide Kelw. 174. pl. 4.

[d] See 1 Co. 24. b. Palm. 125. Poph. 8. Hardr. 306, 434.

[e] Davis 2. a. 3 Keb. 236.

[f] See the Caſe here cited Bro. Teſtament 26. B. N. C. § 486. Dy. 150. pl. 89. N. Bendl. 69 pl. 88. 1 And. 3. pl. 6. 3 Leon. 29. S. P. Moor 309.

And after theſe Arguments Day was given until the ſecond *Saturday* in *Eaſter* Term next following, and in the mean time the Lord Treaſurer deſired the Juſtices to take the Matter and the Arguments into Conſideration. And in the Vacation next following this Term, viz. on *Thurſday* the 19th Day of *February* in the 21ſt Year of the Reign of Queen *Elizabeth*, died Sir *Nicholas Bacon* Knight, of the County of *Suffolk*, and of the Society of Grays-Inn, a Man of great Eloquence, Gravity, and Wiſdom, who then was, and during all the Reign of the ſaid Queen *Elizabeth* had been, Lord Keeper of the Great-Seal, and before that was Attorney of the Court of Wards. In whoſe Place *Thomas Bromley* Eſquire, born in the County of *Salop*, Apprentice of the Inner-Temple, and Sollicitor General to Queen *Elizabeth*, was ſurrogated, and made Knight, and Lord Chancellor of *England*. And he, and the Lord Treaſurer, and all the Barons of the Exchequer, and all the ſaid Juſtices of the King's Bench, the 19th Day of *May* in *Eaſter* Term in the 21ſt Year of the Reign of Queen *Elizabeth*, aſſembled together in the Exchequer Chamber for the Cauſe aforeſaid, upon Account of a new Writ of Error then brought before the ſaid Lord Chancellor and the Lord Treaſurer upon the ſaid Matter: (For the firſt Writ of Error abated by the Death of the ſaid Sir *Nicholas Bacon* Lord Keeper of the Great Seal, for in the Writ of Error he was named by his Chriſtian Name and Surname, and alſo by the Name of Lord Keeper of the Great-Seal, and therefore by his Death the Writ was abated, and this new Writ purchaſed.) And Error was aſſigned in the Matter, to which the Queen's Attorney rejoined, *in nullo eſt erratum.* Which new Writ of Error, Aſſignment of Error, and Rejoinder here follow.

Writ of Error in the Exchequer Chamber abated by the Death of the Lord Keeper.

" *Elizabeth* by the Grace of God of *England*, *France*, and *Ireland* Queen, Defender of the
" Faith, &c. To her very beloved and faithful Counſellors *Thomas Bromley* Knight Lord Chan-
" cellor of *England*, and *William* Lord *Burghley* Treaſurer of *England*, Greeting. Becauſe in the
" Record and Proceſs, and alſo in giving Judgment of the Plaint of a certain Information which
" was in our Court before the Barons of our Exchequer, againſt *Thomas Walſingham* Knight, by

New Writ of Error.

" the

" the Name of *Thomas Walsingham* Esquire, and *John Gillibrand*, in the Term of *St. Hillary* in " the 11th Year of our Reign by *Gilbert Gerard* Esquire our Attorney-General for us in the " same Court exhibited, by which he gave the Court there to understand and be informed, that " whereas one Messuage or Tenement called the *Curtelage* of *Eastpeckham* otherwise called *Great-* " *Peckham*, 120 Acres of Land, 16 Acres of Meadow, 30 Acres of Wood with the Appurte- " nances in *Eastpeckham* aforesaid in the County of *Kent*, late in the several Occupations of *An-* " *thony Weldon* Esquire, *Thomas Cocks*, and others, and one Meadow called *Multon-mead* in *East-* " *peckham* aforesaid, late parcel of the Lands and Possessions of *Thomas Wyat* Knight of High- " Treason attainted, the 17th Day of *November* in the 1st Year of our Reign, and long before, " and always afterwards in our Hands and Possession were, and of Right ought to be, by Rea- " son of the Attainder aforesaid, in Right of our Crown of *England*, as in many Records, Rolls, " and Remembrances of the said Exchequer more fully appeared of Record, nevertheless the said " *Thomas Walsingham* and *John Gillibrand* our Laws not fearing, but our Disinheritance intending " and contriving, with Force and Arms, &c. in and upon our Possession of the Premisses en- " tered, intruded, and made Ingress, and the Issues and Profits thereof arising to their own pro- " per Uses perceived and had, that Trespass from the same 17th Day of *November* unto the ex- " hibiting the Information aforesaid and afterwards continuing, in Contempt of Us, and against " our Laws, wherefore our Attorney aforesaid for Us prayed the Advice of our Court of Exche- " quer aforesaid in the Premisses, and that the aforesaid *Thomas Walsingham* and *John Gillibrand* " might come to our Court of Exchequer aforesaid to answer Us in the Premisses, as it is said, " Error manifest hath intervened, to the great Damage of the said *Thomas Walsingham* and *John* " *Gillibrand*, as by their Complaint we are informed: And whereas in a Statute made in a Par- " liament of Lord *Edward* late King of *England* the *third* our Progenitor at *Westminster* in the " 31st Year of his Reign held, among other Things it was agreed and established, that in all " Cases touching the King or other Persons, where a Man complains of Error done in the Ex- " chequer, the Chancellor and Treasurer shall cause to come before them in any Chamber of " Council nigh the Exchequer the Record of the Process out of the Exchequer, taking to them " the Justices and other sage Persons, such as to them seemeth to be taken, and shall also call " before them the Barons of the Exchequer aforesaid to hear their Informations, and the Causes " of their Judgments, and thereupon shall duly examine the Business, and if any Error be found " they shall correct the same, and amend the Rolls, and afterwards send them back into the " said Exchequer, that Execution thereof may be done as appertaineth, as in the Statute " aforesaid more fully is contained: We therefore being willing that the Error, if there be any, " should be corrected according to the Form of the Statute aforesaid, and that full and speedy " Justice be done to the Parties aforesaid in the Premisses, command You, that if Judgment " be thereupon given, then the Record and Process aforesaid, with all Things concerning them, " before You the foresaid Chancellor and Treasurer in the Chamber of Council nigh the Ex- " chequer aforesaid, called the *Council-chamber*, on *Tuesday* the 19th Day of this Instant Month " of *May*, you cause to come, to the End that you the aforesaid Chancellor and Treasurer hav- " ing seen and examined the Record and the Process aforesaid, and having heard the Informa- " tions of our aforesaid Barons of our Exchequer aforesaid, further in that Behalf, by the Advice " of the Justices and such other sage Persons, you may cause to be done what of Right, and ac- " cording to the Form of the Statute aforesaid ought to be done. Witness ourself at *Westminster* " the 1st Day of *May* in the 21st Year of our Reign."

Assignment of Error. " At which said 19th Day of *May* before the aforesaid Chancellor and Treasurer in the Cham- " ber, &c. came the aforesaid *Thomas Walsingham* and *John Gillibrand* in their proper Persons, " and immediately say, that in the Record and Process aforesaid, and in giving the Judgment a- " foresaid, it is manifestly erred in this, viz. that whereas they the aforesaid *Thomas Walsingham* and " *John Gillibrand* in the same Court pleaded a sufficient Plea in Bar of the Information aforesaid, " as in the aforesaid Record appears, to which said Bar the aforesaid Attorney of the said Lady " the Queen for the same Lady the Queen in the same Court insufficiently replied, in Manner " and Form as also above in the same Record is mentioned, upon which said Replication they " the aforesaid *Thomas Walsingham* and *John Gillibrand* demurred in Law, and that notwithstand- " ing, it was adjudged by the Barons aforesaid that they the said *Thomas Walsingham* and *John* " *Gillibrand* of the Intrusion, Trespass, and Contempt in the Information aforesaid should be " convicted. By Reason whereof and of other Errors in the Record aforesaid appearing, they the " same *Thomas Walsingham* and *John Gillibrand* pray that the Judgment aforesaid may be reversed " and wholly annulled." GAWDY.

Rejoinder *in nullo est erratum*. " And the aforesaid Attorney of the said Lady the Queen says, that in the Record and Process " aforesaid, and in giving the Judgment aforesaid it is in nothing erred. And he prays for the " same Lady the Queen that the Court of the Lady the Queen here may proceed to the Exami- " nation as well of the Record and Process as of the Matter aforesaid above assigned for Errors, " and that the aforesaid Judgment in all Things may be affirmed." G. GERARD.

Easter Term 21 Eliz. And it was prayed on Behalf of the Plaintiffs in Error that the first Record might be amended in the Averment that *Wyat* had Issue, and that the Queen's Attorney might confess it by the Replication, so that by that Means it might be effectually shewn that *Wyat* had Issue alive. And thereupon a Day was given over until the last *Saturday* in *Easter* Term in the 21st Year of the Reign of Queen *Elizabeth*. At which Day Answer was given by the Queen's Attorney that he would not amend the Record, but that it should stand as it was.

And then the ſaid Lord Chancellor ſaid, we have taken the Record into Conſideration, and have conferred with all the Juſtices of the King's Bench, and with Sir *Roger Manwood* now Lord Chief Baron, who knows the Opinions of his Companions, and we are all agreed to affirm the Judgment below. And therefore he ordered *Fanſhaw* the Queen's Remembrancer to enter the Judgment accordingly. And the Apprentice deſired of the Lord Chancellor and of the Lord Treaſurer to know the Cauſe of their Judgment, viz. whether it was upon the Matter in Law, or for the Inſufficiency of the Averment that *Wyat* had Iſſue, or for both, but they would not ſhew the Reaſons thereof; and the Lord Treaſurer ſaid that they themſelves knew the Cauſe thereof well enough, but that it was not neceſſary for them to ſhew it openly. Wherefore Judgment was given, which was entered as follows. Judgment affirmed.

At which Day in the aforeſaid Council-chamber at *Weſtminſter* came the aforeſaid Lord Chancellor and Lord Treaſurer, &c. And as well the aforeſaid *Gilbert Gerard* Attorney General, &c. as the aforeſaid *Thomas Walſingham* and *John Gillibrand* before the ſame Chancellor and Treaſurer in their proper Perſons likewiſe came. Whereupon the aforeſaid Chancellor and Treaſurer having ſeen and diligently examined and more fully underſtood as well the Record and Proceſs aforeſaid as the Matter aforeſaid above aſſigned for Error, and having heard the Informations of the aforeſaid Barons of the Lady the Queen of her Exchequer aforeſaid, and having taken to their Counſel in this Behalf the Juſtices and other ſage Perſons, and having had mature Deliberation thereon, for that it ſeems to the ſame Chancellor and Treaſurer that in the ſaid Record and Proceſs and in giving the Judgment aforeſaid it is in nothing erred, it is conſidered that the Judgment aforeſaid in all Things be affirmed, and ſtand in all it's Force and Effect, the ſaid Cauſe or Matter above aſſigned for Error in any wiſe notwithſtanding, &c. The reſt of the Record. Judgment.

And afterwards I heard that the Lord Chancellor, and the Lord Treaſurer, and the Juſtices of the King's Bench, and the Barons unanimouſly agreed that the Averment in the Bar that Wyat *who was attainted had Iſſue alive was not effectually ſhewn, and that it was of no more Weight than if it had not been ſhewn at all.* * *But it is ſaid that they did not all unanimouſly agree in their Opinions upon the Matter in Law.* Nota bene. * See Hob. 304.

F I N I S.

A Report made by an uncertain Author of Part of an Argument of Edmund Plowden *Apprentice of the Middle Temple, which was made by him at* Serjeant's Inn *in* Fleet-Street, *on* Thurſday *the* 19*th Day of* October *in the* 6*th Year of the Reign of Queen* Elizabeth, *before Sir* Robert Catline *Knight Chief Juſtice of* England, *and Sir* James Dyer *Knight Chief Juſtice of the Common Bench, in a Caſe depending by Bill in the Chancery between* William Baſſet *and* William Morgan *and their Wives, Daughters to Sir* Rice Manxel *Knight and* Anne *his Wife, Plaintiffs, and* Edward Manxel *Defendant, the Matters in Law ariſing whereupon were abbreviated, and by the Order of Sir* Nicholas Bacon *Knight, then Keeper of the Great Seal, made by the Aſſent of the ſaid Parties the* 30*th Day of* June 1563 *in* Trinity *Term in the* 5*th Year of the Reign of the ſaid Queen (as appears there in the Book of Regiſter of Orders of the ſame Term fo.* 74*) were referred to be argued before the ſaid Chief Juſtices, for their Opinions therein. And the Caſe was abbreviated, and the Points in Law divided as hereafter follows.*

And Note that this Report is no Part of Mr. Plowden's *Commentaries, nor printed by his Command, but at the Requeſt of certain Students, who thought it to contain Matter of much Uſe, and worthy to be made public, although no Report could be obtained of the whole Argument, nor of the Arguments of others upon the ſame Matter, nor of the Reſolution of the ſaid Juſtices thereupon.*

SIR *Rice Manxel* was ſeized to him and to his Heirs of his Body lawfully begotten of and in the Manors of *Oxwich*, *Portineon*, *Penrice*, *Horton*, and *Nicholaſton* in the County of *Glamorgan*, and being ſo ſeized thereof, he enfeoffed *William Baſſet* and *Thomas David ap Hoel*, which *William Baſſet* and *Thomas David ap Hoel* together with the ſaid Sir *Rice Manxel*, the 1ſt Day of *July* in the 9th Year of the Reign of King *Henry* 8. made a Feoffment of the Premiſſes (except certain Parcels thereof) to *John Bridges* and *Henry Bridges* and others in Fee, to the Uſe of the ſaid Sir *Rice Manxel* and *Anne* his Wife, Siſter to the ſaid *John Bridges*, and of the Heirs of their two Bodies begotten. Which *Anne* died, having Iſſue by the ſaid Sir *Rice Manxel* one Son, who afterwards died in the Life of the ſaid Sir *Rice*, and two Daughters the Wives of the Plaintiffs, after whoſe Death, viz. in the 26th Year of King *Henry* 8. the ſaid Sir *Rice* entered into the Premiſſes upon the ſaid *John Bridges* and his other Co-Feoffees, and thereof enfeoffed *Philip Manxel* and *John Cradock* in Fee, againſt whom one *John Turbervill* within ſix Weeks after brought a Writ of Entry in the *Poſt* in the Court-Marcher within which the Manors lay, who vouched to Warranty the ſaid Sir *Rice Manxel*, who entered, and vouched over the common Vouchee, who entered, and loſt according to the common Form of common Recoveries, and the Tenant and the Vouchee had Judgment to recover in Value, which Recovery of the Demandant was executed accordingly, and the Recovery was to the Uſe of Sir *Rice Manxel* and his Heirs. And afterwards the Statute of 27 *H.* 8. was made, which transferred Uſes into Poſſeſſeſſion, by Force of which Statute the ſaid Sir *Rice* entered and was ſeized in Fee. And being ſo ſeized, the ſaid *John Bridges*, being then Survivor of the Feoffees to the ſaid Uſe in Tail, by his Deed in the 1ſt Year of the Reign of Queen *Mary* releaſed to the ſaid Sir *Rice* in theſe Words, *for me and my Heirs all Actions, Quarrels, and Demands which I have againſt the aforeſaid Rice.* And afterwards the ſaid Sir *Rice Manxel* by his Teſtament in Writing gave the Manor of *Penrice* to one *Mary Manxel* now living for her Life, and the Reſidue of the Premiſſes deſcended to *Edward Manxel* the Defendant his Son by a ſecond Wife. And afterwards *Edward Bridges* Knight who now is Lord *Chandois*, being Son and Heir to the ſaid *John Bridges* the Survivor of the Feoffees, entered into the Premiſſes to the Uſe of the ſaid two Daughters the Wives of the Plaintiffs, and Iſſues in Tail of the ſaid Sir *Rice* and *Anne* his Wife; and afterwards the ſaid two Daughters and their Huſbands now Plaintiffs entered, upon whom the ſaid *Edward Manxel* and *Mary Manxel* entered. And if their Entry be lawful or not, is the Queſtion.

And this Caſe was divided into ſeven Points. Firſt, whether or no the ancient Tail be barred by the Recovery in which Sir *Rice Manxel* came in as Vouchee. 1 Point.

Secondly, whether or no the Uſe in Tail, by which the Plaintiffs claim, is bound by the ſame Recovery. 2 Point.

Thirdly, whereas it was alledged that the Recovery was executed in Lands which one *Philip Bennet* held for Life at the Time of the Recovery and Execution, and in which the Tenants in the *Præcipe* had no Eſtate but in Reverſion in Fee-Simple depending upon the ſaid Eſtate for Life, whether or no the Eſtate-Tail be barred, inaſmuch as the Execution deveſted the Eſtate in Fee-Simple out of the Tenants: And if it ſhall not be accounted any Execution againſt the Tenants for the ſame Land nor for the Reſidue, yet foraſmuch as the Vouchee, who was Tenant in Tail, had Judgment to recover over in Value, whether or no the ſaid *Edward Manxel*, who has the Land by Deſcent, ſhall be remitted to the Tail, or whether the Tail be barred by the Judgment without any Execution, and if it be, then there is no Remitter. 3 Point.

Fourthly, whereas it is alledged, to prove that the ſaid *Philip Bennet* had an Eſtate for Life, that he was Tenant at Will, and that the Words (*demiſe and to farm let to him for Life*) whi.h 4 Point. Vide D. 269. pl. 20.

were

were contained in a Deed made to him by the ſaid Sir *Rice Manxel*, ſhall enure as a Confirmation to him for Life, whether or no the Words are ſufficient in Law ſo to do.

5 Point. Fifthly, foraſmuch as the ſaid *Philip Bennet* was but Tenant at Sufferance to the ſaid *John Bridges* and his other Co-Feoffees at the Time of making the ſaid Deed, whether or no ſuch Deed made to the ſaid *Philip Bennet* by the ſaid Sir *Rice Manxel*, who was but *Ceſtuy que Uſe*, ſhall enure to enlarge his Eſtate, or if it ſhall be void for Want of Privity.

6 Point. Sixthly, whether or no the Releaſe which was made by *John Bridges* the Survivor of the Feoffees to Sir *Rice Manxel* of all Actions, Suits, and Demands which he had againſt the ſaid *Rice*, extinguiſhed the Right and Title of Entry of the ſaid Feoffees, which accrued after the Death of the ſaid Sir *Rice*.

7 Point. Seventhly, whether or no the dying ſeized of Sir *Rice Manxel*, and the Deſcent to *Edward* his Heir, ſhall take away the Entry of the ſaid Lord *Chandois*, the Heir to the Survivor of the Feoffees, to revive the firſt Uſe.

And theſe Matters ſo divided were argued before the ſaid Chief Juſtices at *Serjeant's Inn* in *Fleet-Street*, in *Trinity* Term in the 6th Year of the Reign of the preſent Queen, by *Bell* Utter-Barriſter on the Part of the Plaintiffs, and by *Thomas Bromley* Utter-Barriſter on the Part of the Defendants. And on *Thurſday* the 19th Day of *October* they were argued by *Plowden* Apprentice on the Part of the Plaintiffs, and by *Wray* Apprentice on the Part of the Defendants.

To the 1ſt Point. An Eſtate-Tail may be barred by a common Recovery. S. P. Dr. & Stud. lib. 1. cap. 26. 1 Finch 28. 2 Finch 40. 10 Co. 37. b. 2 Rol. Abr. 396. E. pl. 1.

And as to the firſt three Points, *Plowden* ſaid as follows. Foraſmuch as the firſt Point comprehends this Queſtion, viz. whether or no the Right of the old Tail, which was in Sir *Rice Manxel*, was bound by the Recovery in which the ſaid Sir *Rice Manxel* being vouched entered into the Warranty, and vouched over, I will not argue it as a principal Point by itſelf, becauſe by the univerſal Conſent of all Men learned in the Law it is received as a firm Bar to the Tail, and a great Part of the Inheritances of the Realm depend upon it, ſo that it would be very improper to call it in Queſtion now, or to diſpute it as a doubtful Matter, and therefore I ſhall paſs over this Point, and proceed to the ſecond, in the Diſcuſſion of which I ſhall ſhew fully the Reaſons and Cauſes why the Tail is bound in the firſt Point.

To the 2d Point. 4 Petty Points. And as to the ſecond Point, viz. if the Right of the Tail in Uſe, and the Eſtate of the Feoffees to the Uſe, be bound by the Recovery, divers Things are to be conſidered herein. Firſt, if the Uſe ſhall be adjudged an Eſtate-Tail by the Statute of *Weſtminſter* 2. And if it ſhall, then, ſecondly, if the Recovery ſhall bind the Tail in Uſe by the common Law. And if it ſhall not, then, thirdly, if any of the Statutes concerning the Pernors of Profits will make the Recovery good to bind the Tail. And if none of them can do it, then, fourthly, if the Statute of 1 *Rich* 3. *cap.* 1. will make the Recovery of Force to bind the Tail in Uſe.

1 Petty Point. A Uſe in Tail is an Eſtate-Tail within the Equity of the Statute *de donis*. S. P. Co. Litt. 20. a. Crompt. J. C. 60. a. Plowd. Quær. § 185. And it ſeems to me that neither the common Law nor any of the Acts extend to bar the Right of the Uſe in Tail. And as to the firſt of the ſaid Points, it ſeems clearly that upon the ſaid Feoffment made to *John Bridges* and others the Uſe limited to Sir *Rice* and his Wife, and to the Heirs of their two Bodies begotten, ſhall be an Eſtate-Tail within the Equity of the Statute of *Weſtminſter* 2. *cap.* 1. For it does not ſeem to be within the Words of the Act, which are, *of Tenements which are oftentimes given upon Condition, &c.* and the Examples of Eſtates put in the Statute are of Lands only, and neither the Tenements here, viz. the Manors, nor any Lands are given in Tail, but in Fee-Simple to the Uſe of Sir *Rice* and his Wife in Tail, and foraſmuch as neither Land nor Tenement is given in Tail, but the Lands and Tenements are given in Fee-Simple, and the Uſe thereupon is limited in Tail, it is out of the Words of the Statute. Yet nevertheleſs foraſmuch as the Uſe is created out of the Land, and is taken in the Law to enſue the Nature and Quality of the Land, and as ſuch it is merely real, and alſo foraſmuch as the ſaid Statute is largely and extenſively expounded for the entailing of Things, it ſhall be taken to be an Eſtate-Tail by the Equity of the Statute rather than by the Words. [a] As if a Man makes a Gift in Tail with Warranty accordingly, this Warranty is in Tail, ſo that although the Donee releaſes it, [b] ſuch Releaſe ſhall not bar the Iſſue, but he may well enough vouch by Reaſon thereof, *cauſâ qua ſupra*. [c] So if a Man makes a Gift in Tail by Deed, foraſmuch as this Deed concerns the Inheritance of the Land in Tail, it is within the Statute, ſo that although the Donee gives the Deed to another, [d] yet the Iſſue in Tail ſhall have a Writ of Detinue, as it ſeems by the better Opinions of the Juſtices in 4 *H.* 7. [e] So if Copyhold-Land is granted by Copy to one and to his Heirs of his Body, this is within the Equity of the Statute *de donis conditionalibus*, as *Littleton* holds in the Chapter of *Tenant at Will according to the Cuſtom*, where he ſhews that the Iſſue ſhall have a Plaint in Nature of a *Formedon* in deſcender. [f] So if a Man grants to A. and to his Heirs of his Body the Office of Receiver of his Manor, or of Bailiff of his Manor, with a Fee, this Office ſhall be in Tail by the Equity of the ſaid Statute, and the Donee cannot by his Grant thereof bar his Iſſue, becauſe it is exerciſeable in Land. [g] But if a Man will grant to A. and to his Heirs of his Body the Office of Maſter of his Hawks, or of Maſter of his Horſes, with a Fee, this is not within the Equity of the ſaid Statute, but the Surrender or other Act of the Donee may bar the Iſſue, becauſe the Exerciſe of the Charge does not concern Land,

[a] Co. Litt. 392. b. Plowd. Quær. § 321 *Per Plowden, alii contra.*
[b] Co. Litt. 20. a. 392. b. Sed contra Plowd. Quær. § 185.
[c] Co. Litt. 20. a. 2 Rol. R. 340. 2 Bac. Abr. 258. Plowd. Quær. § 321.
[d] T. 4 H. 7. 10. a. Fitz. Detinue, 31. Bro. Charters de terre 53. H. 9. Ed. 4. 52. pl. 15. *per Curiam.* Fitz. Detinue 28. Co. Litt. 393. a.
[e] Plowd. Quær. § 185. Vide Litt. § 76. Co. Compl. Copyh. 58. § 47, 48. This has been *multum vexata Quæſtio*, ſee Cro. C. 43, &c. Godb. 367. O. Bendl. 187, &c. 1 Rol. Abr. 838. pl. 8. Gilb. Treat. of Ten. 3 Lev. 327. *Quære* if the Law is yet ſettled herein. Vin. Abr. tit. Copyhold F. e. per totum.
[f] Co. Litt. 20. a. O. Bendl. 190. 7 Co. 33. b. 1 Rol. Abr. 838. pl. 5, 7. 1 Finch 123, 124. 2 Bac. Abr. 258.
[g] Co. Litt. 20. a. 7 Co. 33 b. 1 Rol. Abr. 837. S. pl. 2. 1 Finch 126. Curſon 23. 2 Bac. Abr. 259.

but

but Chattles, and does not ſavour of the Realty: [a] So if a Man for himſelf and his Heirs grants an Annuity to A. and to his Heirs of his Body, the Releaſe of the Grantee ſhall extinguiſh the Annuity, becauſe the Body of the Grantor only is chargeable to the Body of the Grantee, and no Land is charged with the Annuity, ſo that it does not ſavour of the Realty, and ſo is the Diverſity. And ſo here foraſmuch as the Uſe is a Confidence put in a Man touching Land, and is created out of Land, and the Land is the Foundation of it, ſo that it ſavours of the Realty, it is contained within the Equity of the Statute *de donis conditionalibus*; and ſo it is taken by the greater Part of the Juſtices in [b] 19 *H.* 8. and accordingly it has been taken ever ſince.

[a] Plowd. Quær. § 185 Co. Litt. 20. a. 7 Co. 33. b. 1 Rol. Abr. 837. S. pl. 3. W. Jones 214. Curſon 23. 2 Bac. Abr. 259. Toth. 69, *Wiard v. Moſs.*

[b] T. 19. H. 8. 13. Co. Litt. 20. a.

Further, as to the Point whether or no by the common Law the Recovery here ſhall be a Bar to the Iſſue in Tail, or to the Feoffees, it ſeems to me that it ſhall not. And in order to make this more intelligible, I will ſuppoſe the Caſe to be that the Recovery had been againſt Sir *Rice* immediately, for when he came in as Vouchee, it could not be ſtronger, as to this Purpoſe, than it ſhould have been if the *Præcipe* had been brought againſt Sir *Rice* being *Ceſtuy que Uſe* in Tail in Poſſeſſion. And as to this, it is to be obſerved that [c] by the common Law *Ceſtuy que Uſe* had nothing to do with the Land, and could not meddle with it, [d] and if he had entered and occupied the Land, the Feoffees might have had an Action of Treſpaſs or Aſſize againſt him, as it is held in 5 *H.* 7. For the Land belonged to the Feoffees, and they were ſeized thereof, and the *Ceſtuy que Uſe* had nothing to do with it, but he repoſed a Confidence in the Feoffees that they would permit him to take the Profits of the Land, and if they would not, he had no Remedy in the Courts of the common Law, becauſe he had no Eſtate or Intereſt in the Land by the Judgment of the common Law. And if the Feoffees ſuffered him to enter and take the Profits of the Land to his own Uſe, yet he was but Tenant at Sufferance to them, and not able to anſwer to any *Præcipe quod reddat*, for he had no Eſtate of Freehold, but every *Præcipe quod reddat* ought to be brought againſt the Feoffees, for the Land was their's, and their Land could not be recovered againſt the *Ceſtuy que Uſe*, nor could his Uſe be demanded by a *Præcipe*. And if one had recovered the Land againſt the *Ceſtuy que Uſe*, and had entered, or had obtained Execution by *Habere facias ſeizinam*, and the Feoffees had been ouſted thereby, they ſhould have had an Aſſize; and although the *Ceſtuy que Uſe* was eſtopped to claim any Uſe againſt the Recoveror, becauſe he had anſwered and loſt as Tenant of the Land, yet when the Feoffees had re-entered, or had recovered againſt the Recoveror, they were ſeized to the Uſe of the firſt *Ceſtuy que Uſe*, for they could not ſay but that the Recovery was null and void, and they did not claim under it, but above it, from whence it follows that they could not ſay otherwiſe but that they had the Land to the Uſe of the *Ceſtuy que Uſe*, as they had it before the Recovery. Wherefore it is evident that by the common Law neither the Land nor the Uſe could be demanded nor recovered againſt the *Ceſtuy que Uſe* by a *Præcipe quod reddat*, and if it could, then were the Acts concerning the Pernors of Profits made in vain.

[c] Kelw. 42. b. *per Frowick*, by the Courſe of the common Law *Ceſtuy que Uſe* has no more to do with the Land than the meereſt Stranger in the World. S. P. Crompt. J. C. 60. a. Ante 349 (d).

[d] M. 5 H. 7, 5. b. Bro. Feoffment al Uſe 23. H. 15 H. 7, 2. pl. 4. Bro. Ibid. 39. 1 Co. 140. a. *Per Anderſon* C. J. 1 And. 320. Vin. Abr. tit. Uſes E. b. pl. 3. Ante 349 (e).

And as to thoſe Acts they were made in order to make that good which the common Law could not do, viz. to make Recoveries of Land againſt the *Ceſtuy que Uſe* good and effectual againſt the *Ceſtuy que Uſe* himſelf, and againſt the Ter-Tenants alſo; but none of the ſaid Acts makes any Recovery againſt *Ceſtuy que Uſe* good, but only ſuch Recoveries as are had upon good Title paramount the Right of the Feoffees. [e] For the firſt of the Acts is that of 1 *Rich.* 2. *cap.* 9. which recites in the Preamble *that many People having Right and juſt Title to Lands and Tenements are wrongfully delayed of their Rights and Actions by Gifts and Feoffments made, &c.* and alſo it recites *that many diſſeize others, and make Feoffments to Perſons unknown, &c.* and it ordains and enacts *that the Diſſeizees ſhall have their Recoveries againſt the Diſſeizors who take the Profits*, which is as much as to ſay, who are *Ceſtuys que Uſe, ſo that they commence their Suit within the Year after the Diſſeizin done.* So that the Preamble declares that the Miſchief which the Makers of the Act intended to remedy was to thoſe who had Right and juſt Title, or were diſſeized, and the Purview gives the Remedy only to the Diſſeizees, ſo that there ought to be a Diſſeizin in Deed, and after that a Uſe made, in which Caſe Remedy is given to ſuch Diſſeizee againſt the *Ceſtuy que Uſe*, and a Recovery againſt him ſhall bind him and the Feoffees, and ſo this Act makes no other but the *Ceſtuy que Uſe* able to loſe the Land of the Feoffees in a juſt Action brought by the Diſſeizee, and it does not make him able to loſe the Land of the Feoffees in a faint Action brought againſt him. The next Statute which was made touching the Pernors of Profits was that of 4 *H.* 4. *cap.* 7. which enacts *that the Diſſeizee ſhall have his Action againſt the firſt Diſſeizor, during the Life of the ſame Diſſeizor, ſo that the ſame Diſſeizor takes the Profits at the Time of the Suit commenced, and as to other Writs, that the Demandant ſhall commence his Suit within the Year againſt him who is Tenant of the Freehold at the Time of the Action accrued, ſo that ſuch Tenant takes the Profits at the Time of the Suit commenced.* Which Act alſo gives the Action to the Diſſeizee, or to any other to whom an Action is accrued, againſt ſuch *Ceſtuys que Uſe* ſpoken of in the Act, and it gives it to no others. In like Manner the Act of 11 *H.* 6. *cap.* 3. enlarges the Recovery of the Diſſeizees, and enacts *that the Diſſeizees ſhall have all Manner of Writs grounded upon Diſſeizin againſt the Diſſeizors and their Feoffees, ſo that ſuch Diſſeizors and Feoffees, againſt whom the Writs ſhall be brought, take the Profits at the Time of the Writs purchaſed.* All which three Statutes are made for the Benefit of Diſſeizees who have good and lawful Cauſe of Action, in order to raiſe up to them a certain Tenant who ſhall be able to anſwer their Demand, ſo that their Recovery ſhall not be defeated by Non-Tenancy in him againſt whom the Recovery was. But *Ceſtuy que Uſe* is not enabled by theſe Acts to loſe the Land of the Feoffees at the Suit of one

[e] 3 Petty Point. The Statutes touching the Pernors of Profits do not enable *Ceſtuy que Uſe* to bar the Tail in Uſe by a common Recovery, for thoſe Statutes only enable him to loſe the Land in a juſt Action brought againſt him by a Diſſeizee, and not in a faint Action at the Suit of one who never was diſſeized, nor had any Right or Title to the Land paramount the Uſe.

[e] Vin. Abr. tit. Feoffment B. 3. pl. 1.

who never was diſſeized, and never had Right or Title, but whoſe Suit was merely faint, for if the Right of him who recovers be not above the Right of the Feoffees, the Feoffees ſhall falſify his Recovery, and ſay that as the *Ceſtuy que Uſe* cannot give the Land of the Feoffees to another, no more can he bind them by a faint Recovery againſt him, which is no other than his own Act, inaſmuch as the Recoveror has no Right; and the Acts were not made for the Benefit of the *Ceſtuy que Uſe*, nor to give him Power to do what he would with the Land, but only for the Benefit of him who had Right and Title to the Land above the Uſe and Eſtate of the Feoffees, and not under it. So that faint Recoveries are out of the Purview of theſe Statutes, and remain at the common Law, for which Reaſon they ſhall be merely void. And ſuch is the principal Caſe here, for *John Turbervill* had no Right to the Land, but his Recovery was upon faint Title, and ſo it ſhall be intended by the Caſe, for which Reaſon theſe Acts concerning the Pernors of Profits will not enable Sir *Rice Manxel*, ſuppoſing that the *Præcipe* had been brought immediately againſt himſelf, to bind himſelf or the Feoffees by ſuch faint Recovery. And ſo the Law ſtood until the Statute of : *Rich.* 3. *cap.* 1. was made.

4 Petty Point. The Statute of 1 *R.* 3. *cap.* 1. does not enable *Ceſtuy que Uſe* in Tail to bar the Eſtate-Tail in Uſe by a common Recovery, where the Heirs to the ſame claim as Heirs to the *Ceſtuy que Uſe* and his Wife in Tail by the Form of the Gift; for by that Statute they ought to claim *only* as Heirs to the Grantor.

And as to that Act, it gives greater Power to the *Ceſtuy que Uſe* than he had before by the common Law, or by the other Statutes. For beſides that all his Feoffments, Gifts, Releaſes, Grants, Leaſes, &c. are by that Act made firm and ſtable, it ordains *that all Recoveries had againſt Ceſtuy que Uſe ſhall be good and effectual, &c.* [a] which Word *(all)* being general admits of no Exception, but comprehends faint Recoveries as well as Recoveries upon good Title, for a faint Recovery is a Recovery, and in the Words *(all Recoveries)* every particular Recovery is contained, for in the univerſal every ſingular is comprehended. So that this Act enlarges the Ability of the *Ceſtuy que Uſe*, and amplifies and extends his Power, by making as well faint as lawful Recoveries had againſt him to be good and effectual.

[a] Vin. Ab. tit. Uſes. W. a. pl. 1. in Notis.

But although the Act makes ſuch faint Recoveries to be good and effectual, yet it may be aſked, againſt whom ſhall they be good and effectual? To this I anſwer, that the Act itſelf ſhews this under the Word *(againſt)*, which is there repeated in two ſeveral Places. The firſt *(againſt)* is thus, viz. *againſt the Seller, Feoffor, Donor, or Grantor, and his and their Heirs claiming the ſame only as Heir or Heirs to the ſame Seller, Feoffor, Donor, or Grantor, and every of them.* And although it is made good againſt the Seller, Feoffor, Donor, or Grantor, and here there is no Seller, Feoffor, Donor, or Grantor but the *Ceſtuy que Uſe*, who is in the Place of Tenant, yet he is taken within the Equity of the Act, foraſmuch as the Act before makes good all Recoveries had againſt him, ſo that if the *Ceſtuy que Uſe*, againſt whom the Recovery is had, ſhould not be contained in the Word *(againſt)*, then the Sentence thereof would not be as full as the Sentence of the other Words, viz. *the Seller, Feoffor, &c.* but it would be imperfect, which ſhall never be preſumed to be the Intent of the Makers of the Act, but they intended that Recoveries ſhould be good againſt *Ceſtuy que Uſe*, as well as his Feoffment ſhould be good againſt him.

[b] Ibid.

[b] But this *(againſt)* makes the Recovery good againſt no Heirs but *ſuch as claim the ſame only as Heir or Heirs to the ſame Seller, Feoffor, &c.* And the Heirs in Tail here, viz. the two Daughters who are the Wives of the Plaintiffs, don't claim only as Heir to Sir *Rice*, but as Heirs of the Body of Sir *Rice* and his Wife by the Form of the Gift, and ſo the Gift is the principal Part of the Title of every Heir in Tail. For in a *Quare Impedit* the Plaintiff ought to allege Preſentment in him from whom he claims, and if the Iſſue in Tail brings a *Quare Impedit*, it is not a ſufficient Title for him to alledge Preſentment in the Donee, but he ought to alledge Preſentment in the Donor alſo, for from him he derives his Title, and he does not claim only as Heir, for none does ſo but the Heir in Fee-Simple, but he claims as Heir of the Body by the Form of the Gift, and the Gift and the Deſcent together make his Title. [c] So if the Iſſue in Tail brings a *Formedon*, and the Tenant vouches, and the Demandant will counterplead it, he ought to ſay that neither the Vouchee nor any of his Anceſtors, whoſe Heir he is, ever had any Thing *after the Gift*, and it is not ſufficient to ſay, after the Time of him of whoſe Seizin he demands, as it is adjudged in 2 *R.* 3. and 21 *Ed.* 4. for the Gift is the Demandant's Title, and he ought to counterplead the Eſtate of the Vouchee and of his Anceſtors after it. And if the Father is *Ceſtuy que Uſe* for Life, the Remainder to the Son and Heir apparent in Fee, a Recovery againſt the Father ſhall not bind the Son, for he claims the Uſe by the Remainder, and not only as Heir. So if I ſell Land, and all Evidences concerning the ſame Land only, the Vendee ſhall not have Evidences which concern the ſame Land and other Land alſo. [d] So if the Father in Conſideration of Money paid to him, and of the Marriage of his Son, covenants by Deed that from thenceforth he will ſtand ſeized of his Land to the Uſe of himſelf for Life, and afterwards to the Uſe of his Son, and the Heirs of his Body, and the Deed is not enrolled, the Uſe and Poſſeſſion of the Land is changed thereby, and yet the Statute of 27 *H.* 8. *of Inrollments* enacts *that no Land ſhall paſs, alter, or change from one to another, where any Eſtate of Freehold ſhall be made, or any Uſe thereof, by Reaſon only of any Bargain and Sale, unleſs the ſame Bargain and Sale be inrolled within ſix Months, &c.* but here the Uſe is not made by Reaſon only of a Bargain and Sale, but by Reaſon of a Marriage alſo. So the Statute of 32 *H.* 8. *cap.* 37. enacts *that Executors may diſtrain in the Land for the Arrearages of Rent, as long as the ſame Land ſhall continue in the Poſſeſſion of him who ought to pay the ſame Rent, or of any other Perſon claiming it only by or from the ſame Tenant by Deſcent,* [e] yet if Tenant in Tail with Remainder over dies, the Rent being in Arrear, and the Iſſue in Tail enters, he ſhall not be diſtrained for the Rent, for he does not claim the Land only from his Father by Deſcent, but by the Deſcent and by the Gift alſo, and ſo not only by the Deſcent, for

[c] H. 2 R. 3. Fitz. Counterplea de Voucher 8. H. 21 Ed. 4. 20. pl. 24. Fitz. Counterplea de Voucher 7. Bro. 45.

[d] Crompt. J. C. 60. a.

[e] Contra 4 Co. 50. b.

for the Word *(only)* is excluſive of every Plural. So in the principal Caſe the Wives of the Plaintiffs don't claim only as Heirs to Sir *Rice*, but as Heirs to Sir *Rice* and his Wife by the Form of the Gift, which Gift is the principal Part of the Title, and therefore they are not in the Number of thoſe who are comprehended under the firſt *(againſt)*.

And as to the ſecond *(againſt)*, the Words thereof are, *againſt all others having or claiming any Title or Intereſt in the ſame only to the Uſe of the ſame Seller, Feoffor, &c. or his or their ſaid Heirs, at the Time of the Bargain, Sale, Covenant, Gift, or Grant made.* Which Words in ſome Meaſure ſtand in Need of an Expoſition, for where it is ſaid, *to the Uſe of the Seller, &c. or his or their Heirs*, by the Letter it ought to be to the Uſe of him only, or to the Uſe of his Heirs only, ſo that if it be to the Uſe of him and his Heirs, it is out of the Words, but yet it is within the Intent of the Act. For if the Act ſhould be taken literally, it would have no Senſe in it as to the Heirs, for the Feoffees cannot be ſeized to the Uſe of the Heirs of the Seller at the Time of the Sale, becauſe the Seller can have no * Heir as long as he himſelf lives, for the Name of Heir is given to a Man in reſpect that his Anceſtor is dead; and therefore if we would make Senſe of it, it ought to be taken to the Uſe of him, or to the Uſe of him and his Heirs, at the Time of the Sale. And every other Eſtate, as an Eſtate for another's Life, and the like, are taken within the Equity of the Act.

* *Nemo eſt hæres viventis.*

But the Heirs limited in this ſecond *(againſt)* are the like Heirs as are contained in the firſt *(againſt)*, for the Words are, *to the Uſe of the Seller, &c. or his or their ſaid Heirs*, which Word *(ſaid)* being a Relative has Relation to the Heirs mentioned in the firſt *(againſt)*, and thoſe are, Heirs in Fee-ſimple, as is ſhewn before. For if I give *Black-Acre* to A. for Life, the Remainder to B. for Life, the Remainder to the Heirs Females of the Body of A. and by the ſame Deed I give *White-Acre* to the ſame A. for Life, the Remainder to C. for Life, the Remainder to *the ſaid Heirs* of A. this ſhall be to the Heirs Females of his Body, by the Relation of the Word *(ſaid)*. So here the *(ſaid Heirs)* ſhall be Heirs in Fee-ſimple, for the Heirs in Tail does not claim only as Heir, as it has been ſaid. [a] And if the Feoffees were ſeized to the Uſe of A. for Life, and afterwards to the Uſe of B. and his Heirs in Fee-ſimple, and B. enters and makes a Feoffment in the Life of A. the *Ceſtuy que Uſe* for Life, this Feoffment does not bind the Feoffees, becauſe they had not nor claimed the Land only to the Uſe of the ſame Feoffor at the Time of the Feoffment, but to the Uſe of another for Life firſt, and afterwards to the Uſe of the Feoffor. And ſo in the principal Caſe, after the Death of Sir *Rice Manxel* the Feoffees do not claim only to the Uſe of the Heirs of him againſt whom the Recovery was had; but to the Uſe of the Heirs in Tail, who are other Heirs, and therefore after the Death of the ſaid Sir *Rice* the Heir of the Survivor of the Feoffees may enter to revive the Uſe in Tail, becauſe he is not bound to claim the Land to the Uſe of ſuch Heir; and then if he is out of the Words of the Act, he is out of the Intent of it, for the Word *(only)* was put in vain, if by the Equity of the Statute he ſhould be included, and in 19 *H.* 8. and alſo in 4 *H.* 7. it is the better Opinion that the Heir in Tail neither by the Letter nor by the Equity of the Act ſhall be bound by a Recovery or Feoffment made by his Anceſtor, and as he ſhall not be bound, no more ſhall the Feoffees, but they may well enter after the Death of the Tenant in Tail to revive the Uſe in Tail in the Iſſue.

[a] 25 H. 8. Bro. Feoffments al Uſes 44. B.N.C. § 75. 1 Co. 87. a. Gilb. Law of Uſes 29, 239, 240. Ante 350(a).

And thus far I have argued (for the clearer Apprehenſion of the Matter) upon a Suppoſition and by Way of Admittance that the *Præcipe* had been brought immediately againſt Sir *Rice Manxel* himſelf, and that he had not come in as Vouchee, but had been Tenant in Uſe in the Action. Now I ſhall examine whether or no there is any Diverſity, as to the Recovery, when Sir *Rice*, who was *Ceſtuy que Uſe* in Tail, came in as Vouchee, and when the *Præcipe* was brought immediately againſt him, being *Ceſtuy que Uſe*. And as to this, it ſeems to me that if the Law be ſo as I have endeavoured to ſhew before, ſuppoſing that the Recovery had been had againſt Sir *Rice* being *Ceſtuy que Uſe* in Tail in Poſſeſſion, ſo and in the ſame Manner ſhall the Law be to all Purpoſes, and not a Jot more ſtrongly, when he came in as Vouchee, for when he came in as Vouchee, he came in upon the ſame Poſſeſſion which he had before, and upon no other, and to warrant that Poſſeſſion, and no other, and upon ſuch Poſſeſſion he vouched over. For when a Man is vouched to Warranty, and comes in, and enters into the Warranty, the Law preſumes that he parted with his firſt Poſſeſſion with Warranty, and comes in now to warrant the ſame Poſſeſſion, or elſe that he would not enter into the Warranty, but would counterplead it; [b] for he might demand a *lien* if he would, and if the Tenant ſhews a *lien*, he may counterplead it if it is not true, and if he did not make it; but if without demanding a *lien* he enters into the Warranty, who can ſay that there was no Warranty? Certainly none can ſay ſo, for the Tenant who has vouched him to Warranty cannot ſay but that there was a Warranty, the Vouchee cannot ſay but that there was a Warranty, inaſmuch as he hath entered into the Warranty to warrant the Land, the Heir of the Vouchee, for the Salvation of the Land which ſhall be rendered in Value, cannot deny the Warranty, for no Land ſhall deſcend to the Heir without Render in Value but Land in Fee-ſimple, and as the Anceſtor may alien the Land in Fee-ſimple, and by that Means defeat the Heir of it, ſo may he do any other Act which ſhall take it from the Heir, ſo that there is none, who is Privy to the Record, who hath Cauſe to deny the Warranty. Alſo no Stranger ſhall deny it, becauſe the Law always preſumes, when any one enters into the Warranty, that there was a Warranty in Deed, and that it was made upon a Feoffment or Grant of ſuch Eſtate as the Vouchee had before, and therefore no Stranger ſhall deny it.

[b] Vide Dy. 367. pl. 41.

If Vouchee enters into Warranty without demanding a *lien*, none ſhall be received to ſay that there was no Warranty in Fact, becauſe the Law preſumes to the contrary.

But perhaps it may be objected, that altho' the Law will preſume ſo when the Matter ſtands indifferent, yet here the Caſe is put that Sir *Rice* made a Feoffment, and it is not expreſſed that it

it was by Deed, for which Reaſon it ſhall be taken to be without Deed, and ſo it ſhall be preciſely taken that there was no Warranty, and then to ſay that the Law will have it that there was a Warranty, and that Sir *Rice* came in as *Ceſtuy que Uſe*, and that he vouched over of ſuch Eſtate, and no other, when in Fact the Caſe is put otherwiſe, ſeems very unreaſonable; Sir, to this I anſwer, that whether Sir *Rice* made a Feoffment without Warranty to the two who were the Tenants in the *Præcipe*, or whether they diſſeized him, and no Warranty was ever made, and be the Caſe preciſely ſo put, nevertheleſs when Sir *Rice* entered into the Warranty, the Law would not ſuffer any Man, whether a Privy or a Stranger, to ſay otherwiſe but that there was a Warranty in Deed, and that it was annexed to a Feoffment or other Eſtate of Freehold, and that Sir *Rice* the Vouchee came in in ſuch Sort, and that he was in in the like Degree to all Purpoſes as he was before the Warranty made. And herein the Law is grounded upon a very reaſonable Preſumption, for when a Man is vouched, and enters into the Warranty, no reaſonable Perſon can adjudge otherwiſe but that he has juſt Cauſe ſo to do, for by ſuch Act the Vouchee binds himſelf to warrant the Land, and to render as much in Value as the Land in Demand is, if he cannot bar the Demandant. And becauſe ſuch Act tends meerly to the Vouchee's own Diſadvantage, and it is to be preſumed that no Man will prejudice himſelf without Cauſe, therefore the Law gives Credit to his Act, and believes that there is a Warranty, inſomuch that it will not ſuffer any one to ſay to the contrary. And there are many other Caſes in our Law, which are founded upon the like Preſumption. [a] As if a *Præcipe quod reddat* be brought againſt one for 20 Acres, and he comes in, and pleads Jointenancy with another by Deed ſhewn, altho' the Deed and the Plea be falſe, yet the Demandant cannot give any Anſwer to it, becauſe when the Demandant by his Writ admits him to be Tenant of the whole, and he ſays that he is Jointenant with another, that other (if it be falſe) may eſtop the Tenant by this Record from ſaying contrary to his Affirmation, and thereby he ſhall gain the Moiety of the Land againſt him who pleaded the Jointenancy, and therefore foraſmuch as Men are not uſed to lie to their own Diſadvantage, and this Plea, if it was not true, was meerly to the Tenant's own Prejudice, the Law, upon a Preſumption that it was true, would not admit the Demandant to anſwer and deny it, but the Writ ſhould have abated preſently by the Common Law, but now by the Statute *de conjunctim feoffatis* this Matter is remedied; [b] but Jointenancy by Fine remains not yet remedied, as it is taken in 29 *Ed.* 3. where in a *Formedon* the Tenant alledged Jointenancy with his Wife by Fine, and the Demandant ſaid that the Tenements were not compriſed in the Fine, and the Writ abated by Award, becauſe no Anſwer is to be received againſt the Plea, in reſpect of the Credit which the Law gives to it for the Reaſon aforeſaid. [c] So in Replevin if the Lord avows upon the Plaintiff as upon his very Tenant, and the Plaintiff diſclaims to hold of him, the Lord ſhall not be received to give any Anſwer to this, but ſhall be condemned preſently, whether it be true or not, and the Plaintiff ſhall recover his Damages againſt him, for the Law gives Credit to the Diſclaimer, inſomuch that if it is not true, the Lord ſhall recover the Land by Writ of Right upon Diſclaimer, and therefore the Law ſays that the Tenant will not tell a Lie upon the Price. [d] So in a *Præcipe quod reddat* if the Tenant ſays that he is Villain to *J. S.* and holds the Land of him in Villenage, the Writ ſhall abate preſently, and the Demandant ſhall not be received to give any Anſwer to it, altho' it be falſe, becauſe by the Plea the Tenant has bound [e] himſelf and his Blood to perpetual Bondage, which the Law preſumes he would not do if it was not true, and when there is ſuch manifeſt Argument of Truth, the Common Law ſays that is needleſs to bring it to a Trial, for which Reaſon it gives Credit to it as to the Goſpel: But now this Caſe is remedied by the Statute of 37 *Ed.* 3. *cap.* 17. by which an Averment is given to the Demandant againſt ſuch Exception. So if a Man becomes an Approver, and appeals others, the Law takes it as an Indictment, and gives as great Credit to it as if it had been found by a Jury of 12 Men, becauſe he cannot appeal others unleſs he firſt confeſs that he himſelf did the Felony with them, for which he ſhall be hanged, and the Law preſumes that no Man would make ſuch Confeſſion if it was not true; in reſpect of which Preſumption the Law looks upon ſuch Appeal to be as true as an Indictment. From which Caſes we ſee that the Common Law accepts divers Aſſertions and Allegations as a poſitive Proof, which, tho' not proved, none ſhall impugn, and this it does in reſpect of the Loſs which the Party, who aſſerts the ſame, ſhall ſuſtain if they be not true; and becauſe it is the natural Principle of Mankind to act and ſpeak according as it ſuits beſt with their own Intereſt and Advantage, and not otherwiſe, and as the common Proverb is, *If a Man will gabber, he will gabber for Gain*, for this Reaſon in all theſe Caſes the Law judges it to be needleſs and ſuperfluous to bring to Trial ſuch Acts or Allegations which are done or affirmed by him who will receive Prejudice thereby, for the Diſadvantage which he will ſuffer from them is the Reaſon why the Law gives ſuch Credit to his Words and Acts. So here when the Vouchee enters into the Warranty, and thereby hath bound himſelf to render in Value if he cannot bar the Demandant, the Cauſe of the Warranty is not examinable by a Privy or a Stranger, becauſe the Law believes that he has juſt Cauſe for entering into the ſame, and preſumes that otherwiſe he would not have run ſuch a Riſque as he has done. And therefore if one enfeoffs me with Warranty, and I am diſſeized, and the Diſſeizor being impleaded vouches me, and I enter into the Warranty as if the Warranty had been between him and me, I may vouch my Feoffor, and bind him to warrant to me againſt his Will, for it is no Plea for him to ſay that there is no Warranty between the Tenant in the *Præcipe* and me. So if in ſuch Caſe I had been Tenant in Tail at the Time of the Diſſeizin, I might have vouched my Donor; for every one who comes in to Warrant, and enters into the Warranty, ſhall be adjudged in of his firſt Poſſeſſion, and in whatſoever Degree

The Law gives Credit to every Man where he acts or ſpeaks to his own Diſadvantage. S. P. 1 Finch 25. 2 Finch 37.

[a] 1 Finch 25. Vin. Abr. tit. Intendment A. pl. 5.

[b] H. 29 Ed. 3. 18. a. Fitz. Maintenance de Brief 62. Kelw. 66. a. *per Kingſmil.*

[c] T. 13 H. 7. 27. b. *per Keble.* 1 Finch 26.

[d] 1 Finch 25. Vin. Abr. tit. Intendment A. pl. 5. See the like Caſe in Aſſize, 8 Aſſ. pl. 14. Bro. Villenage 32.

[e] H 41 Ed. 3. Fitz. Villenage 6. Co. Litt. 122. b.

he was in before, in the ſame Degree he, being Tenant by the Warranty, is in, and in no other. And therefore if the Intereſt or Eſtate which Sir *Rice Manxel* had before was as *Ceſtuy que Uſe*, he, being Tenant by the Warranty, was in in the ſame Intereſt and Eſtate, and was to all Intents in the ſame Degree as if the *Præcipe* had been brought immediately againſt him then being *Ceſtuy que Uſe*, and if the Recovery immediately againſt himſelf, being in of ſuch Eſtate, ſhould not have been any Bar, no more ſhall it now, and if it ſhould have been a Bar againſt him, being in of ſuch Eſtate, ſo ſhall it be now, for after that he is entered into the Warranty, he is in to all Reſpects of his firſt Eſtate. And to prove that every Tenant by the Warranty is in of his firſt Eſtate, I ſhall recite divers Caſes directly tending to this Point, whereof one is in [a] 8 *Aſs. pl.* 36. and ends in 9 *Aſs. pl.* 3. where it appears that in an Aſſize of *Mortdanceſtor* brought againſt Huſband and Wife for certain Land, the Huſband made Default, upon whoſe Default the Wife was received, and vouched to Warranty a Vicar, who entered into the Warranty, and ſaid that he was Vicar of the Church of *S.* and found his Church ſeized of the Tenements as parcel of his Vicarage, and he prayed in Aid of the Parſon, Patron, and Ordinary, to which it was ſaid that he himſelf confeſſed that he was not ſuch againſt whom a Writ would lie to demand the Tenements, and he entered into the Warranty by his own Deed, whereby he had made Diſheriſon to the Parſon; but at laſt the Aid was granted, whereby it is to be obſerved, that altho' he came in by his own Warranty, and upon an Eſtate made by him in [b] Fee (for any Thing which appears in the Caſe to the contrary), yet when he entered into the Warranty, he was in the ſame Plight as he was before the Warranty made, and if he had vouched over, the Land recovered in Value ſhould without Doubt have come in Succeſſion to his Succeſſors Vicars of the ſame Place. [c] So in 41 *Ed.* 3. there is a Caſe where Tenant by the Curteſy granted over his Eſtate with Warranty, and an Aſſize of *Mortdanceſtor* was brought againſt the Grantee, who vouched the Tenant by the Curteſy, who came in, and entered into the Warranty, and prayed in Aid of his Iſſue, and becauſe he was within Age, he prayed that the Parol might demur, and there it was debated whether he ſhould have Aid of the Iſſue or not, and it was the clear Opinion in a Manner that he ſhould have Aid, wherefore the Demandants counterpleaded it; in which Caſe it is worthy of Obſervation that the Tenant by the Curteſy had Aid, where he was not Tenant for Life, nor had any Thing in the Land, but his Eſtate was granted over, and yet he had Aid as if his Eſtate had continued in him, but the only Reaſon thereof was, for that he came in as Vouchee, in which Caſe he ſhall be in to all Purpoſes as he was when he had the Land, for when he is Tenant by the Warranty, he is in the like Plight as if he had held his firſt Eſtate, and as if the *Præcipe* had been brought immediately againſt him having the ſame Eſtate, in which Caſe he ſhould have had Aid, and ſo ſhall he now. [d] Alſo in 43 *Ed.* 3. there is this Caſe, viz. two Coparceners made Partition, and afterwards one of them enfeoffed her Son and Heir apparent of her Part, and died, the Son enfeoffed a Stranger with Warranty, and died, having a Son, the Stranger was impleaded in a *Præcipe quod reddat*, and vouched the Son of him who made the Warranty to him, who came, and was bound to Warranty by the Deed of his Father, and he entered into the Warranty, and prayed in Aid of the Heir of the other Coparcener, and becauſe he was within Age he prayed that the Parol might demur, and it was there debated whether he ſhould have Aid, or not, and the Feoffment which the Grandmother made to the Father was objected as an Impediment thereto, but notwithſtanding that or any other Matter, it was the Opinion of the Court that he ſhould have Aid, and the Court ſaid to the Demandant that if he would not ſay any Thing elſe, he ſhould have the Aid preſently: In which Caſe there are two Things very obſervable, firſt, the Reaſon why the Feoffment of the Grandmother made to the Father did not take away the Privity of the Partition, which is the Salvation of the Warranty paramount, for if a Man has an Eſtate in Fee with Warranty, and enfeoffs a Stranger with Warranty, and dies, and the Feoffee vouches his Heir, the Heir ſhall deraign the firſt Warranty, [e] but when he enfeoffs his own Son with Warranty, and dies, this Warranty which the Father made to the Son is periſhed and gone, becauſe it deſcended upon himſelf, and he cannot vouch himſelf by Reaſon of a Warranty of Fee-ſimple, and inaſmuch as he cannot do that, he ſhall vouch in reſpect of the firſt Warranty; and if the Law was otherwiſe, it would be very unreaſonable, for if the Law ſhould ſuffer him to vouch himſelf in reſpect of the Warranty of the Father, then when he came in as Vouchee, he might deraign the Warranty paramount as well as he might if a Stranger had vouched him, and the Law, which will not ſuffer him ſo to do for the Sake of avoiding Circuity of Voucher, ought in Reaſon to give him ſome other Means to deraign the Warranty paramount, or elſe the Warranty paramount would be gone, and ſo the Inheritance would be loſt thro' the Defect of the Law, which would be very unreaſonable; and the other Means which the Law gives him is to deraign the Warranty paramount immediately, which is the Method ordained by the Law for the deraigning of the Warranty paramount, and this is the Reaſon of *Finchden* Chief Juſtice, in the ſaid Caſe, which is agreeable with other Books in this Point: So that in that Caſe the Feoffment was no Impediment to his having Aid of the other Coparcener to deraign the Warranty paramount. The other Thing obſervable in the ſaid Caſe, and which comes nearer to our own Purpoſe, is, that the Vouchee had Aid of the Coparcener for the Land which his Father had aliened to a Stranger in Fee-ſimple, and in which he had nothing, but the Cauſe thereof was the Warranty, which made him, being vouched, to be in the ſame Degree as his Father was before the Feoffment, and to recover in Value againſt the other Coparcener in the ſame Manner

When the Vouchee enters into the Warranty, he is in of the ſame Eſtate and Intereſt as he was before, to all Intents and Purpoſes. S. P. Pig. on Recov. 23. 3 Co. 6. b.

[a] 8 Aſſ. pl. 36. 9 Aſſ. pl. 3. Fitz. Ayd 157. Bro. 108.

[b] But ſee S. C. Mich. 9 Ed. 3. 30. pl. 20. where it appears that the Eſtate made to the Huſband and Wife was but for the Life of the Vicar, and that he had not made a Feoffment in Fee to them; but this does not appear in 8 Aſs. pl. 36.

[c] H. 41. Ed. 3. 7. b. Fitz. Counterplea de Aid 1.

[d] T. 43. Ed. 3. 23. b. Fitz. Counterplea de Aid 20. Bro. 5. Aid 27. Co. Litt. 174. a. b.

[e] S. P. 1 Finch 38. 2 Finch 55. Wing. Max. reg. 179. pl. 2.

ner as if he had been Tenant immediately. [a] So in the Caſe of 11 *H.* 4. in a *Cui in vita*, the one Coparcener of Gavelkind-land, after Partition, made a Feoffment, and took back an Eſtate in Fee, and was impleaded, and by the better Opinion he could not have Aid of his Coparcener, becauſe he was out of the Courſe of Coparcenary; but if he had taken back but an Eſtate for Life, and had prayed in Aid of the Feoffee, and the Feoffee had vouched him to Warranty, then he ſhould have had Aid of his Coparcener, as it is there put: And ſo if the Feoffee had retained the Land, and had been impleaded, and had vouched the Coparcener who enfeoffed him, there he, as Vouchee, ſhould have had Aid of the other Coparcener, as it is there put, notwithſtanding that he hath nothing in the Land, becauſe he, being Vouchee, is in his former Degree, as it is ſaid before. And as in theſe Caſes it is evident that the Vouchee ſhall be adjudged in of his former Poſſeſſion, and as immediate Tenant thereof, ſo ſhall Sir *Rice Manxel* the Vouchee be adjudged in here as *Ceſtuy que Uſe* in ſuch Form as he was before the Feoffment. And if a common Recovery with Voucher had immediately againſt him ſhould not have been a Bar to his Iſſues in Tail, nor to the Feoffees after his Death, no more ſhall this Recovery, in which he was vouched, be a Bar to them. And by the Caſes above recited the Reaſon is made manifeſt in the common Caſe, viz. [b] if Tenant in Tail of Land makes a Feoffment, and a common Recovery is had againſt the Feoffee, who vouches the Tenant in Tail, who vouches over, the Tail ſhall be barred, becauſe when he comes in as Vouchee, he ſhall be in the Degree of Tenant in Tail, and the Recompence in Value which he hath or may have ſhall go in Tail, and therefore ſuch Manner of Recovery is the moſt ſure Way to bar the Tail. [c] For if a *Præcipe quod reddat* is brought immediately againſt him to whom the Land is entailed, who vouches, and the Vouchee makes Default, and ſo a Recovery is had according to the common Courſe, there if the Tenant in Tail at the Time of the Recovery is not ſeized of the ſame Tail, but of another Tail, or of a Fee, or other Eſtate, the Tail whereof he is not ſeized at the Time of the Recovery is not barred, as it is held by the better Opinion in 12 *Ed.* 4. and adjudged in 13 *Ed.* 4. in the firſt Caſe of that Year, becauſe the Recovery in Value goes according to ſuch Eſtate whereof he is ſeized, and not in Recompence of the Eſtate whereof he is not then ſeized. For as in the above Caſe of *Cui in vita* the Coparcener who had made a Feoffment, and took back an Eſtate in Fee, was out of the Courſe of Coparcenary, and therefore could not have any Recovery in Value againſt the other Coparcener in Reſpect of the Coparcenary, no more can he who has a Right to an Intail, and is ſeized of another Eſtate at the Time of the Recovery had againſt him, have Recompence in Conſideration of that Intail, for the Recompence in Value goes only in Satisfaction of the Eſtate which the Tenant had in Poſſeſſion at the Time of the Recovery. But when he is vouched, he does not come in in reſpect of any Eſtate which he then hath, but only in reſpect of an Eſtate which he had before, and in Recompence of ſuch Eſtate which he had before the Recovery in Value ſhall go, and therefore ſuch Eſtate-tail as he had before, in Lieu of which a new Recompence ſhall come, ſhall be barred, and ſo is the Diverſity.

[a] M. 11 H. 4. 22. b. Fitz. Counterplea de Aid 14. Bro, 21.

[b] Vin. Abr. tit. Recovery common O. pl. 5.

[c] M. 12 Ed. 4. 19. M. 13 Ed. 4. 1. pl. 1. Fitz. Fauxer de recov. 20, 21. Bro. 30. Kelw. 136. pl. 122. 3 Co. 5. b. 2 Rol. R. 320. Pig. on Recov. 22, 23.

Wherefore I conclude as a Conſequent of my Argument, that the Right of the Tail in Uſe which Sir *Rice Manxel* had is not barred by the Recovery aforeſaid, becauſe if the Recovery had been had immediately againſt Sir *Rice* being *Ceſtuy que Uſe* in Poſſeſſion, the Tail ſhould not have been barred by ſuch Recovery; for that (as I have endeavoured to maintain) Sir *Rice* being Vouchee was in his firſt Degree of the Uſe, and in ſuch Degree for the Uſe as if the Feoffment had not been made.

But perhaps ſome one will ſay, that then the ancient Eſtate-tail which Sir *Rice* had before the Uſe created is not barred, for if Sir *Rice* being Vouchee came in as *Ceſtuy que Uſe*, and the Recovery in Value ſhall go in Lieu of the Uſe in Tail, then he did not come in as Tenant of the firſt Tail, and then the Recompence in Value ſhall not go in Lieu of that Tail, and then that Tail is not bound, and then *Edward Manxel* the Defendant, to whom the Land is deſcended, is remitted to that Tail; Sir, to this Objection and the Concluſions drawn from it I anſwer, that the firſt Tail is alſo bound. And to make my Argument the more clear, I will put this Caſe, viz. [d] *J. S.* hath a Wife, and Land is given to him and to his Heirs Males begotten by him on the Body of his ſaid Wife, and he has Iſſue a Son by the Wife, and afterwards the Wife dies, and he takes another Wife, and has Iſſue by her a Son and a Daughter, and he diſcontinues the Land, and takes back an Eſtate to him and to his Heirs Males by him on the Body of his ſecond Wife begotten, and afterwards he diſcontinues the Land, and takes an Eſtate back again to him and to his Heirs Females of his Body begotten, and afterwards he makes a Feoffment without Warranty to *A. B.* or is diſſeized by *A. B.* and afterwards a ſaint *Præcipe quod reddat* is brought againſt *A. B.* who vouches to Warranty the ſaid *J. S.* who enters into the Warranty, and vouches over one who is not Donor of any of the Intails, but the common Vouchee, who loſes by Default according to the common Courſe, whereby a Recovery is had in the uſual Form, and afterwards the ſaid *J. S.* dies, and his three Iſſues bring three ſeveral *Formedons* in the Deſcender, viz. each of them one againſt the Recoveror, and make ſeveral Declarations upon the ſeveral Gifts to which they are ſeverally inheritable, the Recoveror may bar each of them by the ſaid Recovery, for altho' no Warranty was made, ſo that there was no *Lien* in fact, yet inaſmuch as a *Lien* was not demanded, that is not material, for the Reaſon before ſhewn: And then when the Vouchee does not demand any *Lien*, but enters generally into the Warranty, from thence there ariſes an Incertainty whether the Warranty, which ſhall be intended to have been made, was made upon the Diſcontinuance of the firſt Tail, or of the ſecond Tail, or of the third Tail, by Reaſon of which Incertainty there

[d] S. P. cited and affirmed to be good Law, 3 Co. 6. b. 2 Rol. R. 320. Hob. 338. Hetl. 156.

is no Default in the Demandant who has recovered, for he could not counterplead the Warranty, becauſe none can do that but the Vouchee, and although the Demandant might have counterpleaded the Seizin of the Vouchee, yet the Truth would not permit him to do ſo here, but the Incertainty is occaſioned by the Vouchee who has not demanded any *Lien*, for which Reaſon it ſhall be taken moſt ſtrongly againſt him and thoſe who claim under him, and moſt largely and beneficially for the Recoveror againſt the Vouchee and his Heirs; and therefore if the Recoveror pleads the Recovery in Bar againſt the firſt Eſtate-Tail, the Iſſue who claims that Eſtate cannot ſay that the Warranty was made upon the Grant or Diſcontinuance of another of the Eſtates-Tail, for perhaps there was no Warranty in fact, but the Warranty is admitted by Eſtoppel, and if he had made a Warranty in Fact upon the Diſcontinuance of the Eſtate-Tail which was to the Heirs Females of his Body, and the Tenant had actually vouched upon this Warranty, yet inaſmuch as the *Lien* was not demanded, nor entered of Record, nor the Donor of that Tail vouched, the Iſſue of the firſt Tail cannot ſhew this, viz. that the Voucher was upon ſuch *Lien*, and that the Recompence ſhall go to the Iſſue Female, for this Averment is out of the Record, and the Record will not ſuffer ſuch Averment to annihilate the Force of the Record againſt him, for which Reaſon the Iſſue cannot plead it: And as the Recoveror may plead the Recovery againſt the Iſſue of the firſt Tail, ſo may he againſt the Iſſue of the ſecond Tail, and againſt the Iſſue or the third Tail alſo, and all this is by Reaſon of the Incertainty of the *Lien*. But if the Vouchee, when he came in, had demanded what he had to bind him to the Warranty, and the Tenant had ſhewn his Deed of Warranty made upon the Diſcontinuance in Fee of the Eſtate-Tail to the Heirs Females, and the Deed had been entered of Record at the Prayer of the Vouchee, and thereupon he had entered into the Warranty, and vouched over, there I would admit that neither the Iſſue of the firſt Tail, nor the Iſſue of the ſecond Tail ſhould have been barred, for in that Caſe the Certainty of the Warranty appears, and the Iſſue Female only ſhall have the Recompence in Value, and that ſhall be an Eſtate-Tail to the Heirs Females, for if Tenant in Tail with Warranty makes a Feoffment in Fee with Warranty, although he ſhall render a Fee-Simple to the Diſcontinuee by Reaſon of his Warranty, yet the Eſtate which he ſhall recover in Value ſhall not be greater or other than his Eſtate was before his Warranty made, for although the Eſtate given, and the Warranty thereupon, is the Cauſe why he is vouched, yet when he comes and enters into the Warranty, he is in of the Eſtate which was *eigne* to the ſame Eſtate given, for he is in of the Eſtate which he had before the Warranty made, and before the Eſtate made to which the Warranty was annexed, viz. the Eſtate-Tail to the Heirs Females, for which Cauſe the Daughter ſhall have an *Habere facias ad valentiam* for the Lands recovered in Value, and her Averment that her Father had an Eſtate-Tail to the Heirs Females at the Time of the Warranty made to the Diſcontinuee ſtands with the Record, in which the Deed of the Diſcontinuance and of the Warranty is entered, and therefore the other Iſſues ſhall not be barred for their Intails, for they may ſhew that the Aſſets ſhall go to the Siſter, and ſuch ſhewing ſtands well with the Record, becauſe the *Lien* appears, as it is ſaid before. And therefore if Tenant in Tail with Remainder over be impleaded, and vouches, and the Vouchee enters into the Warranty without demanding a *Lien*, and cannot bar the Demandant, the Recovery in Value ſhall be in Tail with Remainder over as the other Land was, and for this Cauſe the Remainder is bound, for when a *Lien* is not ſhewn, it ſhall be intended that the Vouchee was the Donor, and that the Warranty was annexed to the whole Eſtate given, viz. to the Eſtate-Tail and Remainder, and ſo that the Warranty and the Eſtate commenced together: But if the Vouchee demands a *Lien*, and he ſhews a Confirmation of the Eſtate of the Donee made by the Vouchee after the Gift, and a Warranty to the Tenant and to the Heirs of his Body begotten only, and the Deed of the *Lien* is entered of Record, then the Remainder ſhall not be bound, becauſe the Warranty appears, and, as before, it extends only to convey the Land recovered in Value to the Eſtate-Tail, and no further, and therefore becauſe the Recompence in Value ſhall not go to him in Remainder, the Remainder ſhall not be bound. So that there is a Diverſity where the Certainty of the Warranty appears, and where it does not, for if it does not appear the Law will intend that there is a Warranty, and that the Recompence in Value goes in ſuch Manner as ſhall be moſt for the Benefit and Advantage of the Recoveror, and if it does appear, then the Law will not intend it to go further than the expreſs Words allow. So here in the Caſe which I have before put, inaſmuch as it does not appear what Eſtate-Tail the ſaid J. S. had at the Time of the Feoffment and Warranty made, nor to what Eſtate in certain the Recompence in Value ſhall go, this one Recompence ſhall be objected as a Bar againſt each of the three Intails, as one Recompence was a Bar to three Eſtates-Tail in the Caſe of * 1 *Ed.* 3. where a Heir in Tail, who had a Carve of Land by Deſcent in Fee-Simple from his Father, demanded by three ſeveral *Formedons* in Deſcender againſt three ſeveral Perſons three ſeveral Carves of Land entailed to his Father, and one of the Tenants pleaded the Warranty of the Father in Bar, with the ſaid Carve in Fee-Simple deſcended to the Demandant as Aſſets, and the ſecond Tenant likewiſe pleaded the Warranty of the Father in Bar, with the ſaid Carve in Fee-Simple deſcended as Aſſets, and ſo alſo did the third Tenant, and there it was demanded, if the ſaid one Carve of Land ſhould be Aſſets and a Bar for the three ſeveral Carves of Land in Tail, and *Shard* anſwered (as a Chancellor of Equity) and ſaid that the Demandant ſhall tell his Caſe to the Court, and by the Equity of the Law this Recompenſation ſhall be made, ſo that he ſhall be barred againſt each for the third Part of the Demand againſt him, by the third Part of that which he holds by Deſcent: But *Ingham* ſeemed of the contrary Opinion, and that this could not be by the Rigour of the Law, for,

* P. 1 Ed. 3. 8. pl. 11.

for, he ſaid, every one of them hath his Plea againſt the Demandant, and he hath as much as he demands againſt each of them, and the one Tenant has nothing to do with the *Præcipe* brought againſt the other Tenant, wherefore it ſeemed to him that each of them ſhould bar the Demandant, which latter Opinion ſeems to me to be the better, and to be more conſonant to the common Law than the Opinion of *Shard.* So that as in that Caſe by the better Opinion one and the ſame Aſſets was a Bar to three ſeveral Tails for three Times as much as the Aſſets was, ſo in the other Caſe one and the ſame Aſſets ſhall be a Bar to three ſeveral Tails.

But perhaps ſome one, in order to be more fully ſatisfied of this Matter, will aſk this Queſtion, viz. if the ſaid J. S. the Vouchee, having three ſeveral Rights in Tail, had ſued Execution, and Land had been delivered to him in Execution, what Eſtate ſhould he have had therein? Should he have had it according to the firſt Tail, or according to the ſecond Tail, or according to the third Tail? And to which of the three Iſſues ſhould this have deſcended? Or if the Father had aliened it, which of them ſhould have had a *Formedon* of it? or if the Father had not ſued Execution, which of the three Iſſues ſhould have ſued Execution thereof? To theſe Queſtions, which are full of Difficulty, I give this Anſwer, firſt, that if the Father himſelf had ſued Execution, it does not appear what Eſtate he ſhould have had by the Execution, for the Writ to the Sheriff is, to deliver ſo much of the Land, without expreſſing any Eſtate, and foraſmuch as no Eſtate appears by the ſuing of the Execution, there ought to be ſome other Way by which it may be made to appear. And, Sir, if he whom J. S. vouches over, viz. the laſt Vouchee, be the Donor of any of the Eſtates-Tail, and a *Lien* made upon the Gift be ſhewn, and entered of Record, then the Land recovered of him ſhall be according to the Eſtate-Tail before made by him, and ſuch Iſſue as ſhould have inherited the Land before given by him, ſhall inherit the Land which is newly recovered of the ſame Donor in Lieu of the other Tail, for the Record ſhews that he was the Donor, and that he was vouched in Reſpect of the firſt Gift, and by that Means the Certainty of the Eſtate will appear. And if the Law be ſo in that Caſe, it ſeems that the other Iſſues ſhall not be barred of their Eſtates-Tail, but that their *Formedons* ſhall be maintenable, for there appears ſufficient Certainty that the Vouchee was the Donor. But if the laſt Vouchee be a Stranger, and not the Donor, (as it ſhall be intended in our Caſe here) or if he be the Donor, and no *Lien* is ſhewn, then I ſay that it is in the Election of the ſaid J. S. who recovers in Value to declare which of the three Eſtates he will have therein. As for Example, he is impleaded, and makes his Title, and ſhews the ſecond Eſtate-Tail, and the Recovery in Value in Reſpect of that Eſtate, this is an Election and a Claim of ſuch Eſtate; or if he loſes, and brings a *Quod ei deforceat*, and claims an Eſtate-Tail to him and to his Heirs Males by him on the Body of his ſecond Wife begotten, this ſhall bind the Iſſues, and the Iſſue of the ſecond Tail ſhall have the Land, for in Caſes of Election if he to whom the Election is once given determines his Choice, it ſhall bind all others, and therefore the other Iſſues ſhall be there barred of their Eſtates-Tail. And if the Father had ſued Execution, and had died before any Election made by him, ſuch of the three Iſſues as firſt entered ſhould have held the Land, for the others could not make to themſelves a better Title than he had who entered, and inaſmuch as the Right of his Tail was bound, now upon this Recovery in Value ſuch Iſſue ſhall have the Land ſo recovered, againſt all Stranger, in the ſame Eſtate-Tail as the other Tail was to which he was inheritable, and nevertheleſs the other Iſſues ſhall be barred for the firſt Land in Tail.

But, Sir, (to the ſecond Queſtion) in this Caſe when the Father dies, the Land ſhall deſcend to none, nor ſhall any of the Iſſues have the Freehold in Law before Entry, in Reſpect of the Incertainty to which of them it ſhall deſcend, but the Entry of ſuch Iſſue as firſt enters is an Election by him, and makes him to have the Freehold in Deed and the Eſtate-Tail alſo, although it ſhould not have deſcended to him.

And (to the third Queſtion) if the Father of the Iſſues had ſued Execution of the Aſſets, and had made a Feoffment, and had died, and the three Iſſues had brought three ſeveral *Formedons* againſt the Feoffee, he whoſe Writ had been firſt returned ſhould have had the Land, for thereby he had firſt attached the Poſſeſſion in the Hands of the Tenant, and the others, whoſe Writs had been returned afterwards, could not have made a better Title. But if all the three Writs had been returned at one and the ſame Day, they ſhould all have abated, becauſe it would have been incertain to the Court, if the Tenant had confeſſed the Actions, to which of them they ſhould have awarded Seizin, inaſmuch as all their Titles were alike, and all of them returned at one and the ſame Day, for in that Caſe the Date does not ſeem to be material, becauſe they are not of Record before the Return, and therefore in Reſpect of the Incertainty all the Writs ſhould have abated. * As in the Caſe of 21 *R.* 2. in Replevin againſt two, one of them avowed for Damage-feaſant, becauſe he was ſeized of the Land, and took the Cattle there Damage-feaſant, and the other avowed becauſe he had Common in the Land, and took the Cattle as Commoner Damage-feaſant, and there both the Avowries abated by the Award of the Court, and the Plaintiff recovered his Damages againſt them, becauſe each of them could not have a Return, and which ſhould be preferred, and which rejected, was incertain to the Court, and therefore becauſe the Court did not know what to do, they abated both the Avowries. And ſo for the ſame Reaſon all the Writs returnable at one and the ſame Day ſhall abate in the other Caſe.

And (as to the laſt Queſtion) if the Father had died before Execution ſued, and each of the Iſſues had brought a *Scire facias* againſt the laſt Vouchee to have the Land in Value, he whoſe Writ had been firſt returned ſhould have been preferred, upon the Reaſon above ſhewn; but if all the Writs had been returned at one and the ſame Day, they ſhould all have abated, *causâ qua ſupra.*

Where two ſeveral Writs, for the ſame Thing, and againſt the ſame Perſon, are returned at the ſame Day, both ſhall abate. S. P. Plowd. Quær. § 190. 1 Finch 36. 2 Finch 49. Hob. 128. pl. 161. 1 Rol. Abr. 353. pl. 5. 1 Freem. 401. pl. 526. Vin. Abr. tit. Abatement C. pl. 2. * P. 21 R. 2. Fitz. Avowry 262. Bellew's C. 58. P. 3 H. 6. 44. b. *Per Martin.* Bro. Avowry 6. in fine. 5 Co. 19. a. 38. b. Plowd. Quær. § 190, 210.

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I have been more particular in the Diſcuſſion of this Caſe, in order that thereby I might convey a clearer Knowledge and Underſtanding of the principal Caſe before us, there being a good Deal of Reſemblance and Similarity between them, for as in the Caſe above put the Vouchee had a Right to three Eſtates-Tail, ſo in the principal Caſe Sir *Rice* the Vouchee had a Right to two Eſtates-Tail, ſo that the Reſolution of the one Caſe will decide the other.

Wherefore I ſum up my Argument and conclude that inaſmuch as Sir *Rice Manxel* the Vouchee did not demand a *Lien* upon the Voucher, but entered generally into the Warranty, and vouched over a Stranger, he ſhall be adjudged to come in as Tenant of the firſt Tail, and the Recovery againſt him ſhall be of the ſame Effect as if he had been immediate Tenant to the *Præcipe*, and ſeized of ſuch Intail. And alſo he ſhall be adjudged to come in as *Ceſtuy que Uſe*, and the Recovery againſt him ſhall be of the ſame Effect as if he had been immediate Tenant to the *Præcipe* as *Ceſtuy que Uſe*, the Conſequences from both which Premiſſes are, that the firſt Tail is barred, but not the Tail in Uſe. And if there is any Cauſe why the firſt Tail is not barred, it is but for that Part whereof *Philip Bennet* was Tenant for Life, which is the third Point to be conſidered, and the Matter of it is in Effect this, viz. that the Tenant in the *Præcipe* was not Tenant.

To the 3d Point. A Recovery with Voucher is had of Lands in Tail, where of Part of the Tenements (in which Part the Recovery is executed) the Tenants to the *Præcipe* are not immediate Tenants, but have only a Reverſion expectant upon an Eſtate for Life in them, and of the Reſidue they are immediate Tenants, this Recovery ſhall bar the Eſtate-Tail, and the Iſſue in Tail ſhall never falſify it.

And as to this, for the clearer Apprehenſion hereof, I will ſuppoſe that the Tenants had nothing in Poſſeſſion, Reverſion, or Remainder of any Part of the Land. And admitting the Caſe to be ſo, yet it ſeems to me that the Eſtate Tail of him who is vouched is as fully bound as if they had been actually Tenants. Now the Objection againſt this, which is urged by thoſe who maintain that the Tenancy in the Tenant is material, lies here, viz. it is ſaid [a] that the Eſtate-Tail of the Vouchee ſhall be bound only in Reſpect of the Aſſets recovered, or which by Poſſibility may be recovered, in Value, and until the Demandant has ſued Execution againſt the Tenant, the Tenant, it is ſaid, cannot ſue Execution againſt the Vouchee, nor the Vouchee againſt his Vouchee, and if the Tenant in the *Præcipe* has nothing in the Land, then, it is ſaid, there is no Poſſibility that Execution of that Land can ever be ſued againſt him, and if Execution cannot be ſued againſt him, then, it is ſaid, he ſhall never have Execution againſt the Vouchee, and if Execution could never be ſued againſt Sir *Rice Manxel* the Vouchee here, from thence, it is ſaid, it follows that he ſhould never have had Execution againſt his Vouchee, and then if *Rice* could never have had Execution by Law againſt his Vouchee, from thence, it is ſaid, it follows that the Intail, which ſhould have been barred by Aſſets had or which poſſibly might be had, ſhall never be barred here, the Conſequence of which is, that *Edward Manxel* the Defendant is remitted to the ſaid ancient Intail. Sir, as to this Objection, it can only affect that Part whereof *Philip Bennet* was Tenant for Life, for of the Reſidue the ſaid *Philip Manxel* and *John Cradock* were perfect Tenants, ſo that for the Reſidue there is a Poſſibility of Execution. But I will beg Leave to examine this Objection, and the ſeveral Concluſions drawn from it, each of them by themſelves. But before I enter into it I will admit that the Vouchee ſhall not have Execution in Value until Execution be ſued againſt him. [b] For in 41 *Ed.* 3. in a *Formedon*, *Moris* ſaid that if the Tenant ſues Execution againſt the Vouchee, where Execution is not ſued againſt the Tenant himſelf, and he hath not loſt any Thing, the Vouchee ſhall have an Aſſize. And in H. 17. *Ed.* 2. which is abridged by *Fitz. tit. Recovery in Value pl.* 33. it appears that A. brought a *Scire facias* to have Execution in Value of Tenements recovered, and the Tenant ſaid that the Demandant in the *Scire facias* was ſeized of the Tenements ſuppoſed to be recovered againſt him, to which the Demandant ſaid that the Judgment was executed, ſo that he (the Demandant) was now put out by Execution by Virtue of the Judgment, whereupon Iſſue was there taken, which Iſſue declares that the firſt Judgment ought to be executed before the Recovery in Value ſhall be executed: [c] And this alſo appears in 1 *Ed.* 3. in Sir *John Stoner*'s Caſe in a *Warrantia Chartæ*, that if a Man has Judgment, he ſhall not have Execution until he himſelf has ſuſtained Loſs by Execution ſued againſt him. So that it ſeems to be true that if Execution is not ſued againſt the Tenant, he ſhall not have Execution of the Recompence in Value. And therefore if there is no Poſſibility of Execution againſt the Tenant, there is no Poſſibility of Execution of the Aſſets againſt the Vouchee, nor for the firſt Vouchee againſt the other Vouchee.

[a] Weſt's Symb. pt. 2. fol. 771. a. Pig. on Recov. 31.

In common Recoveries the Tenant to the *Præcipe* ſhall never ſue Execution of the Value againſt the Vouchee, until the Demandant has ſued Execution againſt him; and ſo of the firſt Vouchee againſt the ſecond Vouchee. S. P. Co. Litt. 376. b. 1 Co. 96. a. Pig. on Recov. 31. Plowd. Quær. § 330.

[b] P. 41 Ed. 3. 11. a.

[c] P. 1 Ed. 3. 10. pl. 20.

But I will try whether or no there was not a Poſſibility of Execution againſt the Tenant to the *Præcipe* in the principal Caſe, and I will ſee who it is that can ſay that Execution could not be ſued againſt him. And, Sir, none can deny but that Execution was ſueable againſt the laſt Vouchee, as well as if the Tenant in the *Præcipe* had been Tenant in Deed. For, firſt, the Demandant himſelf brought his Writ of Entry in the *Poſt* againſt the ſaid *Philip Manxel* and *John Cradock* as againſt Tenants, and he appeared and counted againſt them as againſt Tenants, in which Caſe he was eſtopped, without more done, to ſay otherwiſe but that they were Tenants. [d] And therefore in 21 *Ed.* 3. in a *Præcipe quod reddat* againſt two, one of them diſclaimed, and the other took the entire Tenancy upon him, and vouched him that had diſclaimed, and the Demandant counterpleaded that neither he nor any of his Anceſtors ever had any Thing, &c. and the Writ was abated by Award, becauſe when he brought his Writ againſt him, he affirmed him to be one of the Tenants, and when he afterwards ſaid that he never had any Thing, this was contrary to his former Affirmation. So in a *Præcipe* againſt two, if the one takes the entire Tenancy upon him, and pleads in Bar, and the other does the like, the Demandant ought to maintain his Writ; ſo that what he has affirmed by his Writ he cannot diſaffirm. [e] So *Littleton* ſays that if the Tenant aliens, pending the Writ, and nevertheleſs the Demandant releaſes to him, this Releaſe is good, becauſe the Demandant is eſtopped to ſay that the Tenant is not Tenant, for, notwithſtanding his Alienation, he remains Tenant againſt him pending the Suit. So that the bringing of the Writ, and the Appearance of the Demandant, and his Count, ſhall eſtop him to ſay otherwiſe but that the Tenant is Tenant. But in our Caſe the Demandant has gone further,

Where a common Recovery is had of Lands in Tail, and the Tenants to the *Præcipe* are not Tenants of the Land, nor have any Thing in it, and the Vouchee enters into the Warranty without counterpleading the Non-tenancy, the Tail is as fully bound by this Recovery as if the Tenants to the *Præcipe* had been actually Tenants of the Land, and the Iſſue in Tail ſhall not falſify this Recovery for ſuch Non-tenancy.

[d] M. 21 Ed. 3. 33. pl. 19.

[e] Litt. § 490.

for he has alſo recovered, and then to ſay that the Tenant is not Tenant, and to falſify his own Recovery, does not lie in his Mouth, but he is eſtopped to ſay ſo.

And as to the ſaid *Philip Manxel* and *John Cradock*, they appeared to the Writ, and took upon them the Tenancy, and as Tenants vouched, and as Tenants recovered in Value againſt the Vouchee, in which Caſe they ſhall not ſay [f] contrary to their own Acts that they were not Tenants, but they are fully eſtopped.

[f] W. Jones 459.

Where the Tenant in a *Præcipe* vouches, and may abate the Writ for Non-tenure or other Matter, and will not, but perſiſts to charge the Vouchee, the Vouchee is not compellible to enter into Warranty, but may plead that the Tenant is not Tenant, and thereby diſcharge himſelf from the Warranty; but if he does not plead this, but enters into the Warranty, by which he affirms him to be Tenant, he is eſtopped to plead ſuch Plea afterwards. S. P. Pig. on Recov. 29.

And as to Sir *Rice Manxel* the Vouchee, he is alſo eſtopped to ſay that the ſaid *Philip Manxel* and *John Cradock* were not Tenants, for he came in to warrant the Land to them as Tenants, and if they were not Tenants, Sir *Rice* ſhould not have been compelled to warrant it to them, for if the Tenants may abate the Writ by Non-Tenure or otherwiſe, and will not, the Vouchee, foraſmuch as he cannot have the ſame Plea, ſhall object this Matter againſt the Tenants, and thereby ſhall diſcharge himſelf from warranting the Land, for Voucher and Recovery in Value is given to the Tenant as his laſt Safeguard, and if he can aid himſelf by Abatement of the Writ, and will not, but will voluntarily charge the Vouchee where he has no Occaſion to do it, the Law will not compel the Vouchee to enter into the Warranty. [a] And ſo it is held in 9 *Ed.* 4. in the Caſe of a Recovery falſified by Executors, and there it is reſembled to the Caſe of Conſpiracy, [b] in which the Defendant may ſay that the Indictment was not good, and that the Plaintiff upon his Arraignment might have abated it by Exception, in which Caſe inaſmuch as he might have abated the Writ, and did not, but pleaded to it where he did not need to have done ſo, the Conſpirator ſhall object this Matter againſt him, and thereby he ſhall excuſe himſelf of Damages. [c] So in 21 *H.* 6. in a *Præcipe quod reddat*, upon Default of the Huſband the Wife was received, and ſaid that the Demandant had entered into the Land pending the Writ, and there it was debated whether ſhe ſhould ſay, after the laſt Continuance, or generally pending the Writ, and it was the Opinion of the whole Court that ſhe ſhould have the Plea generally, viz. that he had entered pending the Writ, and the Reaſon thereof is, for the Salvation of her Warranty, for otherwiſe, if ſhe would vouch, it would be a good Counterplea to ſhew that ſhe was not Tenant, and ſo could not ſuſtain any Loſs, which was not there denied, but granted by *Priſot*, *Ardern*, and all the others: And there it was held to be a good Counterplea to ſhew that the Writ of the Demandant is falſe, as for Miſnomer of the Tenant, or for that the Demandant (being a Woman) has taken Huſband pending the Writ, or for Jointenancy, or ſuch other Pleas as go in Abatement of the Writ. [d] So it ſeems by 29 *Ed.* 3. in a *Dum fuit infra ætatem*, that the Vouchee ſhall ſay that the Tenements are in another Town, and if the Tenant accepts the Writ to be good, it ſhall deprive him of the Benefit of the Warranty. [e] So in 45 *Ed.* 3. in a Writ of Eſcheat the Tenant vouched, and the Vouchee came and ſaid that the Tenant had nothing in the ſame Tenements the Day of the Writ purchaſed, nor ever after, and the Tenant pleaded againſt him the Eſtoppel (as if the Plea were good), and would have eſtopped him from pleading the above Matter, becauſe the Vouchee had firſt demanded what the Tenant had to bind him to the Warranty, after which he could not deny him to be Tenant; which Plea of Eſtoppel is an Argument that the Plea of the Vouchee was good, and afterwards the Tenant there waived the Eſtoppel, and pleaded that he was Tenant the Day of the Writ purchaſed, whereupon Iſſue was taken. * From whence it appears that it would have been a good Plea for Sir *Rice Manxel* the Vouchee in the principal Caſe to have pleaded in Diſcharge of himſelf, that the ſaid *Philip Manxel* and *John Cradock* were not Tenants. But inaſmuch as he did not plead ſuch Plea, but entered into the Warranty, whereby he affirmed them to be Tenants, he could never afterwards plead that they were not Tenants, nor can his Heirs plead ſuch Matter, for the Preſervation of the Aſſets in Fee-Simple which ſhould be rendered in Value to the Tenants, nor for any other Cauſe, ſo that there is a firm Eſtoppel againſt Sir *Rice* and his Heirs.

[a] T. 9 Ed. 4. 12. b. *Per Littleton.*

[b] Bro. Conſpiracy 23. 4 Co. 45. a. Bridgm. 132.

[c] T. 21 H. 6. 48. Fitz. Reſceit 65. Bro. 62.

[d] P. 29 Ed. 3. 30. b. Fitz. Brief 906.

[e] H. 45 Ed. 3. 2 pl. 3. Fitz. Eſtoppel 193.

* See a good Caſe M. 10 Ed. 3. 55. a. b. where the Vouchee pleaded in Abatement of the Writ, and it was allowed, and the Writ abated. So in H. 22 Ed. 3. 1. pl. 7. Fitz. Voucher 131, the Vouchee in a Writ of Entry out of the Degrees was admitted to plead in Abatement of the Writ, giving a good Writ within the Degrees. But ſee T. 22. Ed. 3. 8. pl. 14. Fitz. Voucher 137, where the Vouchee pleaded Miſnomer of the Town, and was ouſted thereof, becauſe the Writ was affirmed to be good by the Tenant.

And as to the common Vouchee whom Sir *Rice* vouched to Warranty, he could not ſay but that the ſaid *Philip Manxel* and *John Cradock* were Tenants, for as Sir *Rice* might have objected againſt them who vouched him that they were not Tenants, and ſo have diſcharged himſelf of the Warranty, in the ſame Manner the laſt Vouchee might have objected and ſaid to Sir *Rice*, "You "were not compellible to warrant, for you might have pleaded that they who vouched you were "not Tenants, and becauſe you did not do ſo, I by Law am under no Neceſſity of warranting to "you, and therefore will not." And as a Proof that he might have ſaid ſo, there is a Caſe in 10 *Ed.* 3. [f] in a Writ of Dower, where the Tenant vouched, and the Vouchee came and vouched over, and the laſt Vouchee ſaid that the Tenant, who firſt vouched, was not Tenant the Day of the firſt Writ purchaſed, nor ever after. Wherefore inaſmuch as the laſt Vouchee in the principal Caſe might have pleaded the Non-tenancy in the Tenants, and did not plead it, but entered into the Warranty, whereby he admitted the Tenancy in the Tenants, he could not afterwards deny the ſame Tenancy in the Tenants, ſo that he alſo was eſtopped.

[f] P. 10 Ed. 3. 21. pl. 31. Fitz. Counterplea de Garranty 14.

But if there is any Cauſe why the Heir in Tail ſhall falſify the Recovery here for the Non-Tenancy in the Tenants, it is becauſe the Sheriff (as it is objected) could not make Execution by *Habere facias ſeizinam* againſt the Tenant, nor come upon the Land to know the Value thereof, ſo as to be able to give as much in Value to the Vouchee, for if he ſhould come upon the Land, he would be a Diſſeizor to him who was ſeized of the Land, and becauſe he was a Stranger to the Record, he ſhould not be eſtopped, but for his own Indemnity he might refuſe to execute the Judgment: Sir, as to this Objection, I would aſk what would the Perſon who makes it ſay, if the Demandant had entered without ſuing an *Habere facias ſeizinam* to the Sheriff? Probably he might ſay that by ſuch Entry the Demandant would have been a Diſſeizor to him who was ſeized in Fee. But what then? neither the Tenant nor the Vouchee could ſay but that it was a lawful Execution, for they were eſtopped to ſay otherwiſe but that the Tenants in the *Præcipe* were Tenants in Deed, as it is ſhewn before, and then they were alſo eſtopped to ſay otherwiſe but that it was a good Entry and Execution, and then the Tenant and the Vouchee ſhould have had Execution

cution in Value. So that this is one Way for the Demandant to execute the Recovery, which being ſo done, conſequently the Tenant might have had a *Scire facias* againſt the Vouchee to have in Value, and the firſt Vouchee might have had another *Scire facias* againſt the ſecond Vouchee to have in Value alſo, againſt which there is no Objection.

And as to the other Way, if the Demandant had ſued an *Habere facias ſeizinam* directed to the Sheriff, it had been his Duty to execute the Writ, although in Fact a Stranger was ſeized of the Land, and none of the Parties to the Writ was ever ſeized of it, and ſuch Stranger ſhould not have puniſhed the Sheriff for executing the King's Command given by his Writ. [a] For all the Lands in the Realm are held either mediately or immediately of the King, and are defended by the Laws of the King, and in all Quarrels and Complaints as well concerning Land as otherwiſe Recourſe is to be had to the King, who as Head of the Law has an Intereſt to examine ſuch Quarrels and Complaints, and as King ought *ex officio* ſo to do, and all the Lands in the Realm are ſubject to his Cenſure and Examination in ſuch Caſes, from whence it conſequently follows, that when a Complaint concerning Land is made to the King, and his Miniſters thereupon enter into the Land or meddle with it for the Purpoſes of examining and inquiring into the Titles of the Parties complaining, or in order to make Execution of ſuch Rights as are tried and adjudged, they ſhall be diſpuniſhable. And this Liberty of examining and trying the Intereſts of the Subjects is annexed to the Crown as a ſpecial Prerogative, for the Benefit of the People, [b] and all Lands are charged with it as with a Condition in Law. So that if I am ſeized of Land in Fee upon a good and indefeaſible Title, and a Stranger demands this Land by a *Præcipe* againſt another Stranger, and thereupon the Sheriff, by Force of the *Præcipe*, comes upon the Land with Summoners, and ſummons him againſt whom the *Præcipe* is brought, and afterwards the Demandant recovers againſt him by Default or by Iſſue tried upon a certain Point, and by Force of an *Habere facias ſeizinam* the Sheriff comes again and puts him who has recovered in Seizin of the Land, and then goes away from thence, I cannot puniſh the Sheriff either for the firſt or ſecond coming upon the Land, becauſe the Sheriff did nothing but in Execution of the King's Command in ſuch Manner as he was charged to do, and my Poſſeſſion is ſubject by Law to this Juriſdiction of the King and his Miniſters: But after the Sheriff is gone from the Land, I may ouſt him who was the Demandant, for his Recovery againſt a Stranger gave him no Title againſt me, but the Sheriff and thoſe who came with him are diſpuniſhable for coming upon the Land in order to execute the Proceſs, for the Poſſeſſion of every Man is charged by Law with ſuch a Liberty, as to an Entry upon it. [c] For we ſee that the Law gives Liberty to him in Reverſion, who is a Subject, to come upon the Land and meddle with the Poſſeſſion of the particular Tenant, as the Tenant for Life or for Years, for certain Purpoſes, as to ſee if Waſt be done. [d] So *Littleton* in the Chapter of *Villenage* ſays that if a Man makes a Leaſe for Life, and a Villain purchaſes the Reverſion, it ſeems that the Lord of the Villain may preſently come to the Land, and claim the ſame Reverſion, and by ſuch Claim the Reverſion is preſently in him. And if *Littleton*'s Opinion be true, that the Lord may come to the Land and claim it, then by ſuch coming to the Land he is not a Treſpaſſer, for when it is ſaid that a Man may do ſuch an Act, in this Word *(may)* it is implied that he may lawfully do it. [e] So, *Littleton* ſays in the ſame Chapter, if a Villain purchaſes an Advowſon full of an Incumbent, the Lord of the Villain may come to the Church, and claim the ſaid Advowſon; by which Caſe ſo put by him he means that the Incumbent cannot puniſh him for ſuch coming to the Church, for if he could, then *Littleton* did not well ſay that he might come to the Church. [f] So in 9 *H.* 6. a Man being ſeized of the Reverſion of a Houſe deviſeable deviſed that his Executor ſhould ſell it, and died, the Executor came and found the Houſe open, and entered into it to ſee whether it was in good Repair or not, in order that he might know the true Value of the Reverſion which he was to ſell, and the particular Tenant brought an Action of Treſpaſs againſt the Executor, who pleaded the above Matter, and it was taken to be a good Plea, wherefore the Plaintiff there charged him that he claimed a Fee and Freehold, and broke the Windows and Doors, *&c.* and the Executor traverſed the ſame. By which Plea it appears that the Law gives Liberty to him, whom the Reverſioner has appointed to ſell the Reverſion, to enter into the Land upon the particular Tenant, in order to ſee the Condition and Goodneſs of the Houſe. And if the Law gives ſuch Privilege to him in the Reverſion, of whom the particular Tenant holds the Land, that he may enter for his own private Benefit into the Land of his particular Tenant, *a fortiore* the Law gives Prerogative to the King, who is the ſovereign Head of the whole Realm, and of whom all hold their Lands either mediately or immediately, to enter by his Miniſters into the Land of the Subject, in order to examine the Titles and Intereſts of his People, which is a Thing of public Utility. For which Reaſon the Sheriff ſhall not be adjudged a Treſpaſſer to the Ter-tenant for ſuch Entry into the Land in order to make Summons or to execute Recoveries, although none of thoſe who are Parties to the Suit hath or had nothing in the Land. And therefore it is frequently ſeen in our Books, that the Tenants in a *Præcipe quod reddat* have pleaded Non tenure, but it never was ſeen in ſuch Caſe that he who was Tenant in Deed had an Action againſt the Sheriff for coming upon the Land to ſummon him againſt whom the Writ was brought.

The Sheriff is not puniſhable as a Treſpaſſer for entering into Land to execute the Proceſs of Law, tho' the Parties to the Suit are mere Strangers to the Land, and never had any Thing in it.

[a] H. 48 Ed. 3. 9. b. *Per Finch.* 50 Aſs. pl. 1. *Per Bell.* Co. Litt. 1. a. 2 Inſt. 501. 4 Inſt. 192. 1 Finch 55, 112. 2 Finch 83, 132. Ante 498 (c.

[b] Palm. 53, *Per Dodder.* J.

[c] S. P. adjudged 2 Rol. R. 21, *Hunt v. Daddvers*, in an Action on the Caſe by the Leſſor againſt the Leſſee for not ſuffering him to enter to ſee whether Waſt was done or not, and the Action adjudged to be maintainable, and that the Plaintiff need not alledge that Waſt was done before he entered. S. C. Cro. J. 478. 1 Rol. Abr. 108. pl. 32. S. P. 2 Rol. R. 311. *Per Chamberlain* J. 2 Rol. Abr. 568. pl. 1. Plowd. Quær. § 159.

[d] Litt. § 179.

[e] Litt. § 180.

[f] T. 9 H. 6. 29. b. Bro. Treſpaſs 16. 11 Co. 52. a.

And if the Sheriff, by executing upon the Land the Summons of a Stranger, or by delivering Seizin upon a Writ of *Habere facias ſeizinam*, ſhould be adjudged a Treſpaſſer to him who is ſeized in Deed of the Land, from thence it would follow that the Sheriff, in order to avoid any Damage to himſelf, might return that another was Tenant, and that for that Reaſon he could not enter to execute the Writ, and in ſuch Caſe this Return ought in Reaſon to be allowed by the Court. But, Sir, although ſuch Return has been often made, yet it never was allowed in the Law. [a] And accordingly in 17 *Ed.* 3. it appears that where a Writ of Seizin upon a Judgment was ſent to the Sheriff, who returned that he ſent to the Bailiff of the Liberty, who anſwered him that the Perſon, againſt whom the Recovery was, had nothing nor was Tenant,

The Sheriff cannot return Non-tenancy to a Writ of Seizin or Summons. S. P. T. Raym. 105.

[a] M. 17 Ed. 3. 66. pl. 82. Fitz. Return de Vicount 91.

a *Non*

a *Non omittas* was awarded; whereupon the Book makes this Obſervation, *ſo Note that ſuch Anſwer of Non-tenure does not lie in the Mouth of the Sheriff or of the Bailiff:* And the Reaſon why the Return was not good is, becauſe the Law gave him Liberty to execute the Writ without any Damage to himſelf. [b] And in 8 *Ed.* 3. in a Writ of Execution to deliver Seizin upon a Judgment in a Writ of Entry, the Sheriff returned that pending the ſame Writ of Entry one had recovered the ſame Tenements by Aſſize againſt the Tenant, by Reaſon whereof he could not make Execution, and there it was touched whether or no the Return ſhould be good, but it was not there adjudged; [c] but in the ſame Year of 8 *Ed.* 3. a Man ſued a Writ of Execution to the Sheriff to deliver to him Seizin of Lands rendered to him by W. by Fine, and the Sheriff did nothing, whereupon he ſued a *ſicut alias, vel cauſam nobis ſignifices*, to which the Sheriff returned, that he had ſent to the Bailiff of *Richmond*, &c. who anſwered him that he had not made Execution, becauſe the Writ of Covenant, upon which the Fine was levied, did not come to him to make the Summons, and alſo becauſe the ſame W. who ought to have rendered the Tenements had nothing in them, but one *John Marmion* both before the Fine, and at the Time of the Fine levied, and afterwards was Tenant of the Tenements, whoſe Villain W. is, whereupon the Plaintiff prayed a *Non omittas propter aliquam libertatem*, and had it. So that inaſmuch as one of the Cauſes was there allowed, it is evident as well from that Caſe as from the others before cited, that it is no Anſwer for the Sheriff, in Writs of Seizin or Summons, to ſhew Non-tenancy in him whom the Writ or Record ſuppoſes to be Tenant. But if the Law was ſo that the Sheriff in ſuch Caſe could not lawfully make the Summons or deliver Seizin, but ſhould be puniſhable for ſo doing, then the Return of the Sheriff ſhewing ſuch Cauſe for not executing the Writ ſhould be allowed: And foraſmuch as it is not allowed, from thence it follows that he may lawfully, without Offence to any, execute ſuch Proceſs of Law, by Force of a Liberty or Condition in Law with which the Poſſeſſion of every Subject is charged. And from thence it alſo follows that it is a weak and ill grounded Objection to ſay that there was no Poſſibility or lawful Means for Sir *Rice Manxel* the Vouchee to have Execution in Value of Aſſets to the Land in Tail by Reaſon of the Non-tenancy in *Philip Manxel* and *John Cradock*.

[b] H. 8 Ed. 3. 9. pl. 26. Fitz. Garranty de Attorney 18.

[c] H. 8 Ed. 3. 12. pl. 36. Fitz. Execution 95.

And all this I have ſaid by Way of Admittance and upon a Suppoſition that *Philip Manxel* and *John Cradock* had nothing in any Part of the Land. But it is confeſſed that they had the Reverſion immediately expectant upon an Eſtate for the Life of the ſaid *Philip Bennet*, which Reverſion was touched by the Entry of the Recoveror or by Execution, and in which Caſe Execution might be well enough made after the Death of *Bennet*. And as to the Reſt of the Manors, the ſaid *Philip Manxel* and *John Cradock* were immediate Tenants of the Freehold thereof, in which Caſe it is clear that the Tail is barred for the ſame. For the Tail of the Vouchee is not barred in Conſideration of the Aſſets which are already had, but in Conſideration of the Aſſets which may poſſibly be had. And as to the Reſt of the Manors there was a Poſſibility of Aſſets, for the Demandant was at Liberty to ſue Execution of the ſame againſt the Tenants, and they over againſt Sir *Rice*, and he againſt his Vouchee; and in this there is no Sort of Doubt or Queſtion, and it is not in the ſame Degree with the Matter of my Argument above, where I admitted that the Tenants in the *Præcipe* had nothing in Poſſeſſion, Reverſion, or Remainder in any Part of the Land. And then inaſmuch as Sir *Rice* the Vouchee had a Poſſibility of Aſſets both as to the one Part and the other, this Poſſibility is equivalent in Law to Aſſets in Deed, and hath ſuch Operation that the Iſſue in Tail ſhall never falſify the Recovery nor ever be remitted. For there is a Diverſity in the Law when the Iſſue in Tail ſhall falſify a Recovery, and when not. [d] For if a faint *Præcipe* is brought againſt Tenant in Tail, who ſuffers a Recovery by Default or by Reddition, and dies before Execution, there the Iſſue ſhall be remitted, and ſhall falſify the Recovery; [e] for if the Recoveror enters, the Iſſue ſhall have an Aſſize, as it is held in 7 *H.* 4. and if he pleads the Recovery, the Iſſue ſhall falſify it, [f] and if the Recoveror brings a *Scire facias* againſt the Iſſue to have Execution upon the Recovery, the Iſſue ſhall falſify the Recovery, as *Littleton* ſays in his Chapter *of Remitter*, and if the Recoveror had ſued Execution in the Life of the Tenant in Tail, the Iſſue ſhould have had a *Formedon* againſt him, and therein he ſhould have falſified the Recovery. [g] But if a Stranger brings a faint *Præcipe quod reddat* againſt Tenant in Tail, and he vouches to Warranty, and by the Default of the Vouchee or by his Confeſſion the Demandant recovers againſt the Tenant in Tail, and he over in Value againſt the Vouchee, and before Execution the Tenant in Tail dies, and the Land [h] deſcends to his Iſſue, yet the Demandant may enter, or ſue Execution againſt the Iſſue, and the Iſſue ſhall never falſify the Recovery in that Caſe, becauſe he has or may have Aſſets; [i] and if he might falſify the Recovery, then ſhould he retain the Land, and have Execution of the Aſſets alſo, for he who renders owes the Aſſets, and cannot diſcharge himſelf of them, and foraſmuch as the barring of the Intail is no Prejudice to the Iſſue, who ſhall have as much in Value, there is Reaſon to ſay that no Miſchief is done by the Eſtate tail being barred, and therefore that the Iſſue ſhall not falſify the Recovery, nor avoid the Execution. And ſo it was taken in the Star-chamber by the Lord *Montagu* and other Juſtices, in a Caſe there in the Time of King *Edward* 6. And there ſeems to be a good Reaſon for this, [k] for the Iſſue in Tail ſhall never defeat any Act done by his Anceſtor, but ſuch as is to his Diſadvantage, as it is proved by *Octavian Lumbard*'s Caſe in [a] 44 *Ed.* 3. where Tenant in Tail upon defeaſible Title granted a Rent-charge to him that had Right, for a Releaſe of his Right, and the Tenant in Tail died, and it was the Opinion of the Court that the Heirs in Tail and every other Tenant afterwards ſhould hold the Land charged with the Rent-charge. So that if the Iſſue in Tail hath Aſſets in Value, he ſuffers no Damage, for which Reaſon he ſhall not falſify the Recovery, but the Recoveror may

Diverſity when the Iſſue in Tail ſhall falſify a Recovery, and when not.

[d] S. P. Co. Litt. 361. b. 1 Co. 97. a. Kitch. 312. Pig. on Recov. 23. Ante 55 (l).

[e] T. 7 H. 4. 17. pl. 13. Bro. Fauxifier de Recov. 10. Remitter 9.

[f] Litt. § 690.

[g] S. P. Co. Litt. 361. b. 1 Co. 94. a. b. 106. a. 10 Co. 38. a. Dy. 374. pl. 15. 376. pl. 26.

[h] Rol. R. 502. Pig. on Recov. 23, 24. Ante 436 (e).

[i] W. Jones 10.

[k] 1 Lev. 168. Pig. on Recov. 24 Ante 436 (b).

[a] T. 44 Ed. 3. 21. pl. 24. Fitz. Charge 7. Bro. 4. Tayl. 6. Ante 436 (c), 466 (b), and the other Books there cited.

enter upon him, although in the mean Time the [b] Iſſue ſhall be Tenant in Tail, for no other Eſtate can deſcend to the Iſſue but that whereof the Anceſtor died ſeized, and becauſe he hath an Eſtate-tail, in the mean Time it ſhall deſcend to his Iſſue; but when he who had Right to the Tail was out of Poſſeſſion of the Tail, as Sir *Rice Manxel* was here and as Vouchee had Judgment to recover in Value, there although he afterwards comes to the Land, and dies ſeized, he ſhall hold the Eſtate whereof his Anceſtor died ſeized, and ſhall not be remitted to the Eſtate-tail, for that was bound, and he was out of Poſſeſſion thereof, and therefore no Matter *ex poſt facto* ſhall cauſe him to be remitted to it. So that there is a Diverſity when he who had Right to the Eſtate-tail is in Poſſeſſion thereof, and when he is out of Poſſeſſion of it. And although the Vouchee has no Land to render in Value, this is not material in any Caſe, for if he afterwards comes to Land, it may be rendered in Value, and therefore becauſe of the Poſſibility of Aſſets the Tail is bound as well as it is with preſent Aſſets, and this is clear and without Queſtion.

[b] W. Jones 10.

Wherefore upon the whole Matter it ſeems to me that the ancient Tail is bound in the whole, *viz.* as well of that Part which *Philip Bennet* held for Life, as for the Reſidue, and that *Edward Manxel* the Defendant ſhall never be remitted to ſuch Part any more than to the Reſidue, and that the other Tail in Uſe is not bound, nor the Feoffees thereof, for the Cauſes before ſhewn.

Note that afterwards, viz. the 5th Day of February in the Term of St. Hillary in the 7th Year of the Reign of our ſaid Lady the Queen, the ſaid Complainants prayed in the Chancery to be diſmiſſed at the Common Law, as appears by an Order entered in the Book called the Regiſter of Orders and Decrees made in the Chancery, which Prayer of the Complainants ſeemed to that Court to be reaſonable, but becauſe the Defendant was then abſent, the Court gave him a Day until the firſt Day in Eaſter Term then next following, to ſhew Cauſe why the Complainants ſhould not be diſmiſſed according to their Prayer, and it was thereupon further ordered that if the Defendant then failed, the Complainants ſhould be diſmiſſed, and that in the mean Time it ſhould be lawful for the Complainants to enter or commence any Suit or Action at the Common Law againſt the Defendan's for or concerning the Matter in Queſtion, if the Grand Seſſions ſhould be held in the mean Time before the Juſtices of Aſſize in the County of Glamorgan. *From whence it may be collected, that although the Matter was not certainly adjudged for the Complainants, yet, as it ſeems, both the Court and the Complainants had a great Opinion that they could be aided by the Common Law. But inquire the Arguments of others made in this Matter, and what was the End and Succeſs thereof, for it is very uſeful and neceſſary to be known.*

Nota bene.

THE

QUÆRIES

OF

EDMUND PLOWDEN,

Of the MIDDLE-TEMPLE, Eſq;

An APPRENTICE of the COMMON LAW.

Now firſt rendered into ENGLISH at large, with many References, and uſeful Obſervations.

Quid enim laboro, niſi ut veritas in omni quæſtione explicetur ; verum dicentibus facile cedam.

TUL. TUSC. QUÆST. lib. 3.

LONDON:

Printed for the TRANSLATOR, and to be ſold by the Bookſellers in *London* and *Weſtminſter*. MDCCLXI.

PLOWDEN'S QUÆRIES.

1. FEOFFMENT upon Condition that the Feoffee ſhall re-infeoff the Feoffor and his Wife, the Feoffee charges the Land, and afterwards the Grantee brings Annuity, and recovers, and the Feoffor enters, and the Feoffee brings Aſſize. *Vide P.* 44. *Ed.* 3. 9. *b. Parſhay.*

2. Land is given to Huſband and Wife, and to the Heir of the Huſband lawfully begotten on the Body of the Wife, and if the Huſband dies without Iſſue by the Wife, that then the Land ſhall remain to J. S. in Fee, the Huſband and Wife die without Iſſue, J. S. enters, upon whom the Feoffor enters, and J. S. brings Aſſize; it ſeems that it is not maintenable. *Vide* 14 *H.* 6. 25. *a.* ſuch a Limitation good.

3. A. leaſes for Years, and dies, having Iſſue a Daughter, his Wife *priviment enſeint* with a Son, the Daughter confirms the Eſtate of the Leſſee, to have and to hold to him for life, with Warranty, the Son is born, and dies without Iſſue, the Daughter ouſts the Leſſee, and upon his re-entry ſhe brings Aſſize; it ſeems to be maintenable. But if the Son had ouſted him, it ſeems that an *Ejectione firmæ* had lain.

4. A. leaſes for Years, and afterwards the Leſſee being received by the Statute of *Glouceſter*, a Stranger recovers againſt him in a *Præcipe quod reddat*, and the Stranger confirms the Eſtate of the Leſſee, *habendum* the Land to him for Life, and afterwards the Leſſor annuls the Recovery by Writ of Error, and enters upon the Leſſee, and he brings *Ejectione firmæ*; it ſeems to be maintenable.

5. A Recovery is had againſt Leſſee for Years in a *Præcipe quod reddat*, and afterwards the Leſſee brings Error or Attaint, and reverſes the Judgment, and the Leſſor enters upon the Leſſee, and he brings an Action of Treſpaſs; it ſeems to be maintenable. *M.* 8 *Ed.* 4. 19. *b.*

6. Lord, Meſne, and Tenant, the Tenant holds in Socage, and the Meſne in Chivalry, the Tenant makes a Gift in Frank-marriage, and the Meſne releaſes to the Donor all his Right in the Tenancy, and afterwards the four Degrees paſs, and the Donor ſeizes the Wardſhip of the Iſſue, and enters into the Land, and he brings a Writ of Treſpaſs; it ſeems that it is not maintenable.

7. A. gives Land to Huſband and Wife in ſpecial Tail, reſerving Rent, the Wife of the Donor brings Dower againſt the Heir of the Huſband for the third Part of the Rent, pending which Writ one of the Donees dies without Iſſue, it ſeems that the Wife ſhall not be barred, *&c.*

8. A. dies, having Iſſue two Daughters, Land is given by Deed in Tail to the youngeſt and to the Heirs of the Body of her Father begotten, and ſhe has Iſſue, and dies, the Iſſue brings a *Formedon* againſt his Aunt, *viz.* the eldeſt Daughter.

9. Meſnalty deſcends to the Tenant, and the Lord avows for Relief upon the Tenant being within Age, *&c.*

10. A. having a Wife makes a Feoffment upon Condition, and dies, and his Wife is endowed by the Feoffee, and afterwards grants her Eſtate to the Feoffee, reſerving Rent by Deed indented, and the Heir enters for the Condition broken, it ſeems that he ſhall hold the Land diſcharged of the Rent. *Note*, his Title to the Land is *eigne* to the Condition, *puiſne* to the Rent.

11. Land is given to Huſband and Wife and to a third Perſon, the third releaſes all his Right to the Wife, and the Huſband and Wife make a Leaſe for Years of the whole, and bring a Writ of Waſt againſt the Leſſee.

12. Land is leaſed for Life, the remainder to the right Heirs of J. S. Tenant for Life makes a Feoffment, and afterwards J. S. dies, his Heir enters, and the Feoffee brings Aſſize; it is not maintenable. *Quære* if he has any other Remedy.

13. A Man makes a Leaſe for Life, and dies, his Wife *enſeint* with a Son, and the Tenant for Life makes a Feoffment, and afterwards the Son is born, if he ſhall enter for the Forfeiture, *Quære.*

14. A. dies having Iſſue a Daughter, his Wife *enſeint* with a Son, and the Daughter diſclaims, and the Lord recovers in Right of Diſclaimer, and afterwards the Son is born, and the Lord dies, ſo that the Land deſcends to the Son, the Wife of the Lord brings Dower againſt him.

15. Leſſee for 40 Years leaſes for 10 Years, rendring Rent, and afterwards the firſt Leſſee ſurrenders, and the Leſſor brings an Action of Debt againſt the ſecond Leſſee.

16. Leſſee for Life leaſes for 40 Years, rendring Rent, the Leſſor confirms the Eſtate of the ſecond Leſſee, and afterwards Tenant for Life dies within the Term, the Leſſor diſtrains and avows for the Rent, it is not maintenable.

17. The

17. The Tenant holds two Manors of the Meſne, and he holds over the one Manor of A. and the other Manor of B. and A. diſtrains the Tenant, and he forejudges the Meſne, and the Meſne diſtrains and avows for the Moiety of the Meſnalty.

18. A Man being ſeized of two Acres, having Iſſue a Son and a Daughter by one Venter, and a Daughter by another Venter, grants a Rent out of one of the Acres to the Son, who dies, and afterwards the Father dies, and the Daughters make Partition, ſo that the Land charged is allotted to the youngeſt Daughter, ſhe ſhall hold it charged with the whole to the eldeſt Daughter. 34 *Aſſ. pl.* 15. *Finch.*

19. Lord and Tenant by Homage, Fealty, and Rent, the Lord grants his Homage upon Condition, reſerving the Rent, and afterwards the Condition is broken, he has no Remedy for the Arrears of the Rent due before.

20. A. grants a Rent-charge for Life, provided that the Grantee ſhall not charge the Perſon of the Grantor, and afterwards the Grantee dies, and his Executors bring Debt againſt the Grantor for the Arrears incur'd in the Life of the Grantee.

21. Two Jointenants in Fee, the one within Age, the other of full Age, make a Leaſe for Life, and afterwards the Jointenant of full Age dies, and the other recovers the Moiety in a *Dum fuit infra ætatem*, and the Tenant for Life dies, and the Heir of the other Jointenant enters, and the Infant ouſts him, and he brings an Aſſize; maintenable, *Quære.*

22. Tenant in Tail diſcontinues in Fee, and takes back an Eſtate in Fee, and grants a Rent-charge in Fee, and dies, and the Lord ſeizes his Ward, and the Grantee diſtrains for the Rent-charge, and the Lord makes Reſcous, and the Grantee brings Aſſize, it is maintenable.

23. Grandfather, Father, and Son, the Grandfather makes a Leaſe for Life of an Acre, and dies, the Father being Tenant in Tail of an Acre diſcontinues it with Warranty in Fee, and dies, and the Tenant for Life dies, and the Son enters into the Acre after his Death, and brings a *Formedon*, it ſeems that the Warranty of the Father with this Aſſets is no Bar.

24. A. dies without Iſſue, being ſeized of an Acre in Borough-engliſh, and having two Uncles, the youngeſt, who enters into the Acre by reaſon of Poſſeſſion, is vouched with the eldeſt by Reaſon of a Warranty made by the Nephew, and loſes, the Tenant who vouches them and recovers dies, having two Sons, the eldeſt ſues Execution, and the youngeſt ouſts him. See *M.* 11 *H.* 7. 12. *a.* for the Reaſon of ſuing Execution.

25. Leſſee for Life leaſes for 10 Years, rendring Rent, Leſſee for Years makes a Feoffment, and afterwards the Leſſor enters, it ſeems that he ſhall hold the Land diſcharged of the Rent, altho' it binds the Leſſee for Life, for the Rent cannot endure longer than the Reverſion, and altho' he had granted the Rent to a Stranger, yet had it been gone, ſo that it differs from the other which is not in reſpect of the Reverſion. And if a Man makes a Leaſe for Life, rendring Rent to the Uſe of J. S. and the Tenant for Life ſurrenders, the Rent is gone. 1 *Aſſ. pl.* 10. the Meſne grants the Rent of the Tenant, the Tenancy eſcheats, the Rent is gone.

26. Lord and Tenant of 12 Acres by 12 d. the Tenant makes a Leaſe for Years of one of the Acres, the Leſſee for Years thereof enfeoffs the Lord, it ſeems that he may avow for 11 d. For he ſhall not be ſaid a Diſſeizor to this Purpoſe, but a Purchaſor, for altho' he is a Diſſeizor by the Statute, ſo that an Aſſize lies againſt him, yet to another Intent he is in by Feoffment, for if Leſſee for Years enfeoffs two, a Releaſe to the one ſhall enure to both.

27. Tenant in Tail diſcontinues the Tail, and the Diſcontinuee makes a Feoffment in Fee upon Condition, and a Warranty collateral to the Iſſue is made to the Feoffee of the Diſcontinuee, and the Iſſue is barred by the Warranty by the Feoffee, and the Diſcontinuee enters for the Condition broken, the Iſſue has no Remedy againſt him.

28. A. leaſes for Life, and grants a Rent-charge out of the Reverſion, and the Grantee purchaſes the Eſtate of the Tenant for Life, who dies, and the Leſſor enters; the Queſtion is, if the Grantee may diſtrain for all the Arrears from the Time of the Grant.

29. A. grants a Rent-charge in Fee out of his Land, to commence after the Death of the Grantee, and the Grantee dies, it ſeems that the Wife of the Grantee ſhall not be endowed of this Rent, and yet the Heir ſhall have it as Heir, but it was not in the Father, and it ſhall not be Aſſets in the Heir, as it ſeems. * But if the Rent had been granted to one upon Condition that if the Grantee or his Heirs die, their Iſſue being within Age, then the Rent ſhall ceaſe until the Heir comes to his full Age, in that Caſe if the Grantee dies, his Iſſue being within Age, the Wife ſhall be endowed, but Execution ſhall ceaſe until the Heir comes to his full Age. As if the Tenant be in Ward to the Lord, and the Lord takes a Wife, and dies poſſeſſed of the Ward, his Wife ſhall be endowed of the Seigniory which was in Suſpence, becauſe the Freehold was in the Huſband. And ſo in the laſt Caſe before, in 24 *Ed.* 3, the Wife of the Father brought a Writ of Dower againſt the Heir within Age, and recovered, but Execution ceaſed until, *&c.* And there you may ſee that the Freehold is in him, inaſmuch as he is Tenant to the *Præcipe* of his Mother.

* P. 5. Ed. 2. Maynard 161, 162. Fitz. Dower 143. P. 12 Ed. 3. Fitz. Condition 11. M. 22 Ed. 3. 19 pl. 56. Fitz. Ibid. 12. H. 10 H. 7. 13. b. *Per Keble.* Plow. 156. Perk. § 327. 1 Co. 87. a. 1 Leon. 330. 4 Leon 83. Goeb. 103. Jenk. 4. pl. 6. 2 Sid. 117. 1 Vent. 96. 10 Mod. 367. 2 Bac. Abr. 127. Vin. Abr. tit. Dower H. pl. 9. Poſt § 358.

30. If a collateral Warranty deſcends within the Year upon him who has Cauſe to enter for Mortmain, it ſeems that he ſhall not enter afterwards, for if he himſelf had releaſed, he ſhould not have entered after, and a Warranty ſhall bind him as well as his Releaſe. But *Quære* if a collateral Warranty extends to a Title of Entry.

31. The Father dies ſeized of a Remainder, having Iſſue two Sons by two Venters, the firſt Son being Tenant in Tail of the particular Eſtate grants a Rent-charge in Fee, and dies without Iſſue, the ſecond Son enters, and Avowry is made upon him for the Charge. If a Man has two Daughters by divers Venters or by one Venter, and dies, and the eldeſt grants a Rent-charge, and dies before any Entry into the Land, ſhall the youngeſt Daughter hold the whole Moiety charged? It ſeems that ſhe ſhall: As if one Jointenant grants a Rent-charge and dies, the Survivor ſhall hold the Land diſcharged.

32. A. gives in Tail one Acre which he holds in Socage, and another Acre which he holds in Chivalry, ſaying nothing, it ſeems that the Donor ſhall have ſeveral Services, and make ſeveral Avowries, notwithſtanding he hath an entire Reverſion; for the Law makes the Avowry in Reſpect of the Tenure over, and he holds the Reverſion of the one Acre of one, and of the other Acre of another, and they ſhall eſcheat ſeverally; wherefore, *&c.*

33. The youngeſt Son of an Abator has the Land by Deſcent by the Cuſtom of Borough Engliſh, or by Reaſon of an Intail afterwards to his Father and the ſecond Wife, in a *Mortdanceſtor* brought againſt him he ſhall have the Voucher, notwithſtanding the Counterplea given by the Statute of *&c.* for that Statute extends only to the Heir by the Common Law. And therefore it ſeems that if an Abator has Iſſue two Daughters, and makes a Feoffment, and dies, and the one takes a Feoffment, and an Aſſize of *Mortdanceſtor* is brought againſt her, ſhe ſhall have the Voucher, for ſhe is not ſole Heir, but if ſhe had been the ſole Heir, then it ſeems clearly that ſhe ſhould not have had the Voucher, notwithſtanding ſhe did not come to it as Heir. And if an Abator and another, being Tenants in *Mortdanceſtor*, vouch, they ſhall have the Voucher.

*Paſch. 5. Eliz. a great Caſe was argued in the Exchequer: There were three Brothers, the ſecond Brother purchaſed Land, and deviſed it to his Son in Tail, and if he died without Iſſue, that then it ſhould remain to the next of the Kindred of the Lineage of the Father, the eldeſt Son was then dead, having a Son, it was adjudged that the Son of the eldeſt ſhould have the Land, becauſe he is next of the Lineage; for *Lineage* ſhall be taken in a lineal Deſcent, which is the moſt worthy Line. And ſee Dy. 333. pl. 29. a Deviſe to the next of Blood, the Son of the eldeſt Brother ſhall have it before the younger Brother. Plowd. Quær. abridg'd in Engl. 86.

34. Two Jointenants by 12 *d.* the one grants all that which belongs to him to a Stranger upon Condition, the Lord grants the Services of the one, and Attornment is had, and afterwards the Feoffor enters for the Condition broken, it ſeems that he ſhall hold by 12 *d.* and the other by 12 *d.* alſo, for by the Feoffment, *&c.* no Apportionment is made, and then by the Grant 12 *d.* paſſed, and 12 *d.* remains.

35. A Woman has Iſſue a Son, and by another Huſband has Iſſue another Son, and the ſecond Huſband deviſes Land to the Wife for Life, Remainder to the next of the Blood of the Wife, it ſeems that the youngeſt Son ſhall have the Land in Remainder: For altho' the one is not nearer of the Blood of the Mother than the other, and altho' the eldeſt is more worthy in Blood, but not nearer, ſo that by the Words it is uncertain which of them ſhall have it, yet by the Intent of the Deviſor, which is always to be purſued in Deviſes, it ſhall be taken that the youngeſt ſhall have it, becauſe he is the Iſſue of the Deviſor *.

36. If a Woman Leſſee for Life takes Huſband, and ſhe and the Huſband make a Leaſe for Life, rendring Rent, and the Wife avows for the Rent after the Death of the Huſband, now the firſt Leſſor may enter, and the Wife has no Remedy, for by her Avowry ſhe has agreed by Matter of Record: And if ſhe had entered by force of a Condition made by her and her Huſband, it had been all one.

37. Land is given to A. *habendum* the one Moiety to the Feoffee and his Heirs, and the other Moiety to him and his Heirs of his Body, Remainder to his right Heirs, which Land is held by 2 *d.* the Feoffee dies without Iſſue, and his Brother enters, it ſeems that ſeveral Avowries ſhall be made upon him, one for 1 *d.* and another for another 1 *d.* But if Land be given to A. the one Moiety in Fee, the other Moiety in Tail, one Avowry ſhall be made, for this enures as a joint Gift, but in the firſt Caſe it enures ſeverally at the beginning, and that for the benefit of the Tenant, and then it ſhall be alſo ſeverally in the Hands of the Heir. As if there are three Jointenants, and one of them releaſes to one of the others, and he to whom the Releaſe is made has the Moiety of his Companion by Survivorſhip, yet for the third Part one Avowry ſhall be made upon him. *Quære* in the principal Caſe, for the Fee-ſimple was never ſevered, if it had, then it ſeems that the Donee ſhould hold the one Moiety by 2 *d.* and the other Moiety by 2 *d.* and Avowry ſhould be made upon the collateral Heir for 2 *d.* in the one Moiety. *Quære de hoc.*

[a] Co. Litt. 99. b. 213. b. Poſt § 107.

[b] Litt. § 734. Poſt § 304.

38. If Land be deviſed upon Condition, or reſerving Rent, it is void, for the Reſervation of Rent or Re-entry cannot be good but in Reſpect that the Reſervor may by poſſibility take Advantage of it, and the Heir cannot have that which his Anceſtor himſelf could never have. [a] For if a Man leaſes for Life, rendring Rent with Re-entry to his Heir, it is void, *cauſa qua ſupra.* [b] And if a Man deviſes Land with Warranty, this Warranty is void, becauſe the Father was not bound, *Littlet.* But others think there is a Diverſity between the Caſes, for in this laſt Caſe there is a Charge to the Heir, and he ſhall never be charged but where his Father was charged, for if a Man binds his Heir, it is void, but in the other Caſes it is for the Advantage of the Heir.

[c] S. P. Plowd. 171 (e), and ſee the Books there cited in the Margin. Poſt § 131.

[d] S. P. Plowd. 171 (f), and ſee the Books there cited in the Margin. Poſt § 131.

[e] S. P. Dy. 42. pl. 13.

[f] S. P. Dy. 42. pl. 12. in Margine.

39. [c] *Per Dyer*, if a Man makes a Leaſe, rendring Rent to the Leſſor, he ſhall only have it during his Life, becauſe he does not reſerve it longer, for if he had reſerved it during 40 Years, he ſhould not have had it any longer. [d] But if he makes a Leaſe, reſerving Rent, and does not ſay to whom, it ſhall be to the Leſſor and to his Heirs, becauſe there it is left to the Conſtruction of the Law. [e] As if a Man makes a Feoffment to A. and to his Heirs, and binds him and his Heirs to Warranty to the Feoffee, this does but extend to the Feoffee himſelf, [f] but if he had warranted the Land againſt all Men *in forma prædicta*, or in ſuch Words, it ſhould be to the Feoffee and his Heirs, which ſee [g] *H.* 14 *H.* 4. 13. *a.* And at the ſame Time it was ſaid [h] that if Land be leaſed to A. for Life, Remainder to B. in Tail, Remainder to C. *in forma prædicta*, this ſhall be for Life only, for it cannot be an Eſtate of Inheritance, becauſe it is uncertain to which of the foregoing Eſtates the Word (*prædicta*) ſhall be refer'd: [i] But if the Remainder had been in *forma eadem*, then it ſhould have been an Eſtate-tail, for (*eadem*) *refertur proximo antecedenti, ſed* (*prædicta*) *omnibus ut ſuperiori.* If a Man makes a Feoffment, upon Condition that he ſhall enter for Condition broken, *Quære* if his Heir ſhall re-enter. If Leſſee for 20 Years leaſes for 10 Years, rendring Rent to him, his Executors ſhall have it, for they repreſent the Perſon of their Teſtator.

[g] Fitz. Garranty 8. Bro. 23, 66. Expoſition 29.

[h] Herewith agrees Dy. 15. pl. 81. But ſee Co. Litt. 20. b.

[i] 1 Vent. 368. Cart. 104. 3 Danv. Abr. 188. pl. 8. where it is ſaid that the remainder to C. is void for Uncertainty.

40. If Land is given to two, and to the Heirs of the Body of one of them, and he who has the Tail makes a Feoffment, and both die, it ſeems not to be any Diſcontinuance for any Part, for he was not ſeized of the Tail in Poſſeſſion at the Time of the Feoffment. And if Tenant in Tail makes a Leaſe for Life, Remainder for Life, and afterwards releaſes to him in Remainder and to his Heirs, this is a Diſcontinuance if the firſt Tenant for Life dies in the Life of Tenant

See 1 Rol. Abr. 839. pl. 2.

[i] S. P. accord Co. Litt. 20. b. 3 Danv. Abr. 88. pl. 8.

in Tail, otherwiſe it ſeems to be no Diſcontinuance. If Tenant in Tail makes a Gift in Tail to J. S. and afterwards releaſes to him and to his Heirs, and dies, and afterwards J. S. dies without Iſſue, it ſeems that the Iſſue in Tail may enter upon the collateral Heir of J. S. becauſe the Fee was not executed in the Life of the Tenant in Tail, altho' it paſſed out of him. *Quære* of all theſe Matters.

41. Grandfather, Father and Son, the Grandfather Tenant in Tail gives to Huſband and Wife in Tail, the Huſband dies without Iſſue, the Grandfather dies, the Father releaſes to the Wife being *Tenant after poſſibility* and to her Heirs, and dies, the Wife dies, the Iſſue cannot enter upon the Heir of the Wife, for altho' it is no Diſcontinuance, yet when the Wife came to the Fee-ſimple, the Fee was executed, and then ſhe died ſeized in Fee, which Deſcent took away the Entry of the Iſſue; but if the Wife had been Tenant in Tail, and then had died without Iſſue, it had been otherwiſe; for then at the Time of her Death ſhe had only had the Tail in Poſſeſſion and the Fee in Reverſion, which would not have taken away the Entry of the Iſſue.

42. If I ſell for a certain Sum of Money in Market-overt my Goods which were ſtolen, the Vendor has no Remedy for the Money, if he has it not in Hand, becauſe the Contract was void; for if one buys Goods in Market-overt knowing them to be ſtolen, the Property is not changed, no more is it here, inaſmuch as the Vendor knew that they were ſtolen of him.

43. If the Diſſeizee enters upon the Heir of the Diſſeizor, and grants a Rent-charge, and dies, the Iſſue ſhall hold the Land diſcharged, for altho' he hath his Right from the ſame Anceſtor that charged the Land, yet he is remitted to another Poſſeſſion than that which deſcended to him: And if the Heir of the Diſſeizee enters upon the Diſſeizor, and grants a Rent-charge, and afterwards the Diſſeizee dies, now becauſe a new Right is come to him, he is remitted, and it ſeems that he ſhall hold the Land diſcharged. But if the Son diſſeizes the Father, and charges the Land, and afterwards the Land deſcends to him by the Death of the Father, the Son ſhall not hold it diſcharged, for he is not remitted, becauſe the Right deſcended to him from the ſame Perſon to whom he did the Wrong, and he ſhall be diſabled to claim any Right from him whom he diſſeized, but in the other Caſe he claims the Right from another. As if the Father diſſeizes the Grandfather, and dies after he has granted a Rent-charge, and afterwards the Grandfather dies, the Son ſhall hold the Land diſcharged, for he claims the Right from the Grandfather, and ſo from another Perſon: *Quære*, for there the Entry of the Grandfather was taken away, and then when the Right of one, who cannot enter, deſcends to the Tenant, he is remitted. *Quære.* But if there be Lord, Meſne, and Tenant, and the Tenant aliens in Mortmain, and the Lord Paramount enters, and charges the Land, and afterwards his Title is come, *viz.* the Year is paſſed, and the Meſne has not entered, there the Lord ſhall hold it diſcharged, and his Iſſues too, as it ſeems, for he ſhall not be remitted for a Title, as he ſhall for a Right, accrued. But yet it ſeems that he may bar him upon whom he enters, if he brings Aſſize, and that well enough by this Title.

44. A. having three Daughters deviſes £. 100 to each of them for her Marriage, and if any of them die before her Marriage, that then the others ſhall have her Portion by Survivorſhip, and one of them dies in the Life of the Father, it ſeems that the others ſhall have £. 300 after the Death of the Father, and yet nothing ſurvived, for ſhe who died had nothing in Poſſeſſion or in Action, becauſe the Deviſe did not take Effect until after the Death of the Deviſor, but they ſhall have it by the Intent of the Deviſor *, which appears to be that any of them ſhall have £. 300 conditionally if ſhe ſurvives.

* For when he ſays that if any of them die before their Marriage, then the other ſhall have her Portion, this makes it in Nature of a Remainder, in which Caſe tho' the firſt Deviſee dies in the Life of the Teſtator, yet he in remainder ſhall take the Eſtate, *per Manwood.* As a Deviſe to a Monk, the Remainder to another, the remainder is good. Plowd. Quær. abridg'd in Engl. 83.

45. If a Woman has Title to have Dower of three Acres, and afterwards the Heir ſows the three Acres with Corn, and ſhe has one of them aſſigned to her by the Sheriff for her Dower, where ſhe never required Dower of the Heir, *Quære* who ſhall have the Emblements? For no Folly can be imputed to the Heir, becauſe the Poſſeſſion was caſt upon him by the Law, and when he ſowed the Land, it was uncertain whether ſhe would ever claim her Dower, in Reſpect of which [a] Uncertainty the Heir ſhall be aided, [b] as if a Condition on the Part of the Mortgagor be performed, the Mortgagee ſhall have the Emblements. Alſo the Sheriff cannot aſſign Goods to the Widow, and by the ſame Reaſon he cannot aſſign the Emblements, which are but Chattles.

[a] See Litt. §68, and the Commentary thereupon.

[b] So if Tenant by Statute-merchant ſows the ground, and then by a ſudden and caſual Profit is ſatisfied, he ſhall have the Emblements. Co. Litt. 55. b.

46. [c] A Woman is entitled to have Dower of a Marſh, the Heir by his Induſtry makes it good Meadow, ſhe recovers it and ſhall be endowed of the third Part as it now is, becauſe her Title is to the Quantity of the Land, not the Value; [d] but if the Heir improves the Land by Building or the like collateral Improvement, it ſhall be otherwiſe. *Quære* [e] if the Heir ſuffers the Houſes upon the Land to decay, ſhall the Wife be endowed of the Land according to its Value when it was in the Poſſeſſion of her Huſband, or ſhall ſhe have the third Part as it now is, and be allowed in Damages for the impairing? And it ſeems that Damages ſhall not be recouped in Aſſize for the Improvement of ſuch Marſh.

[c] S. P. accord Co. Litt. 32. a.

[d] S. P. accord M. 17 H. 3. Fitz. Dower 192. Perk. § 328. Sed contra Co. Litt. 32. a.

47. If Tenant in Tail holds by Rent, and the Donor grants the Services of the Donee, it ſeems that nothing paſſes, altho' Attornment be made, for the Rent cannot paſs unleſs it paſſes as a Rent-ſervice. For if there be Lord and Tenant by Fealty and Rent, and the Lord grants the Services of the Tenant, ſaving the Fealty, nothing paſſes thereby, for the Rent cannot paſs but as a Rent-ſervice, inaſmuch as it is granted by the Name of a Service, for neither a Rent-ſeck nor a Rent-charge can paſs by that Word, (*quære* if the Saving is not void for Repugnancy) and as a Rent-ſervice it cannot paſs, for then the Donee ſhould pay one Fealty to the Grantee, and another to the Donor for the Reverſion, and ſo the Donor would charge him with two Fealties, which he cannot do, any more than the Lord can grant the Moiety. But *Quære* if his Attornment ſhall not prejudice him, but it ſeems that it ſhall not, becauſe the Law will not ſuffer one Man to hold the ſame of two ſeveral Perſons.

[e] In this Caſe Co. Litt. 32. a. ſays that ſhe ſhall be endowed according to its Value at the Time of the Aſſignment, and not according to it's Value in the Poſſeſſion of her Huſband. See Perk. § 329.

48. Tenant

48. Tenant for Life grants a Rent-charge in Fee, and afterwards he and the Leſſor make a Feoffment of all their Lands and Tenements in ſuch a Town where the Land lies, and make a Letter of Attorney to make Livery, it ſeems that the Rent-charge ſhall not endure longer than for the Life of the Tenant for Life, becauſe it is but a Grant of the Eſtate of the Tenant for Life, and of the Reverſion of the Leſſor alſo, and this by the ſaid Words. But if they had made a Feoffment of that Land only, then the Rent-charge ſhould endure for ever, becauſe it is the Feoffment of the Tenant for Life, and the Confirmation of the Leſſor. *Quære*, for it ſeems that if the Deed is firſt delivered, and afterwards Livery is made, the Reverſion paſſes by the Delivery of the Deed, for it is an Attornment alſo of the Tenant for Life by the Delivery of the Deed.

49. If there is Lord, Meſne, and Tenant, and the Tenant holds by 4*d.* and the Meſne by 12*d.* and the Tenant makes a Gift in Tail ſaying nothing, and after that the Reverſion eſcheats, ſome think that the Donee ſhall hold by 12 *d.* ſo if the Meſnalty deſcends to the Donor, the Donee ſhall hold by 12 *d.* and if the Meſne had releaſed to the Donor, the Donee ſhould hold by 12 *d.* As if the Tenant had made a Gift in Tail, the Remainder in Fee, and the Remainder had eſcheated, it ſeems that the Donee ſhould have held by 12 *d.* for the firſt Services which he ſhall pay, and the firſt Tenure, is extinct by the Unity of the Remainder to the Seigniory, ſo that it is clear that the Meſnalty, *viz.* the 4*d.* is extinct, and then the Donee ſhall hold by 12*d.* and it is all one as if the Meſne had releaſed to him in Remainder. And the Reaſon in the principal Caſe why the Tenure of the Donee ſhall be charged, is, becauſe the Law makes the Tenure of the Donor in reſpect of the Meſnalty, and when the Meſnalty is extinct, the Tenure between the Donor and the Donee ſhall be alſo extinct, and then by the ſame Reaſon that the Donee ſhould take Advantage, if the Donor by Deſcent or Releaſe had held by leſſer Service, by the ſame Reaſon he ſhall be prejudiced when he holds by greater Service. And it ſeems that if the Wife of the Donee in Tail, whereof the Law makes the Tenure, is endowed, and afterwards the Tail is extinct, ſhe ſhall hold but by Fealty only, otherwiſe it is if the Tenure had been reſerved by expreſs Words; and if the Wife of the Tenant is endowed, and afterwards the Reverſion eſcheats, the Wife ſhall hold by Fealty only. If the Tenant who holds by 4*d.* makes a Gift in Frank-Marriage, and afterwards the Donor dies without Heir, ſo that the Reverſion is held by 12*d.* *quære* how the Donees ſhall hold? whether by ſuch Service as the Donor held by when the Gift was made, or by ſuch Service as the Reverſion is now held by. If a Gift is made in Frank Marriage, after the fourth Degree the Donees ſhall hold as the Donor holds over. So if a Man makes a Gift in Tail, reſerving 2 *d.* for the Life of the Father of the Donee, during his Life the Iſſue ſhall hold by the Reſervation of the Party, and after his Death his Iſſue ſhall hold by the Reſervation of the Law. As if a Man makes a Feoffment upon Condition, and that for the Breach thereof he ſhall enter, during his Life he enters by the expreſs Reſervation, and after his Death his Heir enters by the Reſervation of the Law. *Note*, if an Incroachment of Services be made upon the Huſband, the Wife being endowed ſhall not be contributory to it, and yet the Heir ſhall not avoid it.

50. A. having two Sons makes a Gift in Tail to the eldeſt, Remainder in Fee to the youngeſt, upon Condition that the eldeſt ſhall not make a Feoffment with Warranty to the Intent to bar him in Remainder, and if he does, that then the youngeſt and his Heirs ſhall enter. The eldeſt makes a Feoffment with Warranty, the Father dies, the eldeſt dies without Iſſue, it is clear that the youngeſt may enter, for the Entry given to the youngeſt is void, and then the Feoffor and his Heirs may enter, and then the Father having Cauſe to enter, and he being dead, the Condition is in Suſpence in the eldeſt, and revived by his Death, (as the Condition is revived by the Death of Tenant in Tail in 41 *Ed.* 3. 21.) and given to the youngeſt; for the eldeſt did not give away the Condition incluſively extinct by the Feoffment, as it might be, and a Warranty does not bind Titles of Entry, as for Mortmain or Raviſhment. But if the Feoffment with Warranty had been after the Death of the Father, then the Condition had been extinct.

51. There are three Jointenants, the one gives his Part with his Daughter in Frank-Marriage to one of his Companions, and further by the ſame Deed releaſes to them in Frank-Marriage, and makes Livery, ſome think that this ſhall be a good Gift in Frank-Marriage for this Reaſon, *viz.* altho' one Jointenant cannot enfeoff his Companion, yet he may enfeoff his Companion and another, and the Livery made to the other ſhall veſt the Land in both, and this is for the Advantage of the third, as in *Gaſcoign's* Caſe 7 *H.* 6. 3, it was not a Surrender, for the Advantage of the third, nor in 21 *H.* 7. 41, for the Advantage of the Huſband, ſo it ſhall not be void here, for the Advantage of the third. But others think this Reaſon is not good, for the Huſband cannot take it immediately from his Companion, and for him it is void, and good for his Wife. As if a Man makes a Feoffment to a Stranger and to his own Wife, it is void for the Wife, and good for the Stranger, notwithſtanding Livery be made to the Stranger in the Name of both. So here it is good for the Wife, and the other Part of the Deed, *viz.* the Releaſe, is good for the Huſband *. So both the Things make the Frank-Marriage good, inaſmuch as it may be made at an Inſtant, for the Land and the Deed may be put together, and both be delivered at an Inſtant.

52. If a Man makes Livery of an Acre in the Name of that and of another Acre which he has for Life, in Tail, in Right of his Wife, or of his Parſonage or Biſhopric, nothing paſſes, but if it be in Name of an Acre which he has for Years, or as Guardian, or by Reaſon of an Execution, it is otherwiſe.

53. A. is ſeized of a Houſe on the Part of his Mother, and Eſtovers are granted to him in Fee to be burnt in it, and he dies without Iſſue, are the Eſtovers extinct? If two Diſſeizors of a Houſe have Eſtovers granted to them to be ſpent in the ſame Houſe, and one of them accepts a Releaſe of the Diſſeizee, it ſeems that the Eſtovers remain for Part, for a Releaſe to ſuch Stranger does

* Further, if one Jointenant cannot enfeoff his Companion, as it is held 10 *Ed.* 4. then it will enure ſeverally, viz. to his Companion as a Releaſe, and to his Wife for Life, for if it be no good Frank-marriage, then 'tis an Eſtate for Life, and ſo it was reſolved between *Webb* and *Porter*, 24 *Eliz.* and then they take in common, and ſeverally, and no Frank-marriage. Plowd. Quær. abridg'd in Engl. 139.

does not countervail an Entry and Feoffment, as if the Diſſeizor takes a Confirmation of the Lord to hold by leſſer Services, and afterwards accepts a Releaſe of the Diſſeizee, yet he ſhall take Advantage of the Confirmation. If the Son of the Diſſeizor endows his Wife *ex aſſenſu patris*, and afterwards the Diſſeizee releaſes to the Diſſeizor, is the Dower of the Wife avoided, or not? A Warranty made to the Diſſeizor is not gone by the Releaſe of the Diſſeizee.

54. The Tenant ceſſes for two Years, and afterwards takes a Wife, and the Lord recovers in a *Ceſſavit*, and the Tenant dies, his Wife ſhall be endowed againſt the Lord clearly, as it ſeems; for if a Man ceſſes for 20 Years, a *Ceſſavit* ſhall not be maintained for the *Ceſſer* the firſt two Years of the 20, but for the *Ceſſer* the two Years next before the Writ purchaſed, and ſo is the Count in a *Ceſſavit*. Then here no *Ceſſavit* could be maintained for the *Ceſſer* before the Coverture, and ſo the Title of Action ſhall not have Relation, *&c.* but it is founded upon the *Ceſſer* two Years next before the Writ purchaſed, Part of which was during the Coverture, for it could not poſſibly be otherwiſe, and then the *Ceſſer* of the Huſband during the Coverture ſhall not take away the Dower of the Wife *. So Note this for a good Reaſon. But a Man may have a *Ceſſavit* in the *Per* for a *Ceſſer* before the Feoffment.

* But *Quære* if the Caſe be not falſly put here, for it ſhould rather have been that the Huſband ceſſes one year before the Coverture, and another year after, and then the *Ceſſavit* is brought. Plowd. Quær. abridg'd in Engl. 6.

55. Grandfather, Father, and Son, the Father diſſeizes the Grandfather, and dies, and the Son endows the Wife of the Father, and the Grandfather dies, it ſeems that the Son may ouſt the Tenant in Dower, for he has a new Right deſcended from the Grandfather, and as the Entry of the Grandfather was lawful upon the Tenant in Dower, ſo ſhall the Entry of his Heirs, *viz.* the Son, be lawful. † But it ſeems that if the Son had there granted a Rent-charge, and afterwards the Grandfather had died, the Son ſhould have held the Land charged, and ſhould not have been remitted, for the Entry of the Grandfather was not lawful upon him, and when the Right of the Grandfather deſcends upon him, he ſhall not be remitted. But if there are Great-Grandfather, Father, and Son, and the Grandfather diſſeizes the Great-Grandfather, and dies, and the Father dies, and the Son endows the Wife of the Father, and the Great-Grandfather dies, it ſeems that the Son cannot ouſt the Tenant in Dower, for the Great-Grandfather could not enter upon her in that Caſe, no more can his Heir. It ſeems that if the Son diſſeizes the Father, and grants a Rent-charge, and afterwards the Father grants a Rent-charge, the Land ſhall be charged *in perpetuum*: But if the Son had been dead firſt, it had been otherwiſe, and his Son ſhould have held it diſcharged.

† Contra Poſt § 62.

56. The Tenant holds 10 Acres by 10*d.* and makes a Feoffment of one of the Acres, and the Lord grants the Rent, reſerving the Fealty, and the Tenant attorns, and afterwards the Grantee releaſes all his Right in the Land to the Tenant, yet he ſhall have 1 *d.* becauſe by the Feoffment the Seigniory was ſevered, and two Rents paſſed by the Grant, and there is only one extinguiſhed by the Releaſe, *viz.* the Rent of 9 *d.*

57. Two Diſſeizors make a Gift in Tail to hold in Chivalry, and afterwards the Diſſeizee releaſes to one of them, the Donee dies, the Donors ſeize the Wardſhip of his Iſſue, who maries himſelf within Age, and they bring Forfeiture of Marriage, firſt, it ſeems that the Releaſe ſhall enure to both.

58. If the Reverſion is granted to the Tenant for Life and to a Stranger in Fee, now the Jointure of the Fee is ſevered, for the Tenant for Life has a Fee-ſimple in the Moiety of the Land executed preſently. If the Reverſion of Tenant in Tail is granted to him and to another in Fee, the Jointure of the Fee remains in that Caſe. But if the Huſband is Tenant for Life, and the Reverſion is granted to him and to his Wife, the Fee remains in them in Jointure, becauſe there can be no [a] Moieties between Huſband and Wife, and this is clear Law. And if a Leaſe be made to two, *habendum* the one Moiety to the one, and the other Moiety to the other for Life, and afterwards Confirmation is made to them and their Heirs, the Jointure of the Fee is ſevered, and they are Tenants in Common of the Fee, as they were [b] of the Freehold: For a Confirmation ſhall enure according to the Nature of the Eſtate upon which it enures, and a Confirmation does not alter the Eſtate. *See* 9 *H.* 6. 9. for this. But if the Reverſion had been granted to them in Fee, they had been Jointenants of the Fee preſently, for there the Fee in Jointure merges their ſeveral Eſtates of Freehold. But if there are two Tenants in Common for Life, and the Reverſion is jointly in two, and one of them purchaſes the Eſtate of the one Tenant for Life, and the other purchaſes the Eſtate of the other Tenant for Life, there the Jointure is ſevered, for when the one Jointenant purchaſed the Eſtate of the one Tenant for Life, he had his Moiety of the Fee executed to the Moiety of the Freehold, and therefore the Jointure was ſevered preſently, but in the other Caſe they came to the Reverſion at one and the ſame Inſtant; and ſo is the Diverſity. If Land be leaſed to Huſband and Wife, *habendum* the one Moiety to the Huſband, and the other Moiety to the Wife, and afterwards the Land is confirmed to them in ſpecial Tail, reſerving a Hawk, the Donor ſhall have two Hawks, for the Huſband ſhall have the one Moiety of the Inheritance, becauſe his Poſſeſſion was ſevered from the Poſſeſſion of the Wife, *viz.* in the Moiety of the Land, ſo that for that Moiety the Huſband is ſeized in his Demeſn as of ſpecial Tail, and the Wife hath nothing in it; and as to the other Moiety whereof the Wife was Tenant in Common with the Huſband, the Huſband was ſeized thereof in Right of the Wife, and then he had a ſufficient Eſtate upon which a Confirmation might enure, wherefore the Confirmation enures jointly to them, and the Caſe is no other than if a Man marries a Woman who is Tenant for Life, and the Leſſor confirms the Land to them in Fee, they are preſently ſeized jointly in Fee, ſo in the Caſe above the Huſband is ſole ſeized of the one Moiety in Tail, and he and his Wife are jointly ſeized of the other Moiety, and then inaſmuch as it ſhall go ſeverally, the Donor ſhall have ſeveral Hawks. So if Land is given to the Huſband for Life, Remainder to the Wife for Life, and their Eſtates are confirmed in Tail, the Huſband alone ſhall have the one Moiety in the Tail, and he and his Wife the other Moiety, and yet the Tail is not executed

[a] Plowd. 58 (m), 483 (b), and ſee the Books there cited in the Margin.

[b] Plowd. 160 (d), and ſee the Books there cited in the Margin. Poſt § 370.

executed for any Part. *Quære*, for this is a good Moot Caſe. If Land is given to two, and to the Heirs of their Bodies begotten, and afterwards the Donor confirms the Land to them in Fee, they are not Jointenants in Fee, for the Tail was executed to ſuch Purpoſe, and ſo the Confirmation enures ſeverally. If there is Tenant *pur auter vie* of the Tenancy, and the Seigniory is granted to him and to another in Fee, the Jointure is ſevered preſently, and if *Ceſtuy que vie* dies, yet the Seigniory is not in Jointure, inaſmuch as it was not in Jointure at the Begininng. But if a Seigniory is granted to two in Fee, and afterwards one of them takes an Eſtate of the Tenancy *pur auter vie*, and *Ceſtuy que vie* dies, now the Jointure remains, becauſe it was joint at the Beginning.

59 A. has Iſſue two Daughters, and holds Land of the eldeſt by Suit and a Hawk, and dies, and the Daughters aſſign the third Part of their Land to their Mother for Dower, and afterwards make Partition, the Tenant in Dower ſhall not be contributory for any Part of the Services, for the Reverſion remains in Coparcenary between them two, for they cannot make Partition thereof, and then the entire Seigniory is in Suſpence, and ſo there ſhall be no Contribution by the Tenant in Dower: and it ſeems that the youngeſt Daughter ſhall be alſo diſcharged of the Tenure. And yet if land held by a Hawk deſcends upon the Seignioreſs and her Siſter, and they make Partition, the Seignioreſs ſhall have the Hawk, but in that Caſe there is no Suit, for by the Statute of *Marlbridge cap.* 9. the eldeſt ſhall do it, and the other ſhall be contributory, and then if ſhe is the Seignioreſs, ſhe cannot do it to herſelf. But the Reaſon why the youngeſt ſhall be diſcharged in the principal Caſe is, becauſe the Seigniory is in Suſpence for Part, and it cannot be in *eſſe* for the other Part. But if the Termor has two Daughters, and the Lord ſeizes the youngeſt who is within Age, it ſeems that he ſhall diſtrain the other for the Moiety of the Seigniory, for the Act of the Law ſhall not prejudice him. *Quære*, for the Seizure of the Ward is his own Act.

60. Two Femes Diſſeizoreſſes enfeoff their Father, who dies ſeized, ſo that the Land deſcends to them, and the Diſſeizee releaſes to one of them, it ſeems that it ſhall enure to them both, for between themſelves they are in by Title. And if a Diſſeizor dies ſeized, having two Daughters who are Baſtards, and the Diſſeizee releaſes to one of them, this ſhall go to both. And if Tenant for Years enfeoffs two, and the Leſſor releaſes to one of them, this ſhall go to both. For although, as to him, they are Diſſeizors and puniſhable by Aſſize, yet to all other Intents they are in by Title. For if Tenant for Years enfeoffs the Lord of an Acre of Land, the Seigniory ſhall be apportioned. But *Quære* if the Feoffee was not a Diſſeizor at the Common Law. And if a Man enfeoffs two upon Condition, which is broken, and the Feoffor releaſes to one of them, the Feoffee ſhall not hold his Companion out of the Land, for they are not in by Wrong, and a Releaſe, when it countervails an Entry and Feoffment, does not extend to Titles. And if the Diſſeizee enters upon two Diſſeizors, and they recover falſly in Aſſize againſt the Diſſeizee, and he releaſes to one of them, this ſhall enure to both, for between themſelves and the Diſſeizee alſo they are in by Title. And if an Infant enfeoffs two, and afterwards at his full Age he releaſes to one of them, this ſhall enure to them both. If two Diſſeizors make a Feoffment, and take back an Eſtate, a Releaſe to one ſhall enure to both, for altho' they are Diſſeizors in Reſpect of the Diſſeizee, yet between themſelves they are in by Title. So if a Diſſeizor makes a Feoffment, and takes back an Eſtate for Life, and a Releaſe is made to him, it ſhall enure to him in Reverſion. If Leſſee for Years makes a Feoffment, and the Leſſor dies without Heir, the Lord ſhall not have the Eſcheat, for it is a good Feoffment againſt him.

61. If a Man reſerves Rent upon a Leaſe for Life, he has not a Fee in it, for his Wife ſhall not have Dower of it, nor ſhall the Heir have an Aſſize of *Mortdanceſtor*, for there is none that can make it to have Continuance longer than for the Life of the Tenant for Life, and then a Woman cannot be endowed of a Thing determined by Life. But if Leſſee for Life grants a Rent in Fee, a Fee paſſes thereby, for by Poſſibility this may be made to endure in Perpetuity, as if the Leſſor confirms it, it ſhall enure *in perpetuum* by *Littlet*. And the Caſe of *Quintin* proves this, that a Fee paſſed before, whereof the Wife of the Grantee was dowable, *&c.* But if Tenant for Life grants a Rent-charge in Fee to the Leſſor, and he grants it over, yet he ſhall avoid it after the Death of the Tenant for Life, for it cannot enure as a Confirmation, notwithſtanding it was granted by the Words *dedimus et concedimus*, becauſe the Grantee had no Poſſeſſion of it before, and one and the ſame Word at one and the ſame Time cannot enure as a Grant and as a Confirmation alſo. And therefore if the Diſſeizor grants a Rent-charge to the Diſſeizee, and he grants it over, and afterwards re-enters, he ſhall hold the Land diſcharged, *cauſa qua ſupra*. But if the Diſſeizor makes a Leaſe for Life, the Remainder in Fee, and the Diſſeizee purchaſes the Remainder in Fee, and grants it over, now he cannot enter upon the Leſſee for Life, for then he would defeat his own Grant, which may not be, for by the Grant of the Remainder it paſſed with all Charges and Titles which the Grantor had to the ſame Thing, and he had Title before to the Fee, which paſſed incluſively. And if Tenant *pur auter vie* grants a Rent-charge in Fee, and afterwards he has the Reverſion by Deſcent or Releaſe, and *Ceſtuy que vie* dies, he ſhall hold it diſcharged, for by the ſame Reaſon that a Man may ſay that at the Time of the Rent-charge granted he had nothing in the Land, and by that means avoid the Charge, ſo by the ſame Reaſon he may ſay that he had not an Eſtate *pur auter vie*. But it ſeems that if after the Fee acquired he had made a Feoffment, the Feoffee ſhould not have avoided the Rent-charge after the Death of the *Ceſtuy que vie*, but ſhould have held it charged in Fee.

62. If the Diſſeizor makes a Gift in Tail or a Feoffment upon Condition to the Heir of the Diſſeizee, and the Diſſeizee dies, the Heir has the Land in Fee and without Condition, inaſmuch as he has the Right by Deſcent from him whoſe Entry was lawful; but if he had taken a Releaſe of the Diſſeizor, it had been otherwiſe, becauſe it was his own Act. But a Releaſe of the Diſſeizee ſhall avoid all Rights of Entry, and not all Titles, and therefore if the Diſſeizor

makes a Leaſe for Life, the Leſſee makes a Feoffment, and afterwards the Diſſeizee releaſes to the Feoffee, now the Right of Entry which the Diſſeizee had is taken away and avoided. By many, if the Son diſſeizes the Father, and grants a Rent, and dies, yet the Land is charged. But if a Stranger diſſeizes the Father, and grants a Rent charge, and enfeoffs the Son, and the Father dies, the Son ſhall hold it diſcharged. * If the Father diſſeizes the Grandfather, and dies, and the Son enters, and charges the Land, and the Grandfather dies, he ſhall hold it diſcharged, although he was of full Age at the Time of the Charge. As if Tenant in Tail enfeoffs his Iſſue within Age, who grants a Rent charge at his full Age, and afterwards the Tenant in Tail dies, the Son ſhall hold it diſcharged, for in both Caſes he is in of another Eſtate. 21 *Ed.* 4. 94. A Man has two Daughters, the eldeſt diſſeizes the Father, the Father dies, and ſhe has Iſſue, and dies, the other enters claiming her Part of the Moiety, and ſhe brings Aſſize; this was a Moot Caſe. If the Diſſeizor grants a Rent-charge, and is diſſeized, and a Releaſe is made to the ſecond Diſſeizor, the Charge remains, but not the Dower of his Wife, for the Charge is executed, and the Dower is executory only. If the ſecond Diſſeizor makes a Leaſe for Life, Remainder in Fee, and the Diſſeizee releaſes to the Tenant for Life, it ſeems that the Wife of the firſt Diſſeizor ſhall be endowed. And if Tenant for Life is diſſeized by A. who is diſſeized by B. to whom the Leſſor releaſes, the Wife of A. ſhall be endowed, and if the Tenant for Life dies, A. may enter upon B. and ſhall have it for ever.

* Contra Ante § 55.

63. Feoffee with Warranty to him his Heirs and Aſſigns makes a Leaſe for Life, the Tenant for Life in a Plea vouches the firſt Feoffor, and recovers in Value Land held of the Feoffee, if the Feoffee ſhall have his Seigniory and avow for it, is the Queſtion: For if the Reverſion of the Land recovered in Value be in the Feoffee, then he ſhall not avow, and if he ſhall not avow, *quære* if the Leſſee for Life ſhall vouch as Aſſignee, inaſmuch as he has not the whole Eſtate. And it is clear that if the Feoffee had made a Leaſe for Life, Remainder in Fee, then the Leſſee ſhould have vouched as Aſſignee, and if he had recovered in Value, it ſhould have made the Remainder to be in him in whom it was before. 28 *Aſſ. pl.* 18. 11 *Aſſ. pl.* 3.

64. A Woman Leſſee for Life by the Cuſtom of a Manor takes a Huſband by Licenſe, and the Huſband dies, the Lord ſhall have no Heriot, becauſe there is no Alteration of the Tenant. So if Land is leaſed to Huſband and Wife for their Lives according to the Cuſtom, and the Huſband dies, no Heriot ſhall accrue to the Lord by his Death, *cauſa qua ſupra.* And if a Woman Leſſee for Life takes a Huſband by Licenſe, and ſhe dies, the Lord ſhall have no Heriot, becauſe ſhe has no Goods, for the † Eſpowſals was a Gift in Law of them to the Huſband. Wherefore it ſeems in ſuch Caſe that if the Huſband dies, a Cuſtom that the Lord ſhall have a Heriot after his Death ſtands well with Reaſon, becauſe otherwiſe the Lord might poſſibly have no Heriot, *viz.* if the Wife dies firſt, and therefore it ſeems that the Danger of loſing the Heriot ſhall make ſuch Preſcription good. And if ſuch Tenant for Life deviſes all his Goods, yet the Lord ſhall have a Heriot, becauſe the Deviſe does not take Effect until after his Death, and then the Lord's Title ſhall be prefer'd. And if a Man has two Horſes at the Time of his Death, and they are his beſt Chattles, one of which is worth 40*s.* and the other is but a Colt, and not worth more than 10*s.* at that Time, and the Lord does not ſeize the Heriot for two Years after the Death of his Tenant, ſo that the Colt becomes worth 5*l.* he ſhall not ſeize the Colt, becauſe he had a Property preſently by the Death of the Tenant in the other, being the beſt Beaſt which the Leſſee had at the Time of his Death. A Cow has three Calves before the Seizin of the Lord, it ſeems that the Lord may ſeize them with the Cow, *tamen quære.*

† Plowd. 418 (g), and ſee the Books there cited in the Margin.

65. The Tenancy, being a Manor, is held by 12*d.* of another Manor which is the Meſnalty, and which is held by 6*d.* and the Meſne enfeoffs the Tenant of the Manor which is the Meſnalty, now he holds both the Manors of the Lord by one joint Tenure of 6*d.* and the Lord ſhall avow upon the Tenant, becauſe the two Manors are held of him by 6*d.* So had it been if the Tenancy had eſcheated to the Meſnalty, and there the one Manor is parcel of the other Manor, and the Tenancy has not loſt the Name of a Manor, for the Land which was held of the Tenancy is not now held of another Manor which was the Meſnalty, but as it was before. Which ſee adjudged that one Manor may be parcel of another, 32 *H.* 6. 9. *b.*

66. After the Vouchee has entered into the Warranty, a collateral Anceſtor of the Demandant releaſes to the Vouchee with Warranty, and dies, now the Vouchee ſhall not plead this Warranty againſt the Demandant, becauſe the Releaſe was void, for although the Vouchee ſhall be Tenant to the Demandant, yet he ſhall not be ſo to a Stranger, for if a Stranger releaſes to him after his Entry into the Warranty, it is merely void, ſo ſhall it be now: But if a collateral Anceſtor had releaſed to the Tenant after the Vouchee had entered into the Warranty, the Vouchee might have pleaded this with Warranty, if he had it ready to ſhew. *Quære* in the firſt Caſe, although the Releaſe be void, if the Warranty ſhall not be ſaid to be good.

67. In a *Quare Impedit* againſt the Patron and Incumbent, it is no Plea for the Incumbent to ſay that he is in by ſix Months of the Preſentment of the Patron, for none ſhall have the Plea of Plenarty but he who may thereby gain to himſelf the Patronage, and againſt whom a Writ of Right of Advowſon is maintenable, which ſee 16 *Ed.* 4. 11. But in a *Quare Impedit* againſt the Ordinary and Incumbent, the Incumbent may ſay that he is in by ſix Months of the Collation of the Biſhop for Lapſe, becauſe there no Patronage is gained thereby. So Note the Diverſity. 2 *R.* 2. *Fitz. Encumbent* 4. 18 *Ed.* 3. *Fitz. Quare Impedit* 48. 13 *H.* 8. 14. 14 *H.* 8. 31. 39 *Ed.* 3. 30.

68. A Man makes a Feoffment upon Condition to enfeoff him again, and the Feoffee enfeoffs another to his Uſe, if the Feoffor may enter before Requeſt, or not, is the Queſtion, inaſmuch as it is ſuch a Feoffment as hath broken the Truſt repoſed in the Feoffee. If a Man makes a Feoffment, reſerving Rent, and for default of Payment a re-entry, and the Rent is behind, ſo that

that he has Title to enter, and then he releaſes the Rent, now he ſhall not re-enter afterwards, for if he had granted the Rent over after the Title, he ſhould not have enter'd, no more ſhall he now. But if an Annuity is in Arrear to me, and 20 *s.* *nomine pœnæ*, tho' I releaſe the Annuity, yet the Penalty remains; for there appears a Diverſity.

69. In many Caſes a man may do a Thing to which he is not compellible by Law, and yet he ſhall not be puniſhed for it. As if Land is leaſed for Life, upon which there is a Houſe which is ruinous and in Decay at the Time of the Leaſe, now the Leſſee is not puniſhable in Waſt if it falls, but yet if he cuts down Trees growing upon the Land, and repairs it with them, it is juſtifiable, 12 *H.* 8. 1. So he may alſo do, if the Leſſor covenants to repair it, *&c.* as it there appears. So if a Man leaſes a Houſe with Land upon which there is a Wood, *&c.* without Impeachment of Waſt for the Houſe, yet if the Houſe becomes ruinous, it ſeems that the Leſſee may cut Timber for the repairing and re-building of it, and he ſhall not be puniſhed in an Action of Waſt. And Note that the Leſſee may take Timber-wood for Firebote, if there is no other Wood growing upon the Land, which ſee in 21 *H.* 6. 47. *Quære* if a Man is bound to buy Timber for the repairs of a Houſe leaſed to him, where there is none upon the Land. If Leſſee is bound by Obligation to do no Waſt, or if a Leaſe is made upon Condition that if the Leſſee does Waſt then his Eſtate ſhall ceaſe, and a Stranger does Waſt, this is no Forfeiture of the Leaſe, for the Condition only extends to the Perſon of the Leſſee: So a Prohibition to make to Eſtrepement, which ſee 3 *H.* 6. 17. But if a Stranger does Waſt upon the Land of the Leſſee for Years, or of Guardian in Chivalry, they ſhall render treble, and ſhall loſe the Ward, as if it had been their own Waſt; the Diverſity appears. But Guardian in Socage ſhall not be puniſhed for the Waſt of a Stranger, for the Heir himſelf ſhall have an Action for it. If the Lord grants his Seigniory by Fine, and before Attornment the Feoffee makes a Feoffment of the Tenancy, if the Feoffee attorns, it is good enough, by all the Juſtices, and yet he is not compellible to attorn, 18 *Ed.* 4. 10. And if Tenant in Tail attorns, it is good, and yet he is not compellible.

70. If there are two Jointenants for Life, and one of them is bound in a Recognizance, or Judgment is given againſt him, and afterwards he grants over his Eſtate, yet during his Life he ſhall be liable to Execution. But otherwiſe it is of an Eſtate for Years, for in the one Caſe the Land, *viz.* the Freehold, is bound by Judgment, but in the other Caſe not; for a Man ſhall have ſole Execution of Chattles which the Party has the Day of the Execution ſued; ſo of a Leaſe for Years, 2 *H.* 4.

71. A Seigniory is granted for Years, the Rent is behind, and the Tenant dies, and his Years are expired, if the Grantee ſhall have an Action of Debt againſt the Heir of the Tenant for the Rent due in the Time of his Father, and alſo for that which is due after the Death of the Father, or if he ſhall have an Action of Debt againſt the Executor of the Father, becauſe it was due in the Life of the Teſtator, or if he is without Remedy for it, is the Queſtion. And ſome ſay that the Heir ſhall not be charged by Action of Debt as Heir, if the Father does not bind himſelf and his Heirs by expreſs Words, and it ſhall not be here ſaid the Debt of the Heir himſelf; and the Executors ſhall not be charged, becauſe they were not chargeable for it by the Death of their Teſtator, for at that Time the Grantee could not have an Action of Debt for it, but his Remedy was by Diſtreſs and Avowry *; ſo that the Grantee is without Remedy for it. And if an Annuity is granted for the Life of J. S. and the Grantee releaſes to the Grantor all Actions of Annuity, it ſeems that he ſhall not have an Action of Debt for the Arrears after the Releaſe and after the Death of J. S. for when they were due, he had no Remedy. And if a Warren, Toll, or a Hundred is leaſed for Life, rendring Rent, and the Tenant for Life dies, the Leſſor has no Remedy for the Rent, becauſe he had no Remedy during the Eſtate.

* For then the Years were not expired, and ſo no Remedy, 9 H. 7. 17. a. 4 Co. 49. Plowd Quær. abridg'd in Engl. 85.

72. If the Plaintiff is bar'd in an *Entry ſur diſſeizin*, yet he ſhall have a *Ceſſavit*, if he has Cauſe to have it at the Time, *&c.* for it is another Title. If the Heir brings a *Formedon* in Deſcender, and is nonſuited, *quære* if he ſhall enter, becauſe he had Title of Entry, *viz.* for the Condition broken. It ſeems that if a Woman has Cauſe to have Dower of one and the ſame Land as the Wife of J. and alſo as the Wife of S. and ſhe is bar'd of Dower as the Wife of J. yet ſhe ſhall have it as the Wife of S. Huſband and Wife make a Feoffment upon Condition, if the Wife of the Huſband in a *Cui in vita* may enter for the Condition broken, 27 *Ed.* 3. 55, 56.

73. If the Tenant who holds by one Hawk makes a Feoffment of the Moiety to a Stranger, or of the whole to Mayor and Commonalty and to J. S. now the Lord Paramount ſhall have two Hawks, becauſe theſe are ſeveral Feoffments, for if he had made Livery to one in the Name of both, nothing ſhould have paſſed but to him who took the Livery, and the Lord ſhall be compel'd to make ſeveral Avowries, which proves that he ſhall have ſeveral Hawks. If the Tenant who holds by one Hawk makes a Gift in Tail to two ſeveral Perſons, reſerving Rent, *habendum* the one Moiety to the one, and the other Moiety to the other, ſo that they are ſeveral Intails, now the Donor ſhall have two Hawks, becauſe the Law makes the Tenure and the Reſervation. But if the Reſervation be made by the ſpecial Words of the Party, as if a Man makes a Leaſe to two, *habendum* the one Moiety to the one, and the other Moiety to the other, reſerving one Hawk, or a Leaſe *pur auter vie* to J. S. and to Dean and Chapter, reſerving one Hawk, there becauſe the Land goes at the Beginning two ſeveral Ways, and the Party does but reſerve one Hawk, he ſhall not have more than he reſerved, *viz.* only one; ſo Note a Diverſity. The ſame Law if the Reverſion at the Beginning goes ſeveral Ways, and is ſeveral at the Beginning of the Reſervation, yet they ſhall only have that which is reſerved, if the Reſervation is ſpecial by the Party. † As if two Tenants in Common make a Leaſe for Life, reſerving one Hawk, they ſhall but have that which is reſerved, becauſe they are Privies to the Reſervation,

† Plowd. 171 (c). Co. Litt. 197. a. 10 Co. 106. b. Yelv. 189. 1 Brownl. 109. Perk. § 107. 1 Finch 46. 2 Finch 63.

and it is their own Act, for which Reaſon they cannot have more; ſo that it is all one when the Poſſeſſion is in Common, and when the Reverſion is in Common, if the Reſervation is made by the Party himſelf. But if at the Beginning it is the Reſervation of the Party, and afterwards by the Act of the Party or of the Law the Poſſeſſion is made ſeveral to two, or in common to two, then the whole Rent ſhall follow alſo. As if the Leſſor reſerves a Hawk upon a Leaſe for Life, and afterwards the Leſſee grants over the Moiety to a Stranger, or the whole to Mayor and Commonalty and to J. S. *pur auter vie*, or if a Man gives Land to two, and to the Heirs of their two Bodies begotten, reſerving one Hawk, and they die, and their Iſſues enter, or if Land is given to two, *habendum* the one Moiety in Tail to the Heirs Males, and the other Moiety in Tail to the Heirs Females, *&c.* reſerving one Hawk, and they die, having Iſſue a Son and a Daughter, ſo if the one Acre had been to the Heir Male in Tail, the other to the Heir Female, or if a Man gives one Acre in Borough Engliſh and another in Tail to A. reſerving a Hawk, and the Donee dies, having Iſſue two Sons, or if one Hawk is reſerved upon a Gift in Tail, where the Donee dies, having Iſſue two Daughters, and they make Partition, in all theſe Caſes the Leſſor or Donor ſhall have two Hawks, notwithſtanding he had but one at the Beginning, for where the Poſſeſſion is afterwards ſevered and divided without Folly in the Leſſor or Donor, he ſhall have ſeveral Hawks. The ſame Law if the Reverſion after the Reſervation goes ſeveral Ways, *viz.* the one Acre in Severalty to the one, and the other Acre in Severalty to the other, or the one Moiety to the one, and the other Moiety to the other, they ſhall have ſeveral Hawks. And therefore if a Man makes a Gift in Tail of one Acre in Borough-Engliſh and of another at Common Law, reſerving a Hawk, and dies, having two Sons, they ſhall have ſeveral Hawks. So if the Donor has the one Acre by Deſcent on the Part of the Mother, and the other on the Part of the Father, and he dies without Iſſue, the ſeveral Heirs ſhall have ſeveral Hawks. So if the Parſon of a Church be the Donor, and gives one Acre of the Glebe by the Aſſent of the Patron and Ordinary, and another Acre of his own Land, reſerving to him his Heirs and Succeſſors one Hawk, and dies, the Heir himſelf ſhall have one Hawk, and the Succeſſor another. So if a Man has an Intail of one Acre to him and to his Heirs Males, and of another Acre to his Heirs Females of his Body, and he makes a Leaſe of both for 21 Years, reſerving one Hawk, and dies, having a Son and a Daughter, each of them ſhall have a Hawk. So if the one Moiety goes one Way, and the other Moiety another Way, as if ſuch Reverſion is granted to Mayor and Commonalty and to J. S. they ſhall have ſeveral Hawks. *Quære.* If the Tenant holds of two Meſnes by Hawks, and the one Meſne is attainted of Felony, ſo that his Moiety eſcheats to the Lord Paramount, now the Tenant ſhall pay two Hawks. And in all theſe Caſes it is clear Law that the Leſſee, Donee, or Tenant ſhall make two Fealties.

74. If Tenant for Life makes a Feoffment in Fee to the Wife of him in Reverſion, with a Letter of Attorney to the Leſſor to deliver Seizin, who does ſo, now whether the Leſſor is ſeized in Right of his Wife, or in his own Right, inaſmuch as he ſhall be remitted becauſe it was a Forfeiture, is the Queſtion. But if Tenant in Tail enfeoffs the Wife of the Donor, this ſeems to be a Diſcontinuance. If there is Tenant by Curteſy of an Advowſon, and he in the Reverſion is preſented by a Stranger, it ſeems that his Heir ſhall not avoid it, becauſe it was during the Life of the Tenant by the Curteſy, and he ſhall not be ſaid Tenant for Life; and the Stranger has gained the Patronage, tho' he was but Attorney to convey it to him.

75. There ſeems to be a Diverſity between a Releaſe in Deed and a Releaſe in Law. For if the Tenant makes a Leaſe for Life, and the Lord releaſes to the Tenant for Life, all his Right in the Seigniory is utterly extinct, for this is a Releaſe in Deed, and the Law would be the ſame if he had releaſed it but for an Hour. But if the Lord diſtrains the Tenant, and makes a Leaſe for Life, he has not extinguiſhed his Seigniory for ever. As if the Diſſeizee enters upon a Deſcent, and makes a Leaſe for Life, and the Heir re-enters, the Diſſeizee may enter after the Death of the Tenant for Life, for a Releaſe in Law ſhall be taken moſt favourably, otherwiſe of a Releaſe in Deed, for that is the Act of the Party. And if the Tenant makes a Leaſe for Years to the Lord, and he makes a Leaſe for Life, and the Tenant enters, it ſeems that the Seigniory ſhall be revived after the Death of the Tenant for Life, notwithſtanding there was a Diſſeizin, and the Lord was a Diſſeizor by the Statute.

76. If a Man makes a Leaſe for Years, reſerving Rent upon Condition of Entry for Non-payment, and the Leſſee dies, and his Executors break the Condition, ſo that the Leſſor enters, this ſeems to be a *devaſtavit* in them *, otherwiſe it is if the Condition was performable on the Part of the Leſſor, and he had performed it. Which ſee in *Bro. Abr. tit. Extinguiſhment* 54, 57.

77. If a Leaſe is made for Years, to commence at *Eaſter*, Remainder for Life, and Livery is made preſently to the Leſſee, and before the Feaſt of *Eaſter* the Leſſee releaſes to him in Remainder, if this Releaſe is good is the Queſtion.

78. If Huſband and Wife leaſe the Land of the Wife for Years, rendring Rent, and the Huſband diſtrains and avows, and has the Rent, and dies, it ſeems that the Cattle ſhall be diſcharged, for the Executors cannot detain them, becauſe they are but a Pledge, and foraſmuch as the Executors cannot have the Duty, they cannot detain the Pledge, for the Wife ſhall have the Duty; and this is not like to the Caſe where the Huſband recovers upon an Obligation made to him and his Wife, *&c.* which ſee 33 *H.* 6. 38. And if a Woman has ſuch Pledge for a Duty, and ſhe takes Huſband, and a Writ of Detinue is brought againſt him, and he pleads *ut ſupra*, whereby the Plaintiff takes nothing by his Writ, and the Huſband dies, the Wife ſhall have the Duty, and the Executors ſhall not have the Pledge.

* For every voluntary Act of the Executor, by which the Goods of the Teſtator are conſumed without any Benefit to the Teſtator, is a *devaſtavit*. But if an Executor, having ſuch a Term as Executor, purchaſes the Reverſion, that is not a *devaſtavit*, for the Term, as to Aſſets, is in being ſtill. If a man mortgages his Term, and dies, and his Executors don't redeem it, ſome think it is a *devaſtavit*, if they have Aſſets in their Hands wherewith to redeem it, and the Term be better than the Price of the Redemption. So if an Executor ſells a Term under the Value, by which the Creditors loſe their Debts, this, ſome think, is a *devaſtavit*: But if a Man be poſſeſſed of a Term, and deviſes it to his Executors to be ſold *meliori modo quo poſſunt*, for Payment of his Debts, and they ſell it under the Value, that is no *devaſtavit*, for perhaps it was the beſt Price they could get. Plowd. Quær. abridg'd in Engl. 127.

79. If a Rent-charge is granted in Fee, and the Grantee dies without Heir, the Executors ſhall not have Debt for the Arrears, but if the Grantee had purchaſed a Writ of Annuity, and had recovered, then his Executors ſhould have had Debt for the Arrears, for when the Arrears of any Rent are due, if he to whom they are due had an Inheritance in the Rent, and afterwards the Inheritance is determined, the Arrears are extinct, otherwiſe it is of an Annuity, for that is no Freehold; and here inaſmuch as the Thing is determined, his Executors cannot make it nor plead it as an Annuity. If a Leaſe is made to Huſband and Wife for the Life of the Huſband, Remainder to the right Heirs of the Huſband, and the Huſband dies, the Wife ſhall not have Dower, becauſe ſhe could not diſagree to the Eſtate taken during the Coverture, it being determined. But if an Eſtate for the Life of the Huſband be made to Huſband and Wife by a Diſſeizor, and the Huſband dies, ſhe may diſagree, in order to ſave herſelf from Damages, and yet the Eſtate is determined. And if Land is given to Huſband and Wife in Fee, and the Huſband makes a Feoffment, and a collateral Anceſtor of the Wife releaſes with Warranty, and dies, and the Huſband dies, the Wife cannot diſagree, and claim her Dower, for her Eſtate was bound, and her Right to demand it in a *Cui in vita* determined by the Warranty, and inaſmuch as her Eſtate was determined, ſhe cannot diſagree to it. If one grants to J. S. for Life a Robe or 20*s.* at the Election of the Grantee, and the Grantee dies before Election, it ſeems that his Executors cannot demand the Arrears by any Means: But it is the Opinion of many that if it be a perſonal Grant, *viz.* to pay Money only to J. S. there the Executor may demand it. But ſee 28 *Aſſ. pl.* 11. where one accepted another to be his Tenant at Will after his Death, who entered into the Land where his Entry was not lawful.

80. If a Villain purchaſes an Eſtate in Tail, and the Lord enters, and dies, it ſeems that his Wife ſhall not have Dower, for when the Law gave him his Entry, it did not give him more than the Villain could lawfully give, and that was but an Eſtate *pur auter vie*, for otherwiſe the Law would do Wrong, if it ſhould ſay that he had a Fee, and ſo diveſt the Reverſion out of the Donor, which the Law will never do. And it ſeems that if a Stranger diſſeizes Tenant in Tail, where the Reverſion is in the King, and the Diſſeizor dies, his Wife ſhall not have Dower, no more than a Diſcontinuance ſhall take away an Entry.

81. Tenant in Tail makes a Feoffment in Fee, and dies, and the Diſcontinuee makes a Gift in Tail, Remainder in Fee to the Iſſue of the firſt Intail, the ſecond Tenant in Tail dies without Iſſue, his Wife *privement enſeint* with a Son, and the Iſſue of the firſt Tail enters, and afterwards the Iſſue of the ſecond Tail is born, and enters upon him, and he brings an Aſſize, it is not maintenable. See 11 *Ed.* 4. 1. accordingly.

82. A Leaſe is made to a Man for the Lives of J. S. and J. D. the Leſſee makes a Leaſe for the Life of J. S. only, it ſeems that he hath the Reverſion, notwithſtanding this Leaſe, for he has given a leſſer Eſtate than he had, for he claimed for the Term of their two Lives, and of the longeſt liver of them, and he has not given the whole Eſtate, but in his Eſtate is included all that he has given, and more, and therefore if he had reſerved a Rent, it ſeems that the Reſervation ſhould have been good without Deed. And it is clear that if the ſecond Leſſee dies, living J. S. an Occupant ſhall hold the Land, but if J. S. dies, living J. D. then it ſeems that the firſt Leſſee may have an *Ad terminum qui præteriit* againſt the Occupant, and ſhall make to himſelf Title from him in the Form and Manner before ſhewn. But others think the contrary, for before he had but a Freehold, and now by the Leaſe to the ſecond Leſſee he has parted with a Freehold, and the Reverſion of the ſame Freehold cannot be in him. But if a Leaſe be made to me for the Life of A. Remainder to me for the Life of B. and I make a Leaſe for the Life of A. now I have a Reverſion for the Life of B. for they were two Eſtates; but in the other Caſe there was but one Eſtate, and the whole Grant was irrevocable if J. S. ſurvived, and then the Poſſibility of the Survivor of J. S. does not make a Reverſion in the firſt Leſſee: But it is as if I being Leſſee for the Life of C. grant my Eſtate to D. upon Condition that if D. dies, living C. I ſhall enter, now I have no Reverſion, notwithſtanding this Condition, for *quære* if this Condition ſhall be ſufficient for me to enter upon an Occupant after the Death of D. If a Leaſe is made to E. and F. for their Lives, and F. grants all his Moiety to a Stranger for the Life of E. this is a Forfeiture of his Eſtate, becauſe he had no Eſtate for the Life of E. but only in Reſpect of the Jointure, and an Eſtate for the Life of E. does not paſs from the Leſſor in this Moiety but upon a Condition in Law, *viz.* that the Jointure remains, whereas now he has given it for the Life of E. abſolutely without Condition, for which Reaſon it is a Forfeiture: But if both of them had made a Leaſe for the Life of E. it had not been a Forfeiture, *cauſa patet*. *Note* alſo that if Tenant in Tail, Remainder to his right Heirs, makes a Gift in Tail, and dies, and his Iſſue recovers in a *Formedon*, yet there is a Reverſion of the Tail in the Donee. If Land is given to two, to the one for the Life of J. S. and to the other for the Life of J. D. and one of them dies, it ſeems that the other ſhall make Title againſt an Occupant. If Land is leaſed to me during my Life and the Life of J. S. this is but for my Life only, for that is the greater Eſtate, which merges the other Life. As if I am Leſſee for the Life of A. and I accept a Confirmation for my own Life, this has merged the other Eſtate. [a] But if a Woman Leſſee for Life takes Huſband, and a Confirmation is made to them for their two Lives, this is a Remainder in the Huſband, by Reaſon of the joint Eſtate of the Wife. So if Land is given to A. and B. for the Life of B. and afterwards a Confirmation is made to them for their two Lives, this is a Remainder in A. and the Jointure remains. [b] If a Leaſe is made to two for 40 Years, if they ſo long live, and the one dies, the whole Term ceaſes, for it was a Condition, and not a Limitation of the Eſtate. [c] If Land is leaſed as long as J. and S. ſhall be Juſtices, and J. is diſcharged, the Eſtate is determined, becauſe the Time was in the Copulative, and it was a collateral Determination; [d] but if it had been during their Lives, and the one had died, the Eſtate ſhould have continued. If one has a Leaſe during the Life of Huſband and Wife, and he makes a Leaſe during the

[a] Litt. § 525. Plowd. 31 (i), 160(a). Dy. 126. pl. 48. 9 Co. 139. b. Cro. C. 478. Vin. Abr. tit. Remainder C. 4. pl. 9.

[b] Poſt § 173.

[c] So if a Leaſe is made as long as J. and S. ſhall inhabit in *London*, and one of them inhabits in another Place, the Eſtate is determined, Poſt § 173.

[d] Poſt § 173.

Coverture between them, it ſeems that the ſecond Leſſee has not the whole Eſtate, but the firſt Leſſee has a Reverſion. So if Leſſee for the Life of the Lord *Dyer* makes a Leaſe during the Time that he ſhall be Chief Juſtice of the Common Bench, he has a Reverſion, for he ſhall have the Land again if another be made Chief Juſtice in the Life of the Lord *Dyer*. If two Jointenants make a Leaſe for Life, and afterwards one of them grants his Part of the Reverſion to another for the Life of the Leſſee, it ſeems that this is a Severance of the Jointure.

83. If there are two Tenants in Common, and one of them has a Wife, and a Reverſion is granted to them both, and he who is married dies, his Wife ſhall be endowed of the third Part of the fourth Part, if the Law be ſo that the Reverſion paſſed ſeverally, for then the Reverſion and the Fee is executed for the fourth Part.

84. If a Rent is granted to A. and his Heirs, and if it be behind, that he ſhall diſtrain for the Life of J. S. now during the Life of J. S. this is a Rent-charge, and after that it ſhall be a Rent-ſeck. And it is by no Means inconſiſtent that a Rent during a certain Time ſhall be of one Nature, and afterwards the Party ſhall have an Inheritance in a Rent of another Nature. As if a Man makes a Gift in Tail, rendring Socage-tenure during the Life of the Donor, and afterwards Knights-ſervice, this is a good Reſervation, and ſhall be according to the Words, and his Wife ſhall be endowed of the Knights-ſervice. And a Man may have an Eſtate-tail and an Eſtate in Fee expectant, but thoſe are ſeveral Eſtates in one and the ſame Thing, and in the other Caſes the Things are of ſeveral Natures. And it ſeems that Seizin of a Rent-charge is ſufficient Seizin of a Rent-ſeck to have an Aſſize for it. And it ſeems clearly that if the Seigniory and Tenancy come together, ſo that the Surpluſage of the Meſnalty remains, the Meſne ſhall have an Aſſize for it without any other Seizin, for it comes by the Act of the Law. If a Reverſion is granted, rendring Rent, *quære* what Rent it is during the particular Eſtate, but after the particular Eſtate is determined, it is a Rent-ſervice. [b] If a Rent is granted out of two Acres, and if the Rent be behind, that he may diſtrain in one of the Acres, this ſeems clearly to be but a Rent-ſeck, for it is but one Rent, which cannot entirely be a Rent-charge, becauſe the other Acre is not charged, but the Diſtreſs is only a Penalty. And if a Rent be granted out of Land to A. in Fee, and if the Rent be behind for two Years, that the Grantee may diſtrain, now it is not a Rent-ſeck during the two Years, but a Rent-charge diſtrainable after the two Years. And if a Rent is granted to A. and if it be behind, that his Heirs ſhall diſtrain, this Diſtreſs is void, for there is no * ſuch Perſon *in rerum natura*, and it never ſhall be a Rent-charge, becauſe it cannot be a Rent-charge at the Beginning; but if the Diſtreſs had been limited to a Perſon in *eſſe*, then it had been a Rent-charge, as it is in 46 *Ed.* 3. 18. If the Lord grants his Seigniory, reſerving Rent, the Seizin before ſhall not be ſufficient Seizin of it. [c] And if a Rent is granted to two, and if it be in Arrear, that one of them ſhall diſtrain, this is a Rent-ſeck for the one Moiety, and a Rent-charge for the other Moiety, becauſe the one has another Benefit than his Companion has. [d] And if a Rent is granted for Life, and afterwards by another Deed the Grantor releaſes to the Grantee all his Right in the Rent, and if it be in Arrear, that he and his Heirs ſhall diſtrain for it, altho' the Heir ſhall have it by Diſtreſs, as it is adjudged in 8 *H.* 4. 18, yet the Wife ſhall not be endowed thereof, becauſe the Diſtreſs does not alter the Rent, but it is a Rent-ſeck, and the Diſtreſs is but a Penalty, and beſides it is no new Rent which commences after his Death. [e] For if a Rent is granted for Life, and by another Deed the Grantor grants to him that if the Rent is behind he ſhall diſtrain, the Remainder in Fee, the Remainder is void, for he did not take an Eſtate before upon which a Remainder may enure. [f] If a Rent is granted out of the Manor of *Dale*, and if it be behind, that he ſhall diſtrain in the Manor of *Sale*, and the Grantee purchaſes Parcel of the Manor of *Sale*, the Rent remains, and alſo he ſhall diſtrain in the Reſidue, and yet the Penalty was a Thing againſt common Right.

[b] Poſt § 111. Co. Litt. 147. b.

* *Nemo eſt hæres viventis.*

[c] Contra Co. Litt. 147. b. that this is wholly a Rent-ſeck.

[d] Poſt § 111.

[e] See Poſt § 111.

[f] S. P. Co. Litt. 147. b. at the Top.

85. If Tenant in Tail, where the Remainder is over with Warranty, recovers in Value, and dies before Execution ſued, many are of Opinion that he in Remainder ſhall ſue Execution, if the Tenant in Tail dies without Iſſue, becauſe he is Privy in Eſtate. And if a Seigniory is granted for Life, Remainder in Fee, by Fine, and the Tenant for Life dies, he in Remainder ſhall have a *Per quæ ſervitia*, becauſe he is Privy in Eſtate. If a Man recovers in Value by Warranty Land in Borough Engliſh, and dies, having two Sons, *quære* if the youngeſt Son ſhall ſue Execution, or if he ſhall have it and enter upon the eldeſt after he has ſued Execution thereof. But if the Iſſue in Tail recovers in a *Formedon*, and before Execution he dies without Iſſue, the Donor ſhall not enter afterwards, nor have Execution. If Tenant in Tail diſcontinues, and dies, having a Daughter, his Wife *enſeint* with a Son, and the Daughter recovers in a *Formedon*, and dies, and the Son is born afterwards, he ſhall not ſue Execution, nor enter. But if the Iſſue in Tail recovers againſt the Diſcontinuee, and afterwards is attainted of Felony, his Iſſue ſhall ſue Execution, or enter, becauſe he is Privy in Eſtate, altho' he is not Privy in Blood with Regard to the Inheritance in Fee-ſimple. Tenant in Tail recovers in Value by Voucher of the Donor, and is attainted of Felony, his Iſſue ſhall not have Execution, *cauſa patet.* The continual Claim of Tenant for Life enures to him in Remainder.

86. If a Man makes a Leaſe for Life, rendring Rent for the firſt ſeven Years, he ſhall have an Aſſize for it, for it is adjudged in 7 *Ed.* 3. 10, that an Action of Debt does not lie for the Rent. But ſee that Debt does lie by *Spelman*, 28 *H.* 8. *Dyer* 23. *a.*

87. If a Remainder is appointed to the right Heirs Females of the Body of J. S. who dies having a Son and Daughter, the Remainder ſhall be void, becauſe the Daughter cannot have it, inaſmuch a ſhe is not Heir, altho' ſhe be a Female. But if Land be given to one, and to his Heirs Females of his Body, the Female ſhall have it, altho' he has a Son, for ſhe inherits by the Form of the Gift, but in the other Caſe ſhe would take by Purchaſe, and the Name of Purchaſe is not ſufficient for her to take by, becauſe ſhe is

not

not Heir. And *Note* that if J. S. has Iſſue a Daughter, who dies having Iſſue a Son, and a Remainder is limited to the right Heirs Females of the Body of J. S. the Son ſhall have the Remainder, becauſe he ſhall be as a Purchaſer, but he ſhall not have the Land by Deſcent which was given to J. S. and to his Heirs Females of his Body, *cauſa patet*, *Vide Per Newton* 20 *H.* 6. 43. And if a Man dies, having Iſſue a Son and a Daughter, and Land is given to the Daughter and to her Heirs Females of the Body of her Father begotten, ſhe has not an Eſtate-tail, but only for Life, *&c. cauſa qua ſupra.* Land is given to A. and to his Heirs Females, and for Default of Iſſue the Remainder to his Heirs Males, and he has Iſſue a Female and a Male, he ſhall never have the Land clearly. J. S. has Iſſue a Son and a Daughter, and dies, the Son has Iſſue a Daughter, and dies, a Remainder is limited to the right Heirs Females of the Body of J. S. the Daughter of the Son ſhall have the whole.

88. If two are diſſeized, and one of them releaſes to the Diſſeizor all his Right in the one Moiety, all his Right is extinct in the whole, and yet his Right was *per my et per tout* the Poſſeſſion, but inaſmuch as he hath releaſed all his Right in the one Moiety, which extends *per my et per tout*, this is the Reaſon why, *&c.* So if there are two Diſſeizors, and one of the Diſſeizees releaſes to one of the Diſſeizors, the Law is the ſame as in the Caſe before, for he was ſeized *per my et per tout:* But if he had releaſed all his Right to one of them, *viz.* in the Moiety of the ſame one, *&c.* and not in the Moiety generally, the Law ſeems to be otherwiſe, *viz.* that his Right remains in the Moiety of the other Moiety.

89. If the Tenant intermarries with the Seignioreſs, or if the Seignioreſs takes an Eſtate for Life of the Tenancy, and afterwards takes Huſband, he ſhall not be Tenant by the Curteſy, becauſe the Freehold of the Tenancy was in Suſpence, and then he cannot be Tenant by the Curteſy of ſuch Reverſion: But if ſhe had taken an Eſtate for Years, or the Tenant had been her Ward, and afterwards ſhe had taken Huſband, and had died during that Eſtate, he ſhould have been Tenant by the Curteſy, becauſe the Freehold was not in Suſpence, but the Poſſeſſion for Years only.

90. If a Woman is endowed of a Manor, ſhe ſhall pay all Services to the Heir as he pays over.

91. If a Recovery is had againſt one Jointenant, who dies, his Companion ſhall not avoid this Recovery, becauſe the Right was bound thereby; but he ſhall avoid Charges, Dowers, and Recognizances, becauſe the Poſſeſſion is only chargeable with them, and the Right is not bound as in the other Caſe. And if one Jointenant in Fee takes a Leaſe for Years by Indenture of his own Moiety from a Stranger, the Survivor ſhall avoid it, as it ſeems.

93. If an Infant is forejudged, he ſhall be bound for ever thereby, and he has no Remedy; but if he makes a Feoffment of a Manor, and the Feoffee is forejudged, yet the Infant may enter into the Manor, and diſtrain for the Meſnalty: The Diverſity is, becauſe in the one Caſe he was Party to the Record, and in the other Caſe the Forejudger was againſt the Feoffee, who had a defeaſible Eſtate, ſo that the Forejudger under it ſhall be defeaſible alſo. A Recovery in Waſt againſt an Infant ſhall bind him, but a Recovery in Waſt againſt his Grantee ſhall not bind him, becauſe the Infant had an elder Title. And a Recovery in a *Ceſſavit* againſt an Infant ſhall bind him, but a Recovery againſt his Feoffee ſhall not conclude the Infant, unleſs the Title was upon a *Ceſſavit* before the Feoffment, and then *quære.* If Tenant in Dower makes a Feoffment, and the Leſſor recovers in *Caſu proviſo*, ſhe may enter upon him notwithſtanding; this is to be underſtood where the Tenant in Dower is an Infant.

94. If two Coparceners die before Partition, having Iſſues, and a Stranger abates, the Iſſues ſhall not join in a *Mortdanceſtor*, for the Statute of *Glouceſter cap.* 7. is only when one Right deſcends to divers, but here every Iſſue claims his Right by his Mother, ſo that a ſeveral Right deſcends to them, and conſequently the Caſe is out of the Statute, and remains at the Common Law. And therefore if two Coparceners are diſſeized, their Iſſues ſhall not join in a Writ of Entry, but they ſhall have ſeveral Writs in Reſpect of their ſeveral Rights, as they ſhall have ſeveral *Formedons.* And *Note* that if one of them has Cauſe to have a Writ of *Ayel*, and the other to have a Writ of *Beſayel*, they ſhall not join, becauſe they have Cauſe to have ſeveral Writs, and this Caſe is not remedied by the Statute. But where one is entitled to have a Writ of *Mortdanceſtor*, and the other to have a Writ of *Ayel* or *Beſayel*, there they ſhall join. But if none of them can have an Aſſize of *Mortdanceſtor*, then no Remedy is given by the Statute. Which ſee for the better 2 *Ed.* 3. 34. *Fitzherbert* in Writ of *Ayel.* *Contra* 48 *Ed.* 3. 14. and 24 *Ed.* 3. 13.

95. If a Man has a Seigniory, and marries the Tenant, or has the Tenancy by Diſſeizin or by Feoffment upon Condition, he cannot grant the Seigniory, and yet it is but in Suſpence, but inaſmuch as he hath as high an Eſtate in the one as in the other, he cannot grant it over, becauſe it is incertain whether it ſhall ever be revived. But if he had the Tenancy only for Life or for Years, then he might grant it over, and it ſhould be good to take Effect by Diſtreſs after the Determination of the particular Eſtate, becauſe the Fee was not in Suſpence, but as great an Eſtate as he had in the Land was in Suſpence, and no more, and then the Seigniory might be granted over, notwithſtanding it was not in Poſſeſſion. * For if a Leaſe for Years is made to commence after *Michaelmas*, or after the Death of J. S. it may be granted over, and yet the Party has it not in Poſſeſſion. So may the Lord grant his Seigniory where the Tenant is in Ward to him, or where the Tenant has diſclaimed; but if there is Tenant for Life of the Tenancy, and the Seigniory is granted to him in Fee, there he cannot grant it over, becauſe he never had Poſſeſſion of it; but if he had once had Poſſeſſion of it, and then it had come into Suſpence by his taking an Eſtate for Life, then he might have granted it over; and ſo is the Diverſity.

* M. 22 Ed. 4. 37. pl. 20. Bro. Grants 110. Plowd. 142 (k). 423 (f). Co. Litt. 46. b. 270. b. 5 Co. 124. b. Cro. E. 15. pl. 4. 127. pl. 8. Cro. J. 60. 1 Finch 309, 310. 3 Bac. Abr. 436. Poſt § 311.

96. If

96. If the Lord deviſes Land to his Villain, it ſeems that he ſhall be infranchiſed againſt the Heir, and yet he was a Villain to the Heir before the Deviſe took Effect, but inaſmuch as the Father had Power to infranchiſe him, he ſhall be infranchiſed before he is in by the Father. As if one delivers an Eſcrow of Infranchiſement to A. to be delivered to his Villain ſeven Years after, and the Lord dies, and after that the Deed is delivered, this ſhall be a good Infranchiſement. So if a Man makes a Leaſe for Life, Remainder to the right Heir of J. S. who has Iſſue a Son, who is a Villain by Confeſſion to the Feoffor, and the Feoffor dies, and afterwards J. S. dies, and the Tenant for Life dies, and the Son of J. S. enters, he ſhall be infranchiſed, and yet he was not infranchiſed in the Life of the Feoffor, but now he ſhall be ſaid to be in by him. So if a Man deviſes that his Executors ſhall ſell his Land, and they ſell it to one who was a Villain to the Teſtator, he ſhall be manumiſed againſt the Heir, for he is in in the *Per* by the Teſtator.

* S. P. Poſt § 109. Co. Litt. 52. a.

97. * If Leſſee for Life makes a Feoffment, with a Letter of Attorney to the Leſſor to make Livery, who accordingly does ſo, yet he ſhall enter for the Forfeiture, becauſe he did it as Attorney to him who could make Livery; but if the Leſſee had only been Leſſee for Years, it ſhould have been otherwiſe, for then he could not have made Livery, and then the Leſſor ſhould not have avoided the Livery made by himſelf. For if Tenant for Years makes a Feoffment, with a Letter of Attorney to a Stranger to make Livery, who accordingly does ſo, yet the Leſſee for Years ſhall not be ſaid a Diſſeizor, becauſe actual Livery is not made by him, but the Attorney only ſhall be ſaid the Diſſeizor; and ſo in the other Caſe the Law would ſay that the Leſſor ſhould not avoid the Livery. But if the Tenant deviſes that his Lord ſhall make a Feoffment of the Tenancy, and he accordingly does ſo, yet his Seigniory is not extinct, any more than a Rent-charge ſhall be extinct where the Grantee makes Livery of the Land as Attorney to the Tenant of the Land, becauſe he does it as a Servant and in Right of another. But before the Statute, if one had a Rent out of another Land, and was *Ceſtuy que Uſe* of the Land, and entered, and made a Feoffment, the Rent was extinct, becauſe his Feoffment was taken moſt ſtrongly againſt himſelf, ſo that in Conſtruction of Law he did not enter only as *Ceſtuy que Uſe*, but his whole Intereſt was adjudged to be gone. † So if Leſſee for Years makes Livery as Attorney to the Leſſor, it ſeems clearly that this is a Surrender of the Term, otherwiſe the Livery would be void, which it cannot be by any Poſſibility. But in 34 *Eliz.* it was ruled in C. B. to be no Surrender.

† Contra Co. Litt. 52. a.

98. If there is Tenant *pur auter vie*, Remainder to J. S. for his own Life, and J. S. releaſes to the Leſſee, it ſeems that this Releaſe is good, and enures by Way of Creation of an Eſtate, for if a Remainder for the Life of J. S. had been limited to the firſt Tenant, ſuch Remainder had been good, for which Reaſon inaſmuch as there is a ſufficient Tenant for Life and Poſſeſſion upon which the Releaſe may enure, it ſhall be good. But if the firſt Leſſee had held for his own Life, then the Releaſe had enured by Way of Extinguiſhment, and not by Way of Creation of an Eſtate, becauſe the firſt Eſtate was greater with Regard to the Leſſee. And if a Leaſe is made for 40 Years, the Remainder for 10 Years, and he in the Remainder releaſes to the Leſſee for 40 Years, he ſhall have it for 50 Years, for the 40 Years could not have been conſumed if he in Remainder had had 90 Years, no more ſhall the 10 Years, for one Chattle cannot merge another Chattle, for it is as if Leſſee for 40 Years would make a Leaſe for 10 Years, and afterwards would releaſe to the Leſſee, now he ſhall have it for 40 Years, and not for 30, *cauſa qua ſupra*. If a Leaſe is made for Years, Remainder to A. for Life, Remainder to B. for Life, and B. releaſes to the Leſſee, it ſeems clearly that the Releaſe is good, for there is ſufficient Privity between them, altho' he has not the next Eſtate, and the Releaſe enures by Way of Creation of an Eſtate. But if Leſſee for Years will releaſe to his Leſſor, it is void, becauſe the Leſſee for Years is in Poſſeſſion: So if the Guardian will releaſe to the Heir, it is void, becauſe the Guardian is in Poſſeſſion. If two Diſſeizors make a Leaſe for Life, and the Diſſeizee releaſes to one of them, it ſeems that this ſhall enure to them both, becauſe of Neceſſity it muſt enure to the Leſſee for Life, and conſequently to them in Reverſion, and that is, to two. And if Tenant for Life is diſſeized by two, who are diſſeized by another, and the Leſſor releaſes to the laſt Diſſeizor, now the firſt Diſſeizor may enter upon him, notwithſtanding this Releaſe, becauſe the Entry of the Releaſor was taken away; but if his Entry had been lawful, as if the Tenant for Life had enfeoffed a Stranger, who had been diſſeized, and the Leſſor had releaſed to the Diſſeizor, the Feoffee could not have entered, becauſe the Entry of the Releaſor, who had Title paramount, was lawful. As if a Diſſeizor makes a Leaſe for Life, and the Leſſee makes a Feoffment in Fee, and the Diſſeizee releaſes to the Feoffee, the Leſſor, *viz.* the Diſſeizor, cannot enter. But if the Heir of the Diſſeizor who is in by Deſcent leaſes for Life, and the Leſſee makes a Feoffment, and the Diſſeizee releaſes to the Feoffee, now the Leſſor may well enter, becauſe the Diſſeizee cannot enter. And ſo in 9 *H.* 7. 25. *per Fineux*, if the Diſſeizee enters upon a Deſcent, and makes a Feoffment over, the Heir who was in by Deſcent may enter upon the Feoffee; but if in this and the Caſes before he brings a Writ of Right, he ſhall be bar'd, as it ſeems by *Littleton cap. Releaſes*. If an Infant leaſes for Life, and the Leſſee grants over his Eſtate with Warranty, and the Infant brings a *Dum fuit infra ætatem*, and the Grantee, *viz.* the Tenant, vouches the Grantor, who enters into the Warranty, and loſes, and the Demandant releaſes to him and his Heirs, ſome think that the Releaſe is void, becauſe he is Tenant only to anſwer the Action. But a Releaſe which enures to enlarge an Eſtate ſhall enure upon Privity of Eſtate; and therefore if after the Tenant by the Curteſy has granted over his Eſtate a Releaſe is made to him in Fee, it is void, and yet an Action of Waſt ſhall be maintenable againſt him by the Heir, and he ſhall attorn. And if Tenant for Life leaſes for Years, or Donee in Tail makes a Leaſe for his own Life, and he who has the Fee-ſimple confirms

the Eſtate of the Leſſee in Fee, this is void to enlarge the Eſtate for Want of Privity; but otherwiſe in the firſt Caſe, *viz.* of a Releaſe to the Vouchee, for he has the Poſſeſſion in Law. And therefore if a Leaſe is made for Life *, and the firſt Tenant for Life dies, and before any Entry made by him in the Remainder the Leſſor releaſes to him in Fee, this ſhall enure according to the Words; ſo in the firſt Caſe it ſhall enure by Way of Creation of an Eſtate to the Vouchee. But in a Writ of Entry in the *Per* if the Tenant vouches him by whom, *&c.* who enters into the Warranty, and the Demandant releaſes to him, this enures by Way of Extinguiſhment to the Tenant, and ſo is the Diverſity. If a Woman who has Cauſe of Dower releaſes to Guardian in Chivalry, this takes away her Title and Eſtate in the Chattle of the Guardian, *viz.* in his Poſſeſſion, and the Heir ſhall take Advantage of it. But Tenant for Life cannot ſurrender to him in Remainder for Years, for in this Caſe he has the Freehold in Poſſeſſion; and ſo is the Diverſity. It was ſaid that in the Caſe of the *Dum fuit infra ætatem*, if he had releaſed in Tail, a greater Eſtate had not paſſed, for altho' it does not appear by the *Dum fuit infra ætatem* what Eſtate he claims, becauſe the Writ is general, *viz. that he demiſed whilſt he was within Age*, &c. yet when he enters generally into the Warranty, he ſhall not be ſaid to have a Fee againſt the Demandant, but the Demandant may aver that he only made the Demiſe for Life. A Releaſe made to the Patron when the Church is full ſhall not extinguiſh an Annuity, otherwiſe if it be made in Time of Vacation, as it is held in 21 *H.* 7. 41. *a.* but a Releaſe to the Ordinary perhaps will not avail. *Quære* if a Releaſe of the Glebe made to the Patron in Time of Vacation be good. If Tenant for Life grants a Rent-charge, a Releaſe to him in Reverſion will not extinguiſh it, as it ſeems, any more than a Releaſe of the Grantee to the Tenant for Life will extinguiſh a Rent-charge granted by him in Reverſion, *quære inde.* If the Chargee in Fee releaſes to the Leſſor, ſhall this diſcharge the Leſſee for Life? It ſeems that it ſhall, but a Grant thereof to him in Reverſion ſhall not extinguiſh it againſt the Leſſee.

* Theſe Words, *with Remainder for Life*, ſeem to be wanting.

99. † If I grant to A. an Annuity upon Condition that he ſhall promote me to a Benefice within ſeven Years, within which Time I take a Wife, and ſhe dies within the Time, yet A. ſhall not be bound to promote me within the Day, becauſe I who ought to take Advantage of it was once diſabled, at which Time A. had Liberty to tender the Benefice to me, and foraſmuch as I could not then take it, he ſhall be excuſed from tendering it at that Time, and therefore ſeeing that he might have tendered the Benefice at the Time of my Diſability, this ſhall countervail in Law a Tender and Refuſal, in which Caſe a Refuſal once is a Refuſal for ever. So if I am bound to a Woman to marry her at ſuch a Day, and ſhe takes Huſband, and the Huſband dies before the Day, I am not bound to marry her. But if the Perſon who is to be promoted or married is a Stranger to the Obligation, it is otherwiſe. And if I am bound to enfeoff the Obligee before ſuch a Day, and before the Day he accepts a Leaſe for Years, which expire before the Day, yet I am not bound to enfeoff him. But if I am enfeoffed upon Condition to enfeoff the Obligee, and no Day is limited, and he takes a Leaſe, which is determined, yet I ought to enfeoff him, becauſe no Day was limited on which it was to be done, ſo that the Feoffor was not diſabled before Requeſt or Intimation of his Will, and then upon the Requeſt it is feaſible, and not before; but if a Day had been limited, it had been otherwiſe.

† See like Matter, Co. Litt, 224. b.

100. If the Baſtard enters into the Manor, and recovers in a *Ceſſavit*, ſome think that inaſmuch as the *Mulier* diſproves the Eſtate of the Baſtard, he ſhall not take Benefit of this Recovery. [a] If the Baſtard dies ſeized of Land, the *Mulier* being within Age, many think that his Right ſhall not be gone nor bound any more than if the *Mulier* had been born after the Deſcent. [b] So if the Baſtard enters, and the *Mulier* dies, his Wife *enſeint*, and before the Birth the Baſtard dies, and his Iſſue enters, the *Mulier* ſhall not be bound thereby; but many others are of the contrary Opinion in all theſe Caſes. [c] And if the Baſtard dies ſeized of Land, his Wife *enſeint*, and before the Birth the *Mulier* enters, the Iſſue of the Baſtard, when he is born, ſhall be bound thereby, for by the dying ſeized only, [d] without a Deſcent to the Iſſue, the Right of Entry of the *Mulier* was not taken away; for if the Diſſeizor dies without Heir, the Diſſeizee may enter upon the Lord by Eſcheat, ſo here. If the Baſtard *puiſne* enters into Land in Borough-Engliſh, and dies ſeized, and his Iſſue enters, they ſay that the Right of the *Mulier* ſhall be bound, for if the eldeſt Son enters, and dies ſeized of Land in Borough-Engliſh, this Deſcent ſhall not take away the Entry of the youngeſt, any more than the Entry and Deſcent of the youngeſt ſhall take away the Entry of the eldeſt in Land at the Common Law. But *Note* that ſuch Baſtard *puiſne* is intended where the firſt Wife, by whom he had the *Mulier*, dies, and then he has a Baſtard, and afterwards marries the ſame Woman, [e] for, as it ſeems, if a Man marries the Woman by whom he has a Baſtard, and ſhe dies, and afterwards he has a *Mulier* by another Wife, altho' they are not by one and the ſame Mother, yet ſuch Baſtard ſhall gain the Inheritance to his Iſſue, if he dies without Interruption, and by the ſame Reaſon ſhall the Baſtard *puiſne*, &c. If the *Mulier* ouſts the Baſtard, who recovers againſt him in Aſſize, where the *Mulier* pleads *never ſeized*, &c. and afterwards dies, this Deſcent ſhall take away the Right of the *Mulier*, for the Poſſeſſion which he had is abſolutely defeated by the Recovery in Aſſize, for he ſhall have an Aſſize of *Mortdanceſtor* or a *Scire facias* where ſuch Poſſeſſion is removed; but otherwiſe it had been if he had entered. [f] If the Baſtard has Iſſue, and dies in the Life of his Father, his Iſſue ſhall be in the ſame Caſe, againſt the *Mulier*, as the Father ſhould have been, if he dies ſeized without Interruption, or a Deſcent takes away the Right of the *Mulier*. [g] It was ſaid that the Heir of the Baſtard being in by Deſcent ſhall gain the Land againſt the collateral Heir, or againſt the Lord by Eſcheat, as well as againſt the *Mulier puiſne*. So Maxims are not taken ſo very ſtrictly. [h] But Dower *ex aſſenſu fratris* is not good, for the Maxim is of the Aſſent of the [i] Mother and Father only. If the Iſſue of the Baſtard is the firſt who enters, and he dies ſeized, his Iſſue ſhall hold the Land againſt the *Mulier*, as well as the Iſſue of the Baſtard ſhall hold

[a] Poſt § 280. And ſee the principal Authorities *pro et con* cited Plowd. 372 (f). in Margine.
[b] Contra Co. Litt. 241. a.
[c] Co Litt. 244. a. accord.
[d] Co Litt. 244. a. accord.
* See Litt. § 399.
[f] Co Litt. 244. b.
[g] Co. Litt. 244. a.
[h] Co. Litt. 35. b. 1 Finch 106. 2 Finch 127.
[i] Co. Litt 35. b. 1 Finch 105. 2 Finch 126.

hold it, where the Baſtard was the firſt who entered. And it is a Maxim that Aid ſhall be granted to make the Son a Knight, or to marry the Daughter, but it does not extend to the Brother or Siſter; and a Man cannot have an Action *quare fratrem et hæredem cepit et abduxit.* [a] If the Baſtard dies, and his Iſſue endows the Wife of the Baſtard, *quære* if the Right of the *Mulier* is bound, or if he may enter upon her. But if the Wife of a common Anceſtor be endowed, the Deſcent of the Reverſion ſhall be to the *Mulier*, *quære inde*; for if the Siſter has ſuch a Brother of the half Blood, and afterwards ſhe endows the Wife of the common Anceſtor, *quære* to whom ſhall the Reverſion go; but if it be the Wife of the Brother, it is otherwiſe, and there it ſeems that the Siſter ſhall have the Reverſion.

[a] S. P. Co. Litt. 241. a. that the Right of the *Mulier* is bound in this Caſe, and he cannot enter upon the Tenant in Dower.

101. A Man diſſeizes his Leſſee for Life, and afterwards makes a Feoffment to J. S. to the Uſe of the ſame Leſſee for his Life, Remainder in Tail to A. he in Remainder dies, his Heir being within Age, and the Tenant for Life dies ſeized, J. S. ſeizes the Ward of the Donee in Tail, which Ward refuſing the Marriage offered him by J. S. marries himſelf elſewhere, and J. S. brings a Writ of Forfeiture of Marriage.

102. Land is given to two, and to the Heirs of their two Bodies begotten, the Remainder to their right Heirs, which Land was before held by one Hawk, now it ſeems that the Lord ſhall but have one Hawk, and yet, as it ſeems, they are not Jointenants of the Fee-ſimple, which veſts ſeverally in them, but there is no Apportionment in a Moiety. But if a Leaſe is made for Life of two Acres, the Remainder of the one to A. in Fee, the Remainder of the other to B. in Fee, now the Lord ſhall have two Hawks.

103. Land is given for Life, the Remainder in Fee to the right Heirs of J. S. who is dead, leaving a Son, who dies without Iſſue, the Remainder ſhall deſcend to the Heir on the Part of the Father, and not to the Heir on the Part of the Mother, becauſe this is a Purchaſe to the Son in Manner as if the Remainder had been limited to the Son in his own Name, and it is as if Land is given to a Man and to his Heirs on the Part of the Mother begotten, and his Mother is then dead, and afterwards he dies without Iſſue, the Heir on the Part of the Father ſhall have the Land, and (Heir on the Part of the Mother) by which he is named, are but Words of Conveyance to make the Land paſs to him.

104. A Man makes a Leaſe for Life, and dies, having a Son and a Daughter by one Venter, and a Son by another Venter, the eldeſt Son grants the Reverſion in Tail, and the Tenant attorns, and he dies, and afterwards the Grantee in Tail dies without Iſſue, and after that the Tenant for Life dies, it ſeems that the Daughter ſhall have the Land, and not the youngeſt Son.

105. Tenant in Dower of an Advowſon grants her Eſtate to J. S. and to his Heirs, he dies, and his Heir preſents him in Reverſion, and afterwards the Tenant in Dower dies, and after that the Preſentee dies, and his Heir preſents, and is diſturbed by the Heir of J. S. and he brings a *Quare Impedit* againſt him and the Ordinary, and ſhews the ſaid Preſentment for his Title, and the Heir of J. S. ſhews that the Preſentee was the Anceſtor of the Plaintiff.

106. Tenant in Tail leaſes for 40 Years, rendring Rent, and afterwards dies, and his Heir ſuffers the Leſſee to continue two or three Years after the Death of the Leſſor, and then ouſts him, he has no Remedy by Action of Debt or otherwiſe for the Rent behind after the Death of the Tenant in Tail, any more than the Leſſor hath for the Arrears incur'd after the Breach of a Condition, where he has not enter'd for the Condition broken; and it ſeems that he ſhall not have an Action of Account againſt him as Bailiff of the Land.

[b] Litt. § 346. See this Conſtruction followed by the Ld. *Coke* in the Commentary thereupon.

[c] Co. Litt. 99. b. 213. b. Ante § 38.

107. Altho' [b] *Littleton* ſays that a Man cannot reſerve Rent but to the Leſſor or to his Heirs, yet if a Man makes a Leaſe, rendring Rent to his [c] Heir, it is void, for if it ſhould be good, then his Heir ſhould take it as a Purchaſer, and a Stranger too. But *Littleton* is not ſo to be underſtood, but the disjunctive ſhall there be taken as a Copulative. For if a Man enfeoffs one upon Condition to re-enfeoff him or his Heirs before *Eaſter*, and before *Eaſter* the Feoffor dies, now the Feoffee ought to make the Feoffment before Requeſt, becauſe the Heir is a Stranger, for that the Condition was in the Disjunctive. So the Words of *Littleton* are not to be underſtood literally as above, for then they would be contrary to Law. But the Difference between the principal Caſe and the other is this, the Rent is not a Condition, nor can it be reſerved to the Deviſor, becauſe the Deviſe does not take Effect until after his Death, but where the Rent is reſerved to the Heir, it ought to be reſerved to the Leſſor himſelf, and if it is not, it ſhall be void.

108. A. being ſeized of Land in Socage deviſes it to a Stranger upon Condition in Fee, and if the Stranger breaks the Condition, that his Executors ſhall ſell the Land, it ſeems that this Deviſe, as to the Executors, is void, and yet by the Equity of the Statute a Man may deviſe that his Executors ſhall ſell his Land, and that upon Condition; and here it appears that immediately upon the Death of the Deviſor the Land ſhall be in the Deviſee, and then the Deviſe that his Executors ſhall ſell is annexed only to the Condition, for nothing deſcends to the Heir but the Condition, and it is as if one has a Title of Entry for a Condition broken in Land holden in Socage, in which Caſe ſuch Deviſe is void, for the Heir may enter, if he will, for the Breach of the Condition, and then when he enters, he ſhall hold the Land diſcharged of all Conditions made by his Father after the firſt Feoffment. So ſhall it be in the principal Caſe.

109. A Diſſeizor having a Wife makes a Leaſe for Life, the Leſſee makes a Leaſe to the Wife for the Life of the Wife, and the Huſband accepts the Deed and agrees to it, the Diſſeizee releaſes to the Wife, the Huſband dies, the Wife diſagrees to the Leaſe, her Leſſor enters, againſt whom ſhe brings a Writ of Dower. It was held clearly that if the Diſſeizor having a Wife makes a Leaſe to J. S. for Life, who makes a Leaſe to A. for Life, and the Diſſeizee releaſes to A. the Wife of the Diſſeizor ſhall be endowed, for the Releaſe does not countervail an Entry and Feoffment. But if the Diſſeizor makes a Leaſe for Life, and the Leſſee makes

a Feoffment, and the Diſſeizee releaſes to the Feoffee, this takes away the Entry of the Diſſeizor, for ſuch Releaſe ſhall take away all Rights, but not Titles, as Condition or Dower, and becauſe the Diſſeizor had a Right of Entry, he cannot enter. But if the Diſſeizor be diſſeized, and the Diſſeizee releaſes to the ſecond Diſſeizor, this takes away the Dower of the firſt Diſſeizor's Wife. But in the principal Caſe *ſupra* the Releaſe is clearly void, for by the Leaſe made by the Leſſee to the Wife the Huſband had Title to enter for the Forfeiture, and then when he takes it by the Wife, he ſhall be remitted, and altho' he agrees that the Wife ſhall take the Eſtate, yet this is no Eſtoppel, any more than where the [a] Leſſee makes a Feoffment, and he in the Reverſion being his Attorney makes Livery, in which Caſe he may enter nevertheleſs for the Forfeiture; ſo is it here, and then if the Huſband is remitted, there is no Poſſeſſion in the Wife upon which the Releaſe can enure, for which Reaſon ſhe may then diſagree and have Dower.

[a] S. P. Ante § 97.

110. [b] If a Condition is annexed to the Land of a Feme-covert or an Infant, as the Payment of D. which is not done, by Reaſon whereof an Entry is made, the Wife and the Infant ſhall be bound thereby for ever. But if the Wife be Tenant for Life, and the Huſband makes a Feoffment, and the Leſſor enters, yet the Wife ſhall have the Land after the Death of the Huſband, ſo in the Caſe of an Infant ſuch Forfeiture is voidable, for theſe are Conditions in Law, and an Entry given for them ſhall not be of Force for ever. So alſo it ſeems to be in the Caſe of a Forfeiture made by Aid of a Stranger in a *Præcipe quod reddat*, or by one who brings a *Quod ei deforceat*, and claims another Eſtate: ſo that there is a Diverſity between a Condition in Law and a Condition in Deed. But if the Condition is created by Statute, and thereupon there is a Recovery in a Suit to which the Wife is Party, ſhe ſhall be bound by ſuch Recovery, as in the Caſe of [c] *Ceſſavit*, or Waſt; but if the Condition is given by a Stranger, and there is no Recovery conſequent upon it, as in Caſe of [d] Mortmain, then neither the Wife nor the Infant ſhall be bound. But there are ſome Conditions in Law by which both a Wife and an Infant ſhall be bound, as if an Infant or the Huſband breaks the Condition which the Law annexes to the Grant of a Park, or Stewardſhip, or Office, or Liberty, this ſhall bind the Eſtate for ever. Alſo there is another Condition in Law of this Nature, *viz.* if the Goods of an Infant are ſtolen, and ſold in Market overt, or if they be waived or ſtrayed, or if the Ordinary preſents for Lapſe to the Advowſon of an Infant, in all theſe Caſes he ſhall be bound. So Note the Nature of the Condition which the Law annexes to the Thing.

[b] See 31 Aſſ. pl. 17. Fitz. Condition 15. Bro. 114. Coverture 71. Plowd. 375 (f).

[c] See as to an Infant, Plowd. 364 (e) and (f), and the Books there cited in the Margin.

[d] See 1 Show. 84, at the Top.

111. [e] A Rent-ſeck is granted out of Land to A. for Life, and afterwards by another Deed the Grantor confirms his Eſtate, and that if the Rent be behind it ſhall be lawful for the Grantee and his Heirs to diſtrain for the ſame Rent, the Grantee takes a Wife, and dies, it ſeems that his Wife ſhall not have Dower of the Rent, and yet his Heir ſhall have it by Deſcent, as it is adjudged in 8 *H.* 4. 18. for the Rent-ſeck is not yet determined, but the Nature of it ſtill remains, and the Diſtreſs is but in Nature of a Penalty, and he ſhall have a Fee in the Rent-charge, but it ſhall be in him as a Reverſion, and in no other Manner, for he ſhall not have two Rents, and the firſt ſhall not be extinct nor drowned. As if a Lord of a Manor grants to A. the Homage and Fealty of his Tenants, ſaving to himſelf the Rent, this is a Rent-ſeck, and ſhall be Parcel of the Manor, and if afterwards the Tenant will grant to the Lord that he and his Heirs ſhall diſtrain for the ſame Rent, yet the Rent ſhall be always Parcel of the Manor, notwithſtanding this, and the Diſtreſs ſhall be as a Penalty; but if it was a Rent-charge, it ſhould not be ſaid Parcel of the Manor, for then it ſhould be ſaid to commence now. And if the Lord grants the Rent of his Tenant to A. for Life, ſaving to himſelf the Seigniory, and afterwards he grants the Seigniory and the Reverſion of the Rent to the Grantee, yet it ſhall be called a Rent ſeck during the Life of the Grantee, and afterwards it ſhall be called a Rent-ſervice, for the Reverſion of the Rent which was a Rent-ſervice cannot merge the Freehold of the Rent which was of another Nature; no more can the Reverſion of the Rent charge merge the Freehold of the Rent-ſeck in the principal Caſe. But in the laſt Caſe if the Grantee had re-granted the Rent-ſeck to the Grantor who had the Reverſion, it ſhould have enured as a Surrender. *Quære* what is the Diverſity where the Reverſion comes to the Freehold, and where the Freehold comes to the Reverſion? So if one has a Manor to which an Advowſon is appendant, and he grants the Advowſon to A. for Life, and afterwards enfeoffs him of the Manor *with the Appurtenances*, now the Freehold of the Advowſon is not appendant, but if the Grantee of the Advowſon had re-granted it to the Grantor, it had been appendant. But if a Man leaſes his Manor for Life, ſaving to himſelf the Advowſon, and afterwards grants the Reverſion of the Manor *together with the Advowſon*, it is clear that the Advowſon ſhall never afterwards be appendant to the Manor. [f] If a Man grants a Rent out of two Acres, and that if the Rent be behind, he ſhall diſtrain in one of the Acres, this is not a Rent-charge in any Part, becauſe the Diſtreſs is not limited in the whole Land out of which the Rent iſſues. If a Man grants 20*s.* out of his Manor of *Dale*, and that it ſhall be lawful for the Grantee and his Heirs to diſtrain for theſe 20*s.* and for other 20*s.* in the Manor of *Sale*, the firſt 20*s.* are a Rent-ſeck, and the Diſtreſs for them is but a [g] Penalty, and the other 20*s.* are a * Rent-charge iſſuing out of the Manor of *Sale*, ſo that they are ſeveral Rents. But if a Man grants a Rent out of the Manor of *Dale*, and if it be behind that it ſhall be lawful for the Grantee and his Heirs to diſtrain for it in the Manor of *Dale* and *Sale*, this ſeems to be a Rent-charge in the Manor of *Dale*, and a Penalty in the Manor of *Sale*. If there is Tenant for Life of a Seigniory, and he in the Reverſion releaſes to the Tenant of the Land, yet it ſeems that he is Tenant for Life of the Seigniory without any Reverſion, 8 *H.* 6. 24. *b.* [h] If a Rent is granted to a Man out of Land for the Life of J. S. and afterwards by another Deed the Grantor grants that if the Rent be behind the Grantee ſhall diſtrain for it during his Life, the Remainder in Fee, this is a good Remainder, if ſo be that the firſt Rent be determined; but if the Diſtreſs be appointed for the Life of J. S.

[e] Ante § 84.

[f] Ante § 84. Co. Litt. 147. b.

[g] S. P. Co. Litt. 147. a.

* For here the latter 20*s.* are not expreſsly granted out of any Manor, ſo that there is a Neceſſity for the Law to make a Conſtruction that this Grant of Diſtreſs ſhall amount to a Grant of a Rent; whereas as to the firſt 20*s.* there is no need of ſuch Conſtruction, becauſe they are expreſsly granted to iſſue out of the Manor of *Dale*, for which Reaſon the Diſtreſs in the Manor of *Sale* ſhall only be a Penalty, as to them. And when a Man charges Land with Diſtreſs for the Payment of a yearly Sum of Money, and does not expreſsly grant it out of any particular Land, this ever amounts to a Grant of a Rent-charge out of the Land in which the Diſtreſs is given. Litt. § 221.

[h] See Ante § 8.

Or

or J. D. then the Remainder is void, for there it is but a Penalty, but in the other Caſe an Eſtate is alſo given, altho' it is a Penalty during the Time of the Appointment of the Determination of the firſt Rent. If a Rent of 20 *s.* is granted out of the Manor of *Dale*, and that it ſhall be lawful for the Grantee and his Heirs to diſtrain for theſe 20 *s.* and for other 20 *s.* in the Manor of *Dale* and *Sale*, now for the firſt 20 *s.* this ſhall be a Rent-charge in the Manor of *Dale*, and a Penalty in the Manor of *Sale*, and for the other 20 *s.* it ſhall be a Rent-charge in both the Manors. If a Rent is granted out of two Acres, with Diſtreſs in one, and afterwards the other is recovered by an elder Title, it ſeems that it ſhall be a Rent-ſeck as it was before, for it cannot now be a Rent-charge, if it was a Rent-ſeck before. If a Rent reſerved upon a Leaſe for Life is granted over, and afterwards a Recovery is had in Waſt, yet the Rent remains; as if the Lord grants the Rent, reſerving to himſelf the Homage, the Rent remains after the Eſcheat. And if the Tenant enfeoffs the Lord upon Condition, and the Meſne grants the Surpluſage of the Rent which he has as a Rent-ſeck, and Attornment is had, and afterwards the Condition is broken, yet it ſeems that the Grantee ſhall retain the Rent as a Rent-ſeck, and the Tenant ſhall pay the Remnant of the Rent only to the Meſne.

112. At Lecture a Diverſity was held, *viz.* that one Siſter, being Seignioreſs, to whom the Tenancy is deſcended, ſhall not have the Rent nor other Charge before Partition, but if ſhe had the Tithe-Corn, ſhe ſhall have them after Severance from the nine Parts before Partition, becauſe they lie in *prendre*, and ſhe may make Diviſion well-enough with the others, for the Diviſion ſhall be made as Tithes, and ſhe ſhall take them as Parſon, and ſo in another Capacity. So ſhall it be if the Parſon and another purchaſe jointly Land within the Pariſh. If a Woman has 20 Cart-loads of Eſtovers out of the Wood of *Dale*, as appurtenant to her Manor of *Dale*, and afterwards the Wood deſcends to her and her Siſter, ſhe may take the Eſtovers before Partition.

113. If the Daughter recovers in Value, by Reaſon of the Warranty of the Anceſtor, before the Birth of the Son, the Son, when he is born, ſhall enter upon her into the Land recovered in Value, for ſhe recovered it as Heir, and it came in lieu of the former Land, and ſo ſhall be in the ſame Degree as the former Land was, as a Recovery in Value by a Warranty on the Part of the Mother ſhall reſort to the Heir on the Part of the Mother. So if after Partition one Parcener recovers by a Warranty of the Anceſtor, becauſe the other will not come in Aid, the Land ſhall be rateable. But if the Daughter has the Land by Reaſon of [a] Mortmain, [b] Conſent to a Raviſher, or Condition performed on her Part, *&c.* there the Son born after ſhall not have it; ſo of a Recovery by Reaſon of a Warranty made to the Daughter herſelf.

[a] Poſt § 180.

[b] T. 5 Ed. 4. b. a. Bro. Done 28. Plowd. 56 (o). 1 Co. 95. a. 3 Co. 61. b. 1 Leon. 258. Kitch. 215.

114. The Meſne grants the Meſnalty upon Condition that if the Grantee pays a certain Sum to the Grantor or to his Heirs at ſuch a Day, then he ſhall have Fee, and before the Day the Grantor is attainted of Felony, and executed, it ſeems that the Grantee ſhall have the Fee. Firſt, it ſeems clearly that the Fee ſhall not be out of the Grantor preſently, but upon the Performance of the Condition; but here the Act of the Law, which is occaſioned by the Act of the Grantor, *viz.* by the Felony committed and the Attainder thereupon, has made it impoſſible for the Condition to be performed, and inaſmuch as the Condition cannot be performed either to the Grantor or to his Heirs, becauſe he has no Heir, and there is no Folly or Default in the Grantee, he ſhall not be prejudiced thereby, but the Law will conſtrue the Condition to be performed by him, and then the Fee ſhall be diveſted out of the Lord, as it ſhall out of the Perſon of the Grantor. But *quære* the Diverſity between this Caſe and that of *Pleſington* in 6 *R.* 2. *Fitz. Quid juris clamat* 20. But if one Jointenant leaſes for five Years, upon Condition that if the Leſſee does ſuch an Act at ſuch a Day, then he ſhall have the Land for twenty Years, and before the Day the Jointenant dies, now the Condition ſhall be void, as to the Survivor; as if a Huſband has 20 Years in Right of his Wife, and grants 3 Years upon ſuch Condition, *&c.* and before the Day the Huſband dies, the Wife ſhall have the Reſidue of the Term, and ſhall avoid the Condition. *Quære*, for they claim in of a higher Eſtate, and ſo ſhall avoid a Condition as well as a Charge. But *quære* when the Condition charges the Poſſeſſion and the Right; as if one Jointenant or Huſband makes a Leaſe to commence at *Michaelmas*, and they die before the Day, the Leaſe ſhall not be avoided, for there the Poſſeſſion itſelf paſſes preſently, but not in the other Caſes. And therefore if the Leſſor for Life dies, leaving two Sons by divers Venters, and the eldeſt grants to the Leſſee that he ſhall be diſpuniſhable for Waſt, and dies without Iſſue, the youngeſt ſhall notwithſtanding have an Action of Waſt, for the Grant ought to be by the eldeſt and his Heirs, and the youngeſt is not his Heir, but claims by Title paramount, *viz.* as immediate Heir to the Father, and therefore he ſhall avoid the Charge granted out of the Reverſion. If a Rent-charge is granted to commence the Day after the Grantor is attainted of Felony, here notwithſtanding the Land is forfeited by the Attainder, it ſeems that the Rent-charge is good.

115. Tenant in Tail of Rent diſcontinues it with Warranty, and the Iſſue having a Wife is bar'd in a *Formedon* by this Warranty with Aſſets, yet it ſeems that his Wife ſhall be endowed of this Rent, for the Grant was void by the Death of the Tenant in Tail, and then the Iſſue had the Poſſeſſion in Law, and might have diſtrained at his Pleaſure, and altho' he has determined his Pleaſure, and has bar'd himſelf by that which the Law has given him, yet his Wife ſhall not be prejudiced thereby.

116. A Rent is granted in Fee out of Land in Borough-Engliſh and Land at the Common Law, the Grantee dies, leaving two Sons, the eldeſt ſhall have the whole Rent, for it cannot be apportioned when it is one entire Rent, and then the eldeſt, being Heir at the Common Law, ſhall have the whole: As an Aſſize at the Common Law ſhall be maintainable of a Rent granted out of Ancient-Demeſn and out of other Land, 35 *H.* 6. 4. *a. Per Aſhton* accord.

117. A Leaſe for Life is made, upon Condition that if the Leſſor aliens the Reverſion, then the Leſſee ſhall have Fee, the Leſſor grants the Reverſion by Fine for Life, it ſeems that the Grantee ſhall have it for Life, and the Leſſee ſhall have a Fee executed after the Eſtate of the Grantee, and not before; yet if the Condition had been that if the Leſſee pay 20*l.* he ſhall have Fee, *&c.* it ſhould have diveſted the Poſſeſſion out of the Part of the Grantee. *Note* the Diverſity.

118. If two Women diſſeize A. and one of them takes a Huſband, and the Diſſeizee releaſes to the Huſband in Fee, it ſeems that this ſhall enure by Way of Extinguiſhment to both the Women, for it ſhall not enure as an Entry and Feoffment to the one Woman, becauſe ſhe is not privy to the Deed, and as an Entry and Feoffment to the Huſband it ſhall not enure, becauſe he is in by Title, and if the Releaſe had been made to the other Woman, it ſeems that it ſhould not have diveſted the Poſſeſſion out of the Huſband. And if Tenant for Life is diſſeized by two, and he releaſes to one of them, this ſhall enure to both, for if it ſhould enure to the one only, then ſhould it enure as an Entry and Grant of his Eſtate, whereby the Reverſion would be reſtored, which cannot be, nor can the one be diveſted of his Part of the Reverſion, nor have any Reverſion dependant upon the Eſtate of his Companion who joined in the Diſſeizin with him. And if he in the Reverſion had joined in the Releaſe with the Tenant for Life, *quære* how it ſhould have enured? And if two Diſſeizors make a Feoffment, and take back an Eſtate for Life, a Releaſe to one of them ſhall enure to both.

[a] S. P. 26 H. 8. 7. pl. 33 *dubitatur*. But ſee that the Adminiſtrator ſhall not ſue Execution here, O. Bendl. 2, pl. 5. N. Bendl. 18, pl. 24. Moor 4, pl. 13. 139. 680, pl. 931. 1 And. 23. pl. 49. 1 Co. 96. a. 5 Co. 9. b. W. Jones 214, 248. March 9, pl. 24. 2 Brownl. 144. Noy 81, 82. Style 251. Yelv. 33, 83. 2 Saund. 149. 1 Sid. 29. 2 Sid. 122. Cro. E. 435, pl. 49. Cro. J. 4, 394. Cro. C. 167, 227, 451, 459. 1 Finch 10. 2 Finch 13. But if the Executor had ſued out Execution, and before the Debt levied had died inteſtate, then the Adminiſtrator *de bonis non* ſhould take Advantage of this Execution, becauſe it is a Thing veſted, Hill. 12 Car. 2. B. R. *Harriſon v. Bowden* 1 Sid. 29. And now by the Statute of 17 *Car.* 2. *cap.* 8. made perpetual by 1 *Jac.* 2. *cap.* 17. § 5. an Adminiſtrator *de bonis non* may ſue out a *Scire facias* and take Execution upon a Judgment after a Verdict recovered by any Executor or Adminiſtrator.

119. A Huſband having 20 Years in Right of his Wife grants 2 Years to a Stranger, upon Condition that the Grantee ſhall not grant over his Term, and if he does, that the Huſband his Executors and Aſſigns may enter, and afterwards the Huſband dies, and the Leſſee grants over his Term, it ſeems clearly that the Executors of the Huſband cannot enter, becauſe this is a Condition annexed to the Reverſion, and if they might enter, they would defeat the Reverſion of the Wife, for it is clear that the Wife ſhall have the Reverſion of the Term, and if they ſhould enter, they muſt be in the ſame Caſe and Condition as their Teſtator was, and he was ſeized of the whole Land in Right of his Wife, which the Executor cannot be. And therefore if I make a Leaſe for Life, rendring Rent, and for default of Payment a Re-entry, and I grant the Reverſion to a Stranger, by the Common Law I cannot enter, becauſe I cannot be ſeized in the ſame Plight as I was before the Livery or Leaſe made, for then I ſhould diveſt the Reverſion out of my Grantee, and defeat my own Grant, which I cannot do. And therefore the eldeſt Son cannot enter upon the particular Eſtate, where the Reverſion is deſcended to the youngeſt by the Cuſtom of Borough-Engliſh or a ſpecial Tail, nor the Heir on the Part of the Father, where the Reverſion goes to the Heirs on the Part of the Mother, nor the Executor of one Jointenant, where the Teſtator has made a Leaſe for Years upon ſuch Condition, and dies, and the other ſurvives, for then they would diveſt the Reverſion out of the other, which cannot be done. And in the principal Caſe it ſeems that the Wife cannot enter, for it ſeems that ſhe is not privy to the Condition, nor does ſhe claim under the Eſtate of the Huſband, but by Title above it, ſo that ſhe is not Party to the Privity of the Condition; as if one Jointenant grants his Part for Years upon ſuch Condition, the Survivor ſhall not take Advantage of it, *cauſa qua ſupra*. And it is clear that the Statute of 32 *H.* 8. does not extend to enable the Wife to take Advantage of this Condition, becauſe ſhe is not the Grantee of the Reverſion, nor comes in by Privity of the Law. But it is clear that if the Huſband had granted over his Eſtate, *viz.* the whole 20 Years, upon ſuch Condition, or if the Father had made a Feoffment in Fee of the Land aforeſaid in Borough-Engliſh, he ſhould have entered, for there he claims by the Father, and under his Eſtate, and inaſmuch as he is Heir by the Cuſtom, he ſhall enter by the Common Law; ſo in the other like Caſes. And others are of a contrary Opinion, *viz.* that the Condition is gone, as if a man makes a Leaſe for Years upon Condition *ut ſupra*, and dies, leaving Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, the eldeſt gets Poſſeſſion of the Rent, and dies, now the Siſter ſhall have the Reverſion, and the Condition is gone, for ſhe is not Heir. If a Man gives Land in Tail which came on the Part of the Mother, rendring Rent, and dies without Iſſue, the Heir on the Part of the Mother ſhall have the Rent with the Reverſion, and why ſhall not ſhe as well have the Condition? Some ſay that the Rent is incident to the Reverſion, and goes along with it in the Grant of it, but the Condition does not. And, it was ſaid, if there are two Diſſeizors, and one of them leaſes the Moiety for Years, rendering Rent with Re-entry for Non-payment, and the Diſſeizee releaſes to the other who made no Leaſe, it ſeems that he ſhall have the entire Freehold in the whole Land, and the Leſſee ſhall not pay the Rent to him, for he comes to the Reverſion by Title paramount, and not by any Privity. [a] It was ſaid that if the Executor brings Debt, and recovers, and before Execution dies inteſtate, whereby Adminiſtration is committed of the Goods of the firſt Teſtator, the Adminiſtrator ſhall not have Execution, for there is no Privity between him and the Executor, and his Power has Relation antecedent to the Teſtament; *quære tamen*, for it ſeems to me to the contrary, for the Executor who is ſevered ſhall have Execution of a Thing recovered by his Companion, for his Death abates the Writ, in 38 *Ed.* 3. 13. It was ſaid that if the Seigniory is granted in Tail, and there is an Alienation in Mortmain, and the Grantee in Tail dies within the Year without Iſſue, the Donor ſhall enter as he in Reverſion ſhould do, for there is Privity in Eſtate. If the Heir within Age had endowed his Mother of more than ſhe ought to have, the Guardian in Chivalry could not have Admeaſurement until the Statute of *Weſtminſter* 2.

120. [b] If I recover in Aſſize, and afterwards am re-diſſeized by him againſt whom, *&c.* and by another, I cannot have Rediſſeizin, for the [c] Statute gives the Rediſſeizin againſt the ſame Perſon, *&c.* and it is a penal Statute. So if two Coparceners by Record make Partition of an Advowſon, ſo that the eldeſt firſt preſents, and afterwards the youngeſt, and the eldeſt and a

[b] S. P. Poſt § 126. So if an Aſſize be brought againſt A. and B. and A. is found the Diſſeizor, and B. the Tenant, and the Plaintiff recovers, and B. the Tenant diſſeizes the Plaintiff again, the Plaintiff ſhall have no Rediſſeizin, but a Poſt-diſſeizin, becauſe a Rediſſeizin lies not but againſt him that was Party to the former Diſſeizin. 2 Inſt. 417. Poſt § 126.

[c] Stat. Merton cap. 3.

Stranger preſent in the Turn of the youngeſt, the youngeſt ſhall not have a *Scire facias* againſt them, for the Statute of [a] *Weſtminſter* 2. gives it againſt the Perſon who is Party to the Record, but in this Caſe ſhe may have a *Scire facias* againſt the eldeſt only, and omit the other. But in the firſt Caſe Rediſſeizin does not lie only againſt the Rediſſeizor, for he may plead [b] Jointenancy with a Stranger, but in the laſt Caſe it is no Plea that another preſented with her, for ſhe may have a *Quare Impedit* againſt both of them, or ſeveral Actions, as a Man may have for a Treſpaſs done by two, ſo that the *Scire facias* is maintenable againſt the one only. [c] So if the Lord diſtrains the Tenant, and he ſues a Replevin, and afterwards the Lord diſtrains an Ox of a Stranger, and another Ox of the Tenant, now the Tenant ſhall have Recaption, [d] but if the Lord had diſtrained again the Cattle which the Tenant and a Stranger had in Common, no Recaption ſhould lie, for they ought to join in Action for the Cattle laſt taken, and the Stranger cannot join in Recaption. So if a Commoner has ſurcharged and is admeaſured, and afterwards he and another put in their Cattle beyond the Number, *viz.* each of them three, now Superoneration lies againſt the Commoner; but if he and a Stranger have ſurcharged before with Cattle which they have in common, then the Action fails, for it does not lie againſt them both, becauſe one of them did not ſurcharge before, and it does not lie againſt the other only, becauſe he alone did not ſurcharge again. If an Abator makes a Feoffment, and takes an Eſtate back again to himſelf and another with Warranty, they ſhall vouch, for it cannot be counterpleaded that both of them abated, *H.* 46 *Ed.* 3. 2. *a. per Perſay.* If two Coparceners make a Compoſition to preſent by Turn, and afterwards one of them and a Stranger preſents in the Turn of the other, now this puts her out of Poſſeſſion, but if the Stranger dies, ſo that ſhe has the whole by Survivorſhip, then ſhe is not out of Turn, this is a cunning Caſe. But if the youngeſt Brother and a Stranger abate, and the Stranger dies, now a *Mortdanceſtor* does not lie, or if an Abator makes a Feoffment, and takes back an Eſtate to him and to another, and the other dies, now Voucher does not lie for him, and yet before an Aſſize of *Mortdanceſtor* and Voucher lay. If A. knowing Goods to be ſtolen and B. buy them in Market-overt, and afterwards B. dies, now A. ſhall take all the Goods, and the Property was not altered at the Beginning but only for a Moiety. If Tenant in Tail enfeoffs the Donor and a Stranger, this is a Diſcontinuance for the whole, for the Benefit of the Stranger; but if the Donor has the whole by Survivorſhip, *quære* if the Diſcontinuance is purged. If the Wife be Plaintiff in Replevin, the Huſband and Wife ſhall not have ſecond Deliverance, nor the Executors, for the Statute of [e] *Weſtminſter* 2. is, *deliberet ei averia prius ei returnata.*

[a] Weſtm. 2. cap. 5.

[b] 2 Inſt. 83.

[c] So *vice verſa* if the Lord firſt diſtrains the Cattle of two Men, and afterwards diſtrains the Cattle of one of them for the ſame Thing, he alone ſhall have a Recaption. 12 Ed. 1. Itin. Wilt, Fitz. Recaption 13. F. N. B. 71. i. 2 Finch 353.

[d] F. N. B. 72. e. But put the Caſe *vice verſa*, viz. that he firſt diſtrains the Cattle which the Tenant and a Stranger have in common, and afterwards the Cattle which belong to the Tenant alone, there 'tis ſaid that the Tenant ſhould have a Recaption, Ibid. 2 Finch 354. *ſed volo perquirere differentiam.*

[e] Weſtm. 2. cap. 2.

121. If a Man makes a Feoffment with Warranty to the Feoffee his Heirs and Aſſigns, and he makes a Feoffment over, and the ſecond Feoffee re-enfeoffs the firſt Feoffee, he ſhall vouch, for he may be Aſſignee of his Father, inaſmuch as he does not claim as Heir. It was ſaid that the Lord by Eſcheat, or Mortmain, or of a Villain, or he who enters for Conſent to a Raviſher, ſhall not be called Aſſignees; but yet they ſhall rebut, for every one who comes in of another Eſtate, if he comes in under the Warranty, ſhall rebut, as the Caſe is in 45 *Ed.* 3. 18. But if he comes in by force of a Condition broken, which Condition was before, or as Survivor where the Warranty was made to his Companion, there he ſhall not rebut, or if it was made to the Daughter, and afterwards a Son is born, and he has the Land, *&c.*

122. If a Leaſe is made for Years, and afterwards the Leſſor makes a Leaſe to another for Life to commence after the Term, this ſecond Leaſe is clearly void, altho' Attornment is had, for there is no Need of Attornment, becauſe it is not a Grant of the Reverſion, but it is void inaſmuch as a Freehold cannot paſs out of the Perſon of any one who has a greater Eſtate, reſerving to himſelf an Eſtate until the Freehold commences, for then he would have a mean Eſtate, which cannot be, and therefore the Grant is void. So is it if the firſt Eſtate was for Life, and the ſecond alſo for Life, to commence after the End of the firſt Eſtate. [f] But if the ſecond Leaſe be for Years, it is otherwiſe, for that ſhall be good to the Leſſee, and in the mean Time the Leſſor ſhall have the Rent reſerved upon the firſt Leaſe; and the Reaſon thereof is, becauſe a Leaſe for Years is but a Contract, which a Man ſhall have when the Time of the Promiſe comes. But it is not ſo with Regard to a Freehold, nor is that like to the Caſe of a Leaſe for Years upon Condition to have a Freehold upon the Performance of ſuch an Act, for there the Condition is annexed to an Eſtate, *viz.* to the Leaſe for Years, but here there is no Eſtate precedent to which a Condition may be annexed, but a Condition without an Eſtate, which ſhall never gain a Freehold; and ſo is the Diverſity. [g] *Note*, if a Man makes a Leaſe for 10 Years to commence at *Michaelmas*, and afterwards makes a Leaſe for 20 Years to commence at *Eaſter*, the ſecond Leaſe ſhall only be good for 10 Years, altho' the firſt Leſſee ſurrenders before, and within a Day afterwards the ſecond Term commences, becauſe it was void for 10 Years at firſt. [h] By the ſame Reaſon if a Man makes a Leaſe for Life, and afterwards makes a Leaſe for Years to commence preſently, the ſecond Leaſe ſhall be void, altho' the firſt Leſſee dies a Day afterwards. If a Leaſe for Years be made to commence at *Eaſter*, and before *Eaſter* the Leſſee accepts another Leaſe to commence preſently, if this ſhall be a Surrender is the Queſtion, but there cannot be a [i] Surrender in Deed before *Eaſter*. The Heir aſſigns Dower of the third Part of a Manor, and afterwards by Deed gives the two Parts *together with the third Part* after the Death of the Tenant in Dower, the third Part paſſes preſently, as it is adjudged. *Quære* then the Diverſity between this Caſe and the firſt.

[f] S. P. admitted Poſt § 157. Plowd. 432.

123. If a Rent is granted in Fee out of Land, and the Grantee grants it over for Years, the Grantee for Years ſhall have no Remedy for it if it be denied, for he ſhall not have a Writ of Annuity, becauſe that Election is given only to the firſt Grantee and his Heirs, and the Election runs in Privity, which is wanting in the ſecond Grantee. If a Rent incident to a Reverſion is granted to one for Years, ſaving the Reverſion, the Grantee has no Remedy for the Rent if it be

[g] S. P. 26 H. 8. Bro. Leaſe 48. Plowd. 432 (d). Cro. E. 160 *Per Gawdy.* 3 Bac. Abr. 439. Wentw. Off. of Exec. 231.

[h] S. P. accord Poſt § 161. Sed Contra P. 37 H. 8. Bro. Leaſes 48. Plowd. 422 (c), 433 (d). 1 Co. 155. a. Moor 344. Cro. E. 160. Wentw. Off. of Exec. 230, 231.

[i] S. P. Poſt § 311.

be detained, for he ſhall not have an Action of Debt, altho' the Leaſe out of which the Rent was reſerved was for Years, for an Action of Debt is not maintenable but where there is Privity, and that is wanting in the Grantee, becauſe he has not the Reverſion which makes the Privity. If two Acres are given to J. S. *habendum* the one in Fee, the other for Life, and J. S. gives over both the Acres, *viz.* the one in Fee, the other for his own Life, ſhall the ſecond Feoffee have Election? It ſeems clearly that if J. S. had done Waſt in both, or had made a Feoffment in Fee of both, the Leſſor might have entered into which he pleaſed. But *quære* how the Leſſor ſhould puniſh the Waſt? Or if he had granted the Reverſion of the one Acre in certain, and J. S. had attorned, *quære* what ſhould have paſſed thereby? If I give two Acres, *viz.* the one in Fee, the other for Life, and the Donee dies without Heir, *quære* if the Lord ſhall have Election of the Acres? If a Leaſe is made of two Acres, the Remainder of the one to A. the Remainder of the other to B. and it is not certainly ſhewn in which of them the ſeveral Remainders ſhall be, he that firſt enters into the one after the Death of the Tenant for Life ſhall have Election. If Land is leaſed to two, *habendum* the one Acre in Fee, the other for Life, rendring Rent, *quære* how the Leſſor ſhall avow? but his Executor ſhall not have Remedy by the Statute of 31 *H.* 8.

124. If Tenant for Life ſurrenders upon Condition, and afterwards the Leſſor takes a Wife, and dies, and the Wife is endowed againſt the Heir, and afterwards the Tenant for Life enters for the Condition broken by the Wife, and there is no Default in the Heir, yet the Wife ſhall not have the Reverſion of the Land after the Entry of the Tenant for Life, for the Freehold, which was the Cauſe of the Wife's Dower, was clearly taken away by an elder Title. So if the Grandmother recovers Dower againſt the Mother, ſhe has taken away the whole Eſtate of the Mother, inaſmuch as ſhe recovers upon an elder Title than the Deſcent to the Father was; but if the Father had been enfeoffed, it had been otherwiſe. So if the Leſſor diſſeizes his Tenant for Life, and takes a Wife, and dies, and the Wife is endowed by the Heir, and the Tenant for Life recovers, he has clearly taken away the Dower of the Wife, *cauſa qua ſupra*: And at the ſame Time it was held, that if the Leſſee for Life had died before the Wife had been endowed, ſhe ſhould not have recovered Dower, for then the Heir had been in and remitted to another Freehold, which ſhould have defeated the Dower of the Mother; or if ſhe had been endowed, and afterwards the Tenant for Life had died, the Heir ſhould have ouſted the Wife, becauſe the Freehold of which ſhe had Dower was defeated. *Note*, it was there held clearly [a] that if Leſſee *pur auter vie* leaſes for 20 Years by Indenture, and afterwards purchaſes the Reverſion in Fee, and *Ceſtuy que vie* dies, the Leſſor may ouſt the Leſſee, nothwithſtanding the Years continue, becauſe he has now a new Eſtate, and he may confeſs and avoid the Concluſion. [b] But if J. S. by Indenture leaſes Land for Years in which he has nothing, and afterwards purchaſes the Land, the Leſſee may eſtop him, and he cannot confeſs and avoid the Indenture as in the other Caſe, becauſe he had no Eſtate at the Time of the Leaſe. If the Mother recovers Dower againſt the Son, and afterwards the Grandmother recovers againſt the Mother, and dies, it ſeems that the Son ſhall enter, and not the Mother; but if the Dower of the Mother had been by the Aſſignment of the Heir, it had been otherwiſe, for he ſhould have been concluded by his own Aſſignment. *Quære*, for by the Opinion of many the Reverſion is not taken out of the Mother in the laſt Caſe but one.

[a] S. P. Co. Litt. 47. b.

[b] S. P. Co. Litt. 47. b. Plowd. 434 (c).

125. [c] A Man ſhall not have an Action of Debt for [d] Relief or Eſcuage given to him, becauſe it is a Thing mixed in the Realty, but his Executors ſhall have an Action of Debt for it, altho' their Teſtator had no Remedy but [e] Diſtreſs. [f] So the Lord ſhall not have Debt for Aid to marry his Daughter or to make his Son a Knight, but if he dies before the ſame is levied, it ſeems that the Tenant ſhall be diſcharged thereof.

[c] S. P. Co. Litt. 47. b. 83. a. b.

[d] M. 7 H. 6. 13. a. *Per Rolf.* Bro. Dette 194. Relief 11. 32 H. 8. Rot. 528.

[e] M. 34 Ed. 1. Fitz. Avowry 233.

[f] S. P. Co. Litt. 47. b.

126. If one recovers in Aſſize, and afterwards leaſes the Land for Years to the Diſſeizor, and he makes a Feoffment, the Leſſor ſhall not have Rediſſeizin, for this is a Diſſeizin by Statute, and the Recovery before was of a Diſſeizin by the Common Law. So if Tenant by Statute-merchant recovers in Aſſize, and afterwards the Reverſion comes to him, and he is diſſeized again, he ſhall not have Rediſſeizin, for the firſt Eſtate is merged; but if the firſt Eſtate had been for Life, it had been otherwiſe, *quære*. If a Seigniory is granted for Years upon Condition to have Fee, and afterwards the Fee is veſted by Reaſon of the Performance of the Condition, the Arrearages due before ſeem to be extinct, for the Term is extinct. If one recovers by Aſſize an Office at *Weſtminſter*, and afterwards the Court is removed to *St. Albans*, and there the Party is diſſeized again, he ſhall not have Rediſſeizin, for how can it be tried *per proximos et primos Juratores*, &c. *et aſſumptis ſecum cuſtodibus coronæ*, ſeeing it is in another County, for which Reaſon the Rediſſeizin fails. And if a Rent-ſervice is recovered in Aſſize, and afterwards it is become a Rent-ſeck, and a Rediſſeizin is made, Rediſſeizin is maintenable, for it is the ſame Rent. [g] And if upon a Gift in Tail a Rent is reſerved for three Years, and afterwards 20*s.* annually, and the firſt three Years he recovers by Aſſize, as he well may, and after the three Years he diſtrains, and a Reſcous is made, he ſhall have a Rediſſeizin. If two Jointenants recover in Aſſize, and afterwards one of them dies, or releaſes, and the other is re-diſſeized, a Rediſſeizin is maintenable; but if there be two Coparceners, and they recover in Aſſize, and afterwards one of them dies without Iſſue, or releaſes, and the other is re-diſſeized, ſhe ſhall not have a Rediſſeizin but only for the Moiety, the Reaſon whereof is apparent. [h] And if the firſt Diſſeizor and another make a Rediſſeizin, no Rediſſeizin lies. [i] If a Diſſeizor makes a Feoffment, and a Recovery is had in Aſſize againſt the Diſſeizor and the Tenant, and afterwards the Tenant re-diſſeizes the Recoveror, he ſhall have no Rediſſeizin: See the Statute of *Merton cap.* 3. which ſays, *if the ſame Diſſeizors ſhall diſſeize the ſame Plaintiff*, &c. which Words are refer'd to the Diſſeizor himſelf. So if a Recovery is had againſt the Huſband by Aſſize upon a Diſſeizin

[g] Vide Plowd. 154 (l). Poſt § 302, for the Reaſon hereof.

[h] S. P. Ante § 120.

[i] S. P. 2 Inſt. 417.

done by the Wife before the Coverture, and afterwards they re-diſſeize the Recoveror, no Re-diſſeizin lies, for it appears by the Aſſize (but *quære* of this) that the Huſband was only named by Reaſon of the Coverture. If one recovers in Aſſize againſt the Pernor of a Rent-ſervice, and afterwards he grants the Homage, and makes it a Rent-ſeck, and afterwards the Pernor upon Demand gets Seizin again, it ſeems that no Rediſſeizin lies, for now he ought to bring his Aſſize alſo againſt the Tenant of the Land, inaſmuch as it is a Rent-ſeck, and he was not a Diſſeizor before. But *quære* if the naming of him is otherwiſe than for Form's Sake, and not as a Diſſeizor. If one recovers a Seigniory in Aſſize, and afterwards the Tenancy eſcheats, and he is ouſted by the ſame Diſſeizor, he ſhall not have a Rediſſeizin; otherwiſe if it was parcel of the Manor. But if one Jointenant is ſevered in Aſſize, and the other recovers, and afterwards he who was ſevered enters, there if he has the whole Moiety by Survivorſhip, and is re-diſſeized, *quære* if he ſhall have a Rediſſeizin?

127. If a Rent-charge is granted out of Land in Fee, the Heir of the Grantee ſhall have Election to bring a Writ of Annuity, ſo ſhall the Executor have Election, if the Grant be for Years, for they are Privy, and repreſent the Perſon of their Teſtator. For if a Man grants to another one of his Horſes, and the Grantee dies before Election, the Executor ſhall chuſe; but if the Donee had been outlawed, he ſhould not have forfeited any Horſe, or if he had given all his Goods, the Donee ſhould have had no Horſe, for there was no Property in him before his Election, which his Executor ſhould make, and not the Donee. If the Huſband diſagrees to a Remainder, it ſeems that the Wife ſhall not have Dower, otherwiſe if he diſagrees to a Deſcent. If two Acres are given, the one in Tail, the other in Fee, the Heir of the Donee ſhall make Election which Acre he will have in Fee. So Election ſhall be given to the Heir of a Thing which is inheritable, but not to the Grantee or Feoffee. [a] And in the firſt Caſe if the Grantee dies, and his Wife brings a Writ of Dower, it ſeems clearly that ſhe ſhall be endowed, and the Heir cannot ſay that he will take it as an Annuity, for this Election ſhall be determined by the bringing of an Action, and not otherwiſe, wherefore ſhe ſhall recover Dower. [b] And if ſhe has Dower of the third Part of a Rent by ſuch Recovery, or by Aſſignment of the Heir, it ſeems clearly that the Heir ſhall not have an Annuity of the other two Parts, for his Writ of Annuity ought to be brought upon the Deed, and the Writ ſhall be for the whole, or for no Part, for it cannot be apportionted, becauſe by the bringing of the Annuity he makes it a Thing perſonal, which cannot be apportioned. And therefore if the Grantee has Parcel of Land charged by Deſcent, he ſhall not have a Writ of Annuity for the whole or any Part, *cauſa qua ſupra*, but his Remedy is only to avow for the Reſidue. So *Note* that there is no Apportionment of an Annuity or Thing perſonal. And therefore if a Man has Iſſue two Daughters, and binds himſelf and his Heirs in an Obligation to the eldeſt Daughter, and dies ſeized of Land, and the Executors are inſufficient, the Obligation is diſcharged. So if the Son has the Land of the Father and the Land of another in Execution upon a Statute-merchant, and the Father dies, ſo that the Fee deſcends to the Son, the whole Execution is diſcharged; and no Contribution lies for the Feoffee, and therefore the whole Execution is diſcharged where the Conuſee purchaſes one Parcel, and another purchaſes another Parcel. And if a Man is indebted to J. S. in 20*l.* upon Contract, and afterwards he makes him an Obligation of 10*l.* of it, J. S. ſhall not have Remedy for the other 10*l.* for a Contract cannot be ſevered. See the Caſe in *P.* 3. *H.* 4. if a Man binds himſelf and his Heirs in 20*l.* and dies, and his Executors have no more than 10*l.* now it ſeems clearly that Debt lies againſt the Heir for the whole, for if he ſhould neceſſarily be driven to have Execution againſt the Executors, he ſhould only have that which they have, and he ſhould not have an Action againſt the Heir for the Reſidue, for his Action ſhall not be apportioned. [c] If the Obligor in 20*l.* having Goods to the Value of 10*l.* only, makes the Obligee his Executor, and dies, and he proves the Teſtament, he may retain this 10*l.* as Part of the Duty, and for the Reſidue have an Action of Debt againſt the Heir: So *Note* an Apportionment of a Duty by the Act of the Law. But if one recovers againſt the Executors, and they have only Aſſets for Part, he ſhall not charge the Heir for the Reſidue. *Note*, if two Jointenants grant a Rent-charge, with *Proviſo* that the Grantee ſhall not charge the Perſon of one of them by Writ of Annuity, it ſeems that he ſhall not charge the other. If a Man makes a Leaſe of two Acres, rendring Rent for Years, and grants the Reverſion of the one Acre, it ſeems that the Rent ſhall be apportioned, for as the Contract is made in Reſpect of the Reverſion, ſo ſhall it be ſevered in Reſpect of the Reverſion. If a Man makes a Leaſe of two Acres, rendring Rent upon Condition, and if the Condition is broken, that he ſhall re-enter into one of the Acres, and he accordingly does ſo, it ſeems in Reaſon that the Rent ſhall be apportioned; and ſo if the Condition had been that he ſhould have a Fee in one of the Acres, which he accordingly has, the Rent ſhall be apportioned. And if a Manor, which is 10*l.* in Demeſn, and 10*l.* in Services, is leaſed, rendring 20*l.* Rent, there if the Tenants will not attorn, he ſhall but pay 10*l.* Rent, becauſe he has no Remedy to compel them to attorn; and it is not like to the Caſe where I leaſe two Acres, in the one of which I have nothing, rendring 2*s.* there the Rent is iſſuing out of the one only, becauſe I had no Title nor Intereſt in the other, whereas he had in the Services, and ſo he might confeſs and avoid the Leaſe. And if a Man leaſes Land and Sheep for 20 Years, rendring Rent, and the Sheep or Land are evicted, the Rent ſhall be apportioned; but if the Leaſe had been for Life, it had been otherwiſe, for there the Rent is a Freehold, which cannot iſſue out of a Thing perſonal, but in the other Caſe it is but a Contract, for which an Action of Debt lies, which Action is not grounded upon a Thing perſonal. But if I have a Leaſe for 20 Years, which I grant over with Stock of Chattles, rendring Rent, by Indenture, and if the Rent be behind, that I ſhall diſtrain, there if the Stock be recovered, the Rent ſhall not be apportioned, for before my Recovery the Remedy was by Diſtreſs and Avowry, and not by

[a] S. P. Co. Litt. 144. b.

[b] S P. Co. Litt. 144. b.

[c] See the contrary Plowd. 185. (i). Wentw. Off. of Exec. 32, 93. Godolph. Orph. Leg. 115, § 3. 199, § 7. Law of Teſtaments, &c. 358. 3 Danv. Abr. 387. pl. 4. Vin. Abr. tit. Executors M. a. pl. 5.

by Action of Debt, for then no Action of Debt lay, *ergo* no Apportionment for a Chattle deveſted. If the Seigniory deſcends to the Tenant and his Siſter, or if the Tenancy deſcends to the Seignioreſs and her Siſter, ſhe ſhall not have Relief, *&c.*

128. Land is given to A. and B. and to the Heirs of their Bodies, and afterwards they accept a Confirmation of the Leſſor or Donor in Fee, and make a Leaſe for Life to C. Remainder of the whole to A. B. dies without Iſſue, C. dies, and A. enters, and the collateral Heir of B. ouſts him of the Moiety, and A. brings Aſſize.

129. The Huſband makes a Feoffment of the Land of his Wife upon Condition, the Wife brings a *Cui in vita*, and is bar'd, afterwards the Condition is broken, and the Heir of the Huſband enters, and the Wife ouſts him, and afterwards the Heir brings Forger of falſe Deeds againſt the Feoffee for Forgery of a Releaſe of the Condition before the Condition broken.

130. If a Man is bound to A. in 20*l.* to pay 10*l.* to J. S. and he releaſes to J. S. 20*l.* which he owes him, it ſeems that this is no Performance of the Condition, for it ought to be a Payment in Fact. And therefore if one is bound to releaſe his Rent-charge which he has in the Manor of *Dale*, and he purchaſes an Acre of the Manor, now the whole Rent is extinct, but yet the Condition is not performed, for it ought to be a Releaſe in Deed. But if I am bound to infranchiſe my Villain, and I bring an Action againſt him, there I have performed the Condition, for this Word (*infranchiſe*) ſhall be refer'd to a Generality, *viz.* to all manner of Infranchiſements, as well as to Deeds of Manumiſſion. So if I am bound to diſcharge an Obligation in which I am bound to A. and I purchaſe the Manor to which A. is a Villain regardant, this is a Performance of the Condition, for the Word (*diſcharge*) is a general Word, and is refer'd to all manner of diſcharges. If I am enfeoffed upon Condition that I ſhall not alien to J. S. and I ſuffer a feint Recovery to him, or if I ceſs, ſo that he being my Lord recovers in a *Ceſſavit*, or if I acknowledge myſelf to be his Villain, by Reaſon whereof he enters, or if I make a Feoffment with Warranty, ſo that this Land is recovered by him in Value, I have not broken the Condition, for it extends only to an Alienation in Deed. *Note*, if I make a Gift in Tail, upon Condition that the Donee ſhall not ſuffer a feint Recovery unleſs it be to the Benefit of his Iſſues, and afterwards in a feint Writ he vouches, and a Recovery is had againſt him, and he recovers in Value, and has Execution, and that is to the juſt Value only, the Condition is not broken. And *Note* that a Recovery in Value againſt a Stranger is upon Releaſe, the Reaſon is, becauſe the Land recovered in Value is without Condition, and ſo to their Benefit; *quære.* But *Note*, if the Donor had been vouched, it ſeems clear that he ſhould not have entered, for when he is vouched, and made a Party to the Breach of the Condition, he ſhall not ſay that the Action is feint, and it ſeems that he cannot enter into the Warranty, ſaving the Condition which is not broken, for it is but a Poſſibility; but if he had an Action or Title of Entry, this ought to be and might be ſaved, 6 *Ed.* 3. 11. *Fitz. Counterplea de Garranty* 18.

131. A Feoffment is made to the Uſe of J. S. and afterwards to the Uſe of the Feoffor and his Heirs, the Feoffor dies, if his Iſſue be within Age, he ſhall be in Ward, for the Fee is not in him as a Remainder, but the Limitation of the Uſe to the Feoffor in Fee is merely void, becauſe the Law would have ſaid as much if nothing had been ſpoken of it by the Party; for if a Man makes a Leaſe for Life, Remainder to himſelf in Fee, this is in him as a Reverſion, ſo in the other Caſe. But if a Feoffment is made upon Condition to enfeoff J. S. who refuſes, *&c.* the Feoffor may enter, becauſe there is no Intent that the Feoffee ſhould ever have the Fee to his own Uſe: But if the Condition was, to make a Gift in Tail to J. S. who refuſes, *&c.* now the Feoffee ſhall have the Land to himſelf in Fee, becauſe the Intent of the Feoffor was ſuch, for inaſmuch as the Feoffee was to make a Gift in Tail, and to execute Livery, this was a ſufficient Cauſe for the Law to intend that he ſhould have the Fee in Recompence for his Labour, but in the other Caſe he is put to no ſuch Trouble, and ſo there is no Conſideration for which it may be intended that he ſhould have the Fee to his own Uſe after the Tail determined, but that it ſhould be to the Uſe of the Feoffor only. But if the Feoffment had been to the Uſe of the Feoffor for Life, then it ſeems that the Feoffee ſhould have had the Fee-ſimple to his own Uſe, for when the Feoffor has reſerved and created a Uſe to himſelf during his Life, the Law ſays that he ſhall not have more than he has reſerved, nor for a longer Time than he has appointed it, ſo that by his own Words he has excluded himſelf of that which the Law would have given him, if he had appointed a particular Eſtate in the Uſe to another, without ſaying any Thing of the Fee. * As if a Man makes a Leaſe for Life, reſerving Rent, and does not ſay to whom, nor how long it ſhall continue, he ſhall have it to him and to his Heirs during the Eſtate for Life, † but if he had reſerved it to himſelf during his Life, he ſhould not have had it longer. Others are of a contrary Opinion in the principal Caſe, *viz.* that he ſhall not have it as a Remainder; for if a Man makes a Feoffment without Conſideration, it is clear that the Feoffor ſhall have the Uſe in Fee, but if he appoints any Uſe, there ſhall be no other Uſe made by the Law but only that which is appointed. For if a Man makes a Feoffment to the Uſe of J. S. for Life, and afterwards to the Uſe of the Feoffor in Tail, it is clear that this Tail is good, *ergo* he had no Fee in the Uſe before, for if ſo, then he could not give himſelf a leſſer Eſtate. *Vide* 26 *H.* 8. 5. And in the Caſe of *Bucknam*, 28 *H.* 8. *Dyer* 10, the Feoffees to the Uſe of *Bucknam* in Fee at his Requeſt made a Feoffment over to the Uſe of *Bucknam* and his Wife, and the Heirs of *Bucknam*, who died, and it was adjudged that his Heir ſhould be in Ward, for there was a Reverſion of the Uſe in *Bucknam*, and not a Remainder, for it was the ſame Uſe which was in *eſſe* before, and *Bucknam* ſhould have had the Uſe if nothing had been ſpoken of it, becauſe the ſecond Feoffees had Notice of the Uſe; but in the firſt Caſe there is no Reverſion of the Uſe, for a Reverſion is a remnant of an Eſtate which was in *eſſe* before the Creation of the particular Eſtate, but there the Uſe in Fee was not in *eſſe* before the particular Uſe was made. *Note* that

* S. P. Ante § 39.

† S. P. Ante § 39.

in *Mitford's* Caſe *Anno* 31 *Eliz. B. R.* it was ruled to be a Reverſion and not a Remainder, upon the Argument of *Popham.*

132. If Land is given to Huſband and Wife, and to the Heirs of the Body of the Huſband, Remainder to the Huſband and Wife in ſpecial Tail, and the Huſband dies without Iſſue, and the Wife keeps herſelf in, it ſeems that ſhe ſhall be puniſhed for Waſt, for the Remainder in ſpecial Tail is void, becauſe it was not poſſible for any Iſſue to be begotten which could inherit the ſpecial Tail, for as long as the Huſband had Iſſue, it ſhould inherit by Force of the general Tail, and if the Huſband died without Iſſue, then the ſpecial Tail could not take Effect, becauſe the Iſſue inheritable to the ſecond Tail muſt be begotten by the Huſband, ſo that the greater Eſtate-tail, *viz.* the general Tail, has clearly fruſtrated the ſpecial Tail. As if a Man makes a Leaſe for the Life of the Leſſee, Remainder to the Leſſee for the Life of J. S. the Remainder is void. So if a Leaſe is made for Life, rendering Rent, and the Reverſion is granted to the ſame Leſſee for his Life, it ſeems that the Grant is void, and he ſhall pay the Rent; but if the Grant of the Reverſion had been to another for the Life of the Leſſee, it ſeems that it would have been good, for he ſhould have had the Rent, and ſhould have taken a Surrender without Livery. If Tenant for Years purchaſes the Eſtate of the Grantee for Life, the Chattle is merged, but if Tenant for Life purchaſes the Eſtate of the Grantee for Years, the Chattle remains, and the Tenant for Life ſhall be diſcharged of the Rent reſerved upon the Leaſe for Life during the Years.

133. Land is given in Tail to the Heirs Males of the Body of the Donee, upon Condition that if he dies without Heirs Females of his Body, then the Donor ſhall enter, it ſeems that this is a void Condition, becauſe he cannot have an Heir Female whilſt he has an Iſſue Male, for during that Time ſhe ſhall not be called Heir. [a] For if J. S. has Iſſue a Son and a Daughter, and dies, and Land is given to one for Life, Remainder to the right Heirs Females of the Body of J. S. begotten, this is a void Remainder, becauſe there is no ſuch Perſon. [b] But if Land is given to a Man and to his Heirs Females of his Body, *&c.* and he has Iſſue a Male and Female, there the Female ſhall inherit, for the Diverſity appears. So in the principal Caſe the Condition is void, but if the Condition had been that if he died without Iſſue Female, then, *&c.* it had been otherwiſe. [c] If Land is given to a Man and to his Heirs Males of his Body, Remainder to his Heirs Females of his Body, the Daughter of his Son ſhall not have the Land, as it ſeems. [d] So if Land is given to a Man, *habendum* to him and to the Heirs Males of his Body, and to him and his Heirs Females of his Body, he ſhall have it as a Remainder, *quære tamen*, and the Daughter of the Son ſhall inherit, for, in the laſt Caſe but one, *Littleton* [e] ſays that the Warranty of the Father ſhall be lineal to the Daughter; and if both had been in ſpecial Tail, and his Wife had died, he having Iſſue a Female only, the ſecond Eſtate-tail ſhould be executed, and he not Tenant after Poſſibility. If Land is given to a Man and to his Heirs Males of his Body, and to his Heirs Females of his Body, it ſeems that if he has Iſſue a Male and a Female, they ſhall take by Moieties ſeverally by Deſcent. So if a Woman has three Sons by ſeveral Huſbands, and Land is given to her and to her Heirs of the Bodies of the firſt and ſecond Huſband begotten, the two Sons ſhall take ſeverally by Moieties, as it ſeems, and yet there was but one Eſtate in the Wife. If a Man gives Land in Frank-marriage with his Daughter, and alſo with another Woman who is his Couſin, to one Man, they ſhall take by Moieties, *viz.* they ſhall all be Jointenants, and the Man and his Wife ſhall have an Eſtate-tail in the one Moiety, and the Man and his other Wife ſhall have an Eſtate-tail in the other Moiety.

[a] Co. Litt. 24. b.

[b] Litt. § 22.

[c] Co. Litt. 377. a.

[d] Co. Litt. 377. a.

[e] Litt. § 719.

134. [f] If a Man grants to another 20*s.* or a Robe yearly at the Feaſt of *Eaſter*, there at the Day or before the Day it ſhall be in the Election of the * Grantor to pay which of them he will, becauſe the Thing has Continuance, and if an Obligation be made for the ſame, the Obligor ſhall have Election after the Day. [g] But if a Man grants to another out of his Wood 20 Loads of Wood or 20 Oaks yearly at the Feaſt of *Chriſtmas*, there after the Day and alſo at the Day it ſeems to be at the Election of the Grantee to take the one or the other, notwithſtanding it is a Thing of Continuance, becauſe it lies in *prendre*, in which Caſe the Grantor has nothing to do: So that there is a Diverſity between a Thing which conſiſts in Payment and in *prendre*. 13 *Ed.* 4. 4. *b.* [h] If a Leaſe is made for Life, reſerving a Rent or a Robe, at the Day it ſhall be in the Election of the Leſſee to pay which he will, and after the Day it ſhall be in the Election of the Leſſor to have which he will.

[f] M. 9 Ed. 4. 36. b. 37. a. Fitz. Dette 89. Bro. 113. M. 13 Ed. 4. 4. b. Bro. Dette 160. 3 Ed. 3. Fitz. Aſſize 175. Plowd. 13 (f). Co. Litt. 145. a. 2 Co. 37. a. Moor 85. Touch. of Preced. 21.

* In the Original it is *(the Grantee)* but by the Words *(to pay)* which immediately follow, and by the ſubſequent Matter, that appears plainly to be an Error of the Preſs.

[g] S. P. Co. Litt. 145. a. 2 Co. 37. a.

[h] S. P. Co. Litt. 145. a. 2 Co. 37. a.

135. Land is given to Huſband and Wife, and to the Heirs of the Huſband, he makes a Feoffment with Warranty, and dies, the Wife brings a *Cui in vita*, and the Feoffee vouches, and recovers in Value by Reaſon of the ſaid Warranty, it ſeems that after the Death of the Wife he ſhall vouch again by Reaſon of the Warranty aforeſaid. So if the Wife brings a Writ of Dower, and the Feoffee vouches by Reaſon of the Warranty, after the Death of the Wife he ſhall vouch again by Reaſon of the Warranty, becauſe the Voucher and Recovery in Value was only in Reſpect of the Freehold; but if he had once recovered in Value a Fee-ſimple, he ſhould never vouch by Reaſon of the firſt Warranty, for he has the Effect of it, and alſo the Warranty is gone with the Eſtate. But if a Tenant in Frank-marriage recovers in Value, he ſhall vouch again, as it ſeems, otherwiſe it is of Tenant for Life. Tenant in Tail to the Heirs Females, Remainder to him in Fee, makes a Feoffment with Warranty, and dies, the Heir Female recovers, and the Feoffee recovers over in Value, he ſhall vouch again after the Tail is expired, by Reaſon of the firſt Warranty.

136. If there be Tenant for Life of three Acres, and the Reverſion of them is granted, and the Tenant for Life ſurrenders one Acre to the Grantee, he ſhall be ſeized of this Acre in Fee, and this ſhall countervail an Attornment in this Acre, and in no more, becauſe it is but an Attornment in Law: But if he had attorned for the one Acre by Parol, this had been an Attorn-

ment for the whole, for if he had attorned to one Grantee, this had been an Attornment to both, as if the Lord takes Cogniſance of one Feoffee, thereby he takes Cogniſance of all. And if there is Lord and Tenant, and the Lord grants his Seigniory, and the Tenant enfeoffs the Grantee of one Acre, the Seigniory is extinct as to this. And it ſeems that if a Man brings a *Quid juris clamat*, to have Attornment of three Acres, and pending the Writ he enters into one of the Acres, he has not abated his Writ for the Reſidue.

137. The Diſſeizee dies, leaving a Son and a Daughter by one Venter, and a Son by another Venter, the Son enters upon the Heir of the Diſſeizor who is in by Deſcent, and dies without Iſſue, and the Daughter enters, it ſeems clearly that ſhe is not remitted, becauſe ſhe is not Heir to the Father, and here the Poſſeſſion of the Brother was no ſuch Poſſeſſion as made the Siſter to be Heir, becauſe it was by Wrong, for which Reaſon it ſeems that the youngeſt Son ſhall have an Action againſt her. If a Man makes a Leaſe for Life, and dies, and the eldeſt Son grants the Reverſion in Tail, and dies without Iſſue, and the Grantee dies without Iſſue, it ſeems that the Siſter ſhall have the Reverſion, and not the youngeſt Son, for the Reverſion in Fee is now expectant upon the laſt Eſtate, and the Heir of the Brother ſhall have it, becauſe he made the laſt Eſtate. And if a Man has Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and dies ſeized, and the eldeſt enters, and makes a Leaſe for Life, and the Wife of the Father recovers Dower againſt the Leſſee, and the Son dies, the Daughter ſhall have the Reverſion, and not the youngeſt Son, *cauſa qua ſupra:* But if the Tenant for Life dies after the Death of the Son, and during the Life of the Tenant in Dower, then *quære* who ſhall have the Reverſion, the Son or the Daughter? And if a Man makes a Leaſe for Life, and has Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and dies, and the Son diſſeizes the Tenant for Life, and dies, and afterwards the Tenant for Life dies, the youngeſt Son ſhall have the Land from the Daughter, which Caſe is put in the *Book of Aſſizes*, and the principal Caſe there is, if the eldeſt Son endows his Mother, and dies, ſhall the youngeſt Son, or the collateral Heir of the eldeſt, have the Land after the Death of the Tenant in Dower? And it ſeems that if the Tenant holds of the Meſne by 10*s.* who holds over by 5*s.* and the Lord grants his Seigniory to the Tenant in Fee upon Condition, and afterwards the Meſne dies, leaving a Son and a Daughter by one Venter, and a Son by another Venter, and the Son is ſeized of the Surpluſage, and dies without Iſſue, and the Siſter has it, and afterwards the Lord has his Seigniory again by Reaſon of the Condition broken, in this Caſe the Siſter ſhall hold the 5*s.* and the youngeſt Son ſhall have the entire Seigniory, and the Reſidue of the Rent. *Quære bene inde.*

138. J. S. dies, leaving Iſſue two Daughters, and the one is attainted of Felony, and a Leaſe is made for Life, Remainder to the right Heirs of J. S. it ſeems that the other Daughter ſhall take nothing in the Remainder, becauſe ſhe who is attainted is alive. For if J. S. has a Son, and dies, and the Son is attainted of Felony, and a Leaſe is made for Life, Remainder to the right Heirs of J. S. this Remainder is clearly void, and the Fee continues in the Perſon of the Leſſor, for he has appointed the Remainder to one who is not *in rerum natura*; and then for the ſame Reaſon that the Remainder is void in this Caſe, it is alſo void in the firſt, for one of the Daughters alone is not Heir, and the Remainder cannot be divided into Moieties, for the other Daughter ſhall either take the whole Remainder or no Part of it, and the Daughter who is attainted cannot be called the Moiety of the Heir, for which Reaſon the other Daughter ſhall take nothing. And therefore if a Man makes a Gift in Tail, rendring to him during his Life 20*s.* Rent, and after his Death, if his Heir be of full Age, 40*s.* to him and to his Heirs, now if he dies, leaving Iſſue two Daughters, the one within Age, the other of full Age, the Donee ſhall hold only by Fealty, for inaſmuch as both the one and the other is his Heir, and the one is not of Age, *ergo* his Heir is not of Age, and therefore ſeeing that the Condition is not performed, the Donee ſhall hold by Fealty only, for if he had ſaid nothing of any Tenure after his Death, the Donee ſhould have held by Fealty only, and then when he reſerves the 40*s.* upon Condition to be afterwards performed, which is never performed, it is the ſame as if he had never ſpoken of any Reſervation, in which Caſe the Donee ſhould have held by Fealty, and ſo ſhall he now: But if one of the Daughters had been born out of the King's Allegiance, then the other ſhould have taken the whole Remainder, for ſhe who was born out of the King's Allegiance was never Heir. And when the one is attainted, and afterwards the Father dies, the Moiety of the Land, which deſcends, eſcheats, and the other Daughter ſhall have the other Moiety by Deſcent clearly, and this by the Act and Appointment of the Law in Favour of the Deſcent. But when a Man has appointed a Capacity to take, and that Capacity cannot take according to his Appointment, then the Thing appointed does not paſs as a Remainder to the right Heirs Females of J. S. who is dead, leaving a Son and a Daughter, but it is a void Remainder, for ſhe is not Heir. So note an apparent Diverſity.

139. Lord, Meſne, and Tenant, each holds by Fealty and 12*d.* the Meſne is outlawed for Felony, the Lord confirms the Eſtate of the Tenant to hold by 1*d.* the Heir of the Meſne reverſes the Outlawry by Error, and diſtrains and avows for 12*d.* in this Caſe there ſeems to be a Diverſity, *viz.* if the Tenant dies without Heir, the Law caſts the Poſſeſſion of the Tenancy upon the Lord, ſo that he has the Poſſeſſion in Law before any Entry; but if the Tenant is attainted of Felony, he ſhall not have the Poſſeſſion in Deed or in Law before Entry, for if the Tenant continues 20 Years in Poſſeſſion after the Attainder, he ſhall be called Tenant; then here the Law did not caſt the Poſſeſſion of the Meſnalty upon the Lord. Further, * it ſeems clearly that if there be Lord, Meſne, and Tenant by Service *ut ſupra*, and the Lord confirms the Eſtate of the Tenant to hold by 1*d.* this Confirmation is clearly void, becauſe there ought to be Privity, which ſhall be an immediate Tenure where the Confirmation enures to abridge the

* S. P. accord Co. Litt. 305. b.

the Tenure, as if Tenant for Life makes a Leaſe for Years, and he who has the Fee confirms the Eſtate of the Leſſee in Fee, this Confirmation is void, as to enlarging his Eſtate, for Want of Privity. So if Tenant in Tail leaſes for his own Life, and the Donor confirms the Land to the Leſſee in Fee, this is no Enlargement of his Eſtate. So ſhall it alſo be if in theſe Caſes a [a] Releaſe in Fee be made to the Leſſees, or if in the other Caſe the Lord paramount releaſes to the Tenant to hold by 1 *d.* [b] for where a Releaſe or Confirmation enlarges the Eſtate or abridges the Tenure, there ought to be Privity. Then in the principal Caſe the Confirmation ſhall enure to prove his Agreement to the Eſcheat, or otherwiſe it would be void, which the Law will not ſuffer it to be, and it ſhall enure only upon the Abridgment of the Meſnalty, and not of the Seigniory, for the Meſnalty only was in Poſſeſſion, becauſe it had merged the Seigniory for the Time. But if the Meſne had granted the Meſnalty to the Lord *pur auter vie*, and afterwards the Lord had made the Confirmation *ut ſupra*, and then the *Ceſtuy que vie* had died, there it ſeems that the Meſnalty ſhould have been but 1 *d.* for the Fee-ſimple of the Seigniory was not in Suſpence, becauſe he had but an Eſtate for Life in the Meſnalty, and therefore the Confirmation goes as well to the Seigniory as to the Meſnalty. But in the principal Caſe he had a Fee in the Meſnalty, as if he had accepted an Eſtate in Fee of it upon Condition, or had diſſeized the Meſne, in which Caſe he could not grant over the Seigniory, and conſequently the Confirmation ſhall not enure to the Seigniory, but only to the Meſnalty. And therefore if the Meſne had died without Heir, his Wife being *priviment enſeint*, and the Lord had made the Confirmation *ut ſupra*, and afterwards the Iſſue had been born, the Confirmation ſhould have been fruſtrated, ſo here. But if the Lord had releaſed all his Right in the Tenancy, this would have gone as well to the Seigniory in Suſpence as to the Meſnalty. As if the Tenancy is given to the Lord and to another, and the Heir of the other and the Lord releaſe all their Right in the Land to another, this goes to the Land and alſo to the Seigniory. But if the Meſne had granted his Meſnalty to the Tenant upon Condition, and afterwards the Lord had made the Confirmation *ut ſupra*, it ſeems clearly that this ſhould have gone to the Meſnalty, becauſe there the Seigniory was in *eſſe*. And if the Meſnalty is recovered by erroneous Judgment, and afterwards the Lord releaſes to the Tenant, *quære* if he ſhall have Error?

[a] See accordingly as to a Releaſe to Leſſee for Years of Leſſee for Life, Litt. § 517.

[b] S. P. Co. Litt. 296. a. 305. b.

140. [c] If the Tenant vouches, and at the *ſequatur ſub ſuo periculo* the Tenant and the Vouchee make Default, whereby the Demandant has Judgment to recover againſt the Tenant, and afterwards he brings a *Scire facias* againſt the Tenant to execute the Judgment, if the Tenant ſhall have a *Warrantia Chartæ* againſt the Vouchee is the Queſtion. [d] But if a Stranger brings a *Præcipe quod reddat* againſt the Tenant, it ſeems that he ſhall vouch again, for by the firſt Voucher, and by the Judgment given againſt the Tenant, the Warranty was not annulled, nor the Poſſeſſion of the Tenant. [e] But if the Tenant has Judgment to recover in Value againſt the Vouchee, he ſhall never vouch again by Reaſon of that Warranty, for the Warranty has loſt its Force inaſmuch as he has Judgment to have in Value by Reaſon of it, and if he ſhould recover in Value again, he would have two Recompences by Reaſon of one Warranty. It was held clearly that if the Tenant has Judgment againſt the Vouchee, he ſhall have in Value no Land but that which the Vouchee had at the Time of the [f] Judgment given againſt him. And *Note*, [g] upon a *Summoneas ad warrantizandum* if the Sheriff returns the Vouchee warned, and he makes Default, the Tenant ſhall have a *Capias ad valentiam*, and ſhall recover in Value, but if he returns that he has nothing, then after the *Sicut alias* and *Pluries* a *Sequatur ſub ſuo periculo* ſhall iſſue, and there if the Vouchee makes Default, the Tenant ſhall not have Judgment to recover in Value, for the Warranty is not confeſſed, and it is aſcertained that he has nothing, but in the *Capias ad valentiam* it appears that he has Aſſets.

[c] See this Point reſolved Co. Litt. 102. a. 303. a. that the Tenant ſhall have a *Warrantia chartæ*.

[d] S. P. Co. Litt. 102. a. 393. a.

[e] S. P. Co. Litt. 102. a. 393. a.

[f] But ſee that the Recovery in Value ſhall be of the Lands which the Vouchee has at the Time of the Voucher, F. N. B. 134. k. 1 Finch 249, 288.

141. A Rent-charge is granted out of Land to A. in Tail, to the Uſe of J. S. and his Heirs, the Rent is behind, the Donee dies without Iſſue, and J. S. brings Debt for the Arrears.

[g] S. P. Co. Litt. 101. b. 393. a.

142. If two Acres deſcend to J. S. and a Stranger abates into the one, and J. S. enters into the other in the Name of both, it ſeems that this ſhall not gain the Poſſeſſion of the Acre in which the Abatement was made, but if he had entered into the Acre in which the Abatement was made in the Name of both, it ſeems that this ſhould have gained the Poſſeſſion of both. If an Infant makes Livery by View, it ſeems that he ſhall not have an Aſſize if the Feoffee enters, for it is more than a Livery in Law.

143. If a Record of the Common Bench is pleaded in any other of the King's Courts, and it is neceſſary to be ſhewn, it ought to be exemplified under the Great Seal of *England*, and the Seal of the Court is not ſufficient; but if it be pleaded in the ſame Court, *viz.* in the Common Bench, there if the Exemplification under the Seal of the ſame Court be ſhewn, it is ſufficient, for in the one Caſe there is the Clauſe *Teſte meipſo*, and in the other *Teſte* the Chief Juſtice. 28 *Aſſ. pl.* 14. 6 *Eliz. Dyer* 228.

144. If a Man has a Mill or a Houſe, which falls down, and he builds it up again, and a Nuſance is raiſed before the Re-building of it, it ſeems clearly that he ſhall not have an Aſſize of Nuſance, nor can he abate it, becauſe it was not done to the Nuſance of his Freehold, for his Freehold was not then in *eſſe*, but the Nuſance is elder than the Freehold. It ſeems to be all one if the Nuſance had been raiſed in the Time of the firſt Houſe.

145. If a Man makes a Leaſe for Years, having ouſted the Termor for Years, and the firſt Termor releaſes to the ſecond Termor, it ſeems clearly that the firſt Leſſor may enter, and have the Land againſt the Termors preſently, for by the Releaſe the Right of the firſt Termor is merged and extinct, as much as if a Rent-charge be releaſed to the Diſſeizor, and the Releaſe ſhall not fortify and make good the Eſtate of the ſecond Termor for the Time of the firſt Term, for if the firſt Leaſe was for 20 Years, and the ſecond but for 1 Year, yet by the Releaſe of the firſt Leſſee to the ſecond Leſſee the whole firſt Term ſhould be determined and extinct.

But if the firſt Leſſee had been Tenant for Life, and being diſſeized had releaſed to the Diſſeizor, now during his Life the Leſſor could not have entered, but otherwiſe where he is Tenant for Years, for in the one Caſe the Diſſeizor had the Freehold in him, which might well be made firm, but in the other Caſe he had no Term for Years in him.

146. If a Man makes a Feoffment of a Manor, ſaving to him an Acre for 20 Years, it ſeems that the Feoffor has a Fee in it, and nothing of it paſſes, for it cannot paſs by Livery, nor can it paſs to the Leſſor himſelf or be ſaved by him for a certain Time, for then he would have a Leaſe for Years without a Leſſor, which cannot be.

147. If a Man is enfeoffed of 20 Acres, *viz.* of one of them to the Uſe of J. S. and it is not certainly ſhewn which Acre that ſhall be, it ſeems that J. S. ſhall take no Advantage of this Feoffment, becauſe the Poſſeſſion cannot be executed, for it is not certain which Acre ſhall paſs to J. S. and J. S. ſhall not have Election becauſe he was not Privy.

148. If the Diſſeizor makes a Leaſe for Life, and dies, it ſeems that the Lord is compellible to avow upon the Heir of the Diſſeizor, but if the Diſſeizor makes a Gift in Tail, and the Donee dies, and his Iſſue enters, the Lord is not compellible to avow upon the Donor, *viz.* the Diſſeizor.

149. Notwithſtanding the Huſband cannot give any Thing to his Wife immediately, yet if a Diſſeizoreſs makes a Leaſe for Life, Remainder to herſelf in Tail, Remainder to J. S. in Fee, and afterwards intermarries with the Diſſeizee, who releaſes to the Tenant for Life, it ſhall enure to the Wife.

150. If Land is given to one for Life to the Uſe of J. S. and his Heirs, J. S. has a Fee determinable upon the Eſtate for Life, for at the Common Law if Land had been given to one for Years or for Life to the Uſe of J. S. in Fee, there is no Queſtion but that the Heirs of J. S. ſhould have had it for the Life of the Tenant for Life or during the Years, and it was not like to any other ſuch Eſtate by the Common Law. Then here the Law does not alter the Eſtate, and if Tenant in Fee-Simple recovers in Value an Eſtate for Life, it is clear that this ſhall deſcend to his Heir. So an Inheritance ſhall be determinable upon an Eſtate for Life. But there *Note*, it does not appear that the Eſtate is recovered until the Death of the Tenant for Life.

151. If an Infant Diſſeizor makes a Feoffment, and the Feoffee dies ſeized, and his Heir enters, to whom the Diſſeizee releaſes, yet the Infant ſhall have a *Dum fuit infra ætatem*, &c. and ſhall recover, becauſe he demands the Poſſeſſion, to which he has more Right than the Diſſeizee, and the Tenant ought to anſwer to the Demiſe, not to the Right. As if the Heir of the Diſſeizor who is in by Deſcent brings an Aſſize againſt his Diſſeizor, it is no Plea for him to plead the Releaſe of the Diſſeizee, for he demands the Poſſeſſion, to which he had more Right than the Diſſeizee. So if the Diſſeizor recovers in Aſſize by erroneous Judgment againſt his Diſſeizor, and the Diſſeizee releaſes to him who has recovered, and afterwards the other brings Error, it is no Plea for him to plead the Releaſe, for the Intent of the Suit is to correct the Errors in the Record. And therefore if a Meſnalty equal to the Seigniory is recovered by erroneous Judgment, and afterwards the Tenant enfeoffs the Lord paramount, yet a Writ of Error lies. But if Tenant *par auter vie* brings a Writ of Error upon a Recovery againſt him in an Action real, it ſeems to be a good Plea to plead the Death of *Ceſtuy que vie*, becauſe there is no Poſſibility for his ancient Eſtate to be revived, but in the other Caſe the Feoffment may be defeaſible, and ſo the ancient Eſtate may be revived, and ſo is the Diverſity. And if a Diſſeizor makes a Leaſe for Life, and the Leſſee makes a Feoffment, and the Feoffee gets the Releaſe of the Diſſeizee, and the Diſſeizor brings a Writ *in conſimili caſu*, he ſhall recover, as it ſeems, but if the Heir of the Feoffee in by Deſcent gets the Releaſe, it is clear that the Diſſeizor may have the Action, and in both Caſes it ſeems that the Tenant ought to anſwer to the Demiſe, and not to the Right of the Land. And where in the Caſes above the Poſſeſſion is taken from him to whom the Right was releaſed, it ſeems that he ſhall not maintain a Writ of Right, becauſe the Poſſeſſion is removed. As if the Diſſeizor enters upon his Feoffee for Condition broken, the Feoffee ſhall not have a Writ of Right, altho' he had the Right of the Diſſeizee releaſed to him before the Condition broken. So if the Diſſeizee enters upon the Heir who is in by Deſcent, and makes a Feoffment, or releaſes to the Diſſeizor of ſuch Heir, and the Heir enters again, or if one who has Title brings a *Formedon* in Remainder againſt an Abator, and recovers by Default, and afterwards makes a Feoffment and after that the Abator reverſes the Judgment by Writ of Diſceit, and enters, as the Caſe is in 9 *H.* 7. 25. in all theſe Caſes and the others he to whom the Releaſe was made or the Right given ſhall not have a Writ of Right, but it ſhall go in Advantage of him who removes the Poſſeſſion, for inaſmuch as the one had a Right in Poſſeſſion, and has recontinued it, this ſhall draw the very Right to him, and the Right by itſelf ſhall not be left in the other, but the very Right of the Land ſhall enſue the Right of the Poſſeſſion, and ſo ſhall run in Advantage of the Tenant. *Note*, in all the foregoing Caſes the Right came after the Poſſeſſion, but if the Right was before the Poſſeſſion, and then the Poſſeſſion is removed, the Right ſhall remain in the Perſon to whom it was given, and he ſhall have a Writ of Right. As if the Heir of the Diſſeizor who is in by Deſcent makes a Feoffment, and divers Feoffments are made, and afterwards the Land comes again to the Heir, and the * Diſſeizee enters upon him, and he ouſts him, now if the Diſſeizee brings a Writ of Right of his firſt Poſſeſſion, he ſhall be greatly delayed by the vouching of the Feoffees, but he may have a Writ of Right of the laſt Poſſeſſion which he had by Diſſeizin, and ouſt all the Vouchers, and altho' the Poſſeſſion was removed, yet this is not material, for, as *Littleton* ſays, the Effect of the Writ is the mere right. So he in Remainder, as *Littleton* ſays, ſhall have a Writ of Right, *cauſa qua ſupra*. So *Note* where the Right is in one before the Poſſeſſion

* In the Original it is (*Diſſeizor*) but that muſt be an Error of the Preſs.

which is removeable. It was ſaid that if Land is given to A. for Life, Remainder to B. for Life, Remainder to the right Heirs of A. and A. dies, and B. enters, and dies, and a Stranger abates, the Heir of A. ſhall have a Writ of Right of the Poſſeſſion of A. And if Land is given to C. and D. and to the Heirs of C. who dies, and a Recovery is had againſt D. and he dies, the Heir of C. ſhall have a Writ of Right of the whole Land, *quære*. And if Land is given in Tail, Remainder in Fee to A. and the Donee dies without Iſſue, his Wife being *privement enſeint*, and he in Remainder enters, and the Iſſue, when born, ouſts him, and dies without Iſſue, he in Remainder ſhall have a Writ of Right. If the Tenant enfeoffs the Lord upon Condition, and enters for the Breach thereof, the Seigniory is revived, but if the Lord grants his Seigniory in Fee upon Condition to one who has the Tenancy, and afterwards the Feoffor enters for the Condition broken before or after, there the Seigniory is gone in both Caſes, which proves the aforeſaid Diverſities. The Huſband diſcontinues in Fee, and takes back an Eſtate to himſelf and his Wife for their Lives, and the Huſband makes a Feoffment in Fee to another, and dies, and the Wife releaſes to the ſecond Feoffee, yet the firſt Feoffee may enter upon him for the Forfeiture, and he has no Remedy, *cauſa qua ſupra*, this is to be intended before the Statute of 32 *H.* 8. But if the Wife had not releaſed, but the firſt Feoffee had entered upon the ſecond Feoffee for the Forfeiture, it ſeems that after the Death of the Huſband the Wife might have entered upon him, becauſe ſhe might claim by the Leaſe, and then the Entry for the Forfeiture has avoided the Diſcontinuance, and ſo ſhe might enter in Reſpect of the Leaſe made by the firſt Diſcontinuee. If Tenant for Life is diſſeized, and the Diſſeizor is diſſeized, and the Leſſor releaſes to the ſecond Diſſeizor, and the firſt Diſſeizor ouſts him, he has no Remedy by Writ of Right or otherwiſe, *quod nota*.

152. If the Parſon and Ordinary grant a Rent-Charge out of the Glebe to the Patron, it ſeems that the Succeſſor ſhall avoid it, for there ought to be an expreſs Aſſent of the Patron and of the Ordinary alſo, where the Succeſſor ſhall be bound, and here it is not expreſſed, but implied only. But if it was agreed that the Patron ſhould have ſuch Rent, they ought all to grant it to J. S. who ſhould re-grant it to the Patron. And in the principal Caſe if the Patron grants it over, this is no full Aſſent, but the Succeſſor may well avoid it.

153. It ſeems that a collateral Warranty is no Bar of Execution of a Recovery in Value, for that is but a Title, to which a Warranty does not extend, any more than it does to bar a Title of Entry for Condition broken, Mortmain, Conſent to a Raviſher, *&c.* to which it is clear that it does not extend, for this is no Action to demand ſuch Lands, and foraſmuch as the Action is not uſeable, he cannot vouch nor rebut before the firſt Removal of the Poſſeſſion, and conſequently never. Alſo Conditions and ſuch like Titles are always in Poſſeſſion as Rent is, and then a Warranty to the Tenant of the Land does not extinguiſh them.

154. There are two Brothers of the half Blood, the eldeſt releaſes with Warranty to the Diſſeizor of the Uncle, and dies without Iſſue, the Diſſeizor grants a Rent to the Uncle out of an Acre, and if it be behind, that he ſhall diſtrain in that Acre and in the Manor of *Dale*, the Uncle dies without Iſſue, the youngeſt enters into the Acre, and diſtrains and avows in the Manor of *Dale*.

155. [a] If a Man makes a Leaſe for Life, rendring Rent with Re-entry, and he has Title of Entry, and afterwards accepts the Rent, now he ſhall never enter, for when he accepts the Rent, he does not accept it as a Debt, for he cannot have an Action of Debt for it, but he accepts it as a Rent, and it cannot be a Rent but in Reſpect that it has Continuance, and then inaſmuch as the Acceptance cannot be called an Acceptance of the Arrears only, becauſe it was not a Debt nor could be called a Debt or Duty before the Leaſe was avoided, his Title of Entry ſhall be waived in a Manner, as much as if he had accepted the Rent due [b] at another Day of Payment which came after the Condition broken, or as if he had joined in Aid to the Leſſee being impleaded in a *Præcipe quod reddat*, in which Caſes ſuch Act of his ſhould be called an Admittance of the Leaſe and a Waiver of Entry. As if a [c] Woman, or Iſſue in Tail, or Infant accepts a Rent reſerved upon a Leaſe for Years by the Huſband and herſelf, or by the Tenant in Tail, or by himſelf during his Nonage, the Title of Entry is waived. But in the principal Caſe if the Leaſe be for Years, it ſhall be otherwiſe, for there during the Leaſe it ſhall be called a Rent as well as after, and ſo *Note* a good Diverſity.

156. If a Man for himſelf and his Heirs grants a Rent out of his Land to J. S. *pro conſilio impendendo*, and does not ſay to whom the Counſel ſhall be given, it ſhall be intended to the Grantor and to his Heirs, but if the Grant is, *pro conſilio ſibi impendendo*, it ſhall be given to no other but to the Grantor himſelf. But if Dean and Chapter make a Leaſe, rendring Rent to them, their Succeſſors ſhall have the Rent, altho' it be not reſerved to their Succeſſors, becauſe they never die, [d] for if a Leaſe is made to them for their Lives, they ſhall have a Fee.

157. [e] A. makes a Leaſe for 10 Years, and afterwards makes a Leaſe to another for 10 Years, to commence after the firſt Term determined, and the firſt Leſſee ſurrenders, it ſeems that the ſecond Leſſee may enter. Firſt, it ſeems clearly the Surrender to the Leſſor. Otherwiſe it had been if the Reverſion had been granted for 10 Years.

158. If Coparceners make Partition, ſo that the one has the Seigniory, and afterwards the Tenancy eſcheats, and ſhe is impleaded thereof, ſhe ſhall not have Aid of her Coparcener, for Aid ſhall never be granted but of Land deſcended, and if the one recovers by Warranty-anceſtrel, where the other would not come in Aid, ſhe ſhall not have Aid nor *pro rata* thereof, ſo it is here. Another Reaſon is, becauſe the Tenancy is of more Value than the Seigniory, and if the other ſhould render *pro rata*, ſhe would be greatly hurt thereby, and therefore if a Tenancy eſcheats to a Manor to which a Warranty is annexed, there ſhall be no Voucher for it. Another Reaſon in the firſt Caſe is, becauſe the Seigniory, whereof the Partition was made, is

[a] S. P. 3 Co. 65. a. by the Reporter. And ſee Plowd. 133 (k) and (l) and the Books there cited.

[b] S. P. Co. Litt. 211. b. Cro. E. 3.

[c] So if ſhe takes a ſecond Huſband, who accepts the Rent reſerved by her and her firſt Huſband, it is ſaid that this affirms the Leaſe againſt her. Dy. 159. pl. 36. 1 Rol. Abr. 475. A. pl. 1.

[d] 1 Finch 128.

[e] S. P. adjudged *Wrotesley v. Adams* Plowd. 189. and ſee the Books there cited at the Head of the Caſe.

to be revived by the Suit, if the Tenancy is ſevered from it. 18. *H.* 3. *Voucher* 18, that if the Seigniory is granted with Warranty, and the Tenancy eſcheats, the Warranty does not extend to it, and this is there adjudged. See other Books contrary.

159. If a Woman is Tenant for Life, Remainder for Years to J. S. who marries with the Woman, and commits Waſt, ſhall he loſe his Land? If Tenant for Life makes a Leaſe for Years, and afterwards enters upon the Termor, and commits Waſt, and the Leſſor recovers, the Leſſee ſhall loſe his Term. So if he recovers in a *Ceſſavit*, the Termor ſhall loſe his Term. But if Tenant for Life makes a Leaſe for Years, and afterwards enters, and makes a Feoffment, or if after the Leaſe made he prays in Aid of a Stranger, in theſe Caſes the Leſſee ſhall not loſe his Term, becauſe theſe Matters in Deed do not defeat the Eſtate of the Leſſee which was older than the Forfeiture; but in the other Caſes altho' the Eſtate of the Termor is older, yet there enſues a Recovery againſt the Tenant to the Freehold, who is Tenant to the Demandant, and ſo the Eſtate is not material, with Regard to the Chattle. And in the two laſt Caſes he ſhall have the Reverſion by Claim, becauſe he cannot enter. But if the Reverſion is granted upon Condition, which is broken, there the Reverſion ſhall be adjudged in the Leſſor without Claim, becauſe the Grantee was privy to the Condition. As if a Condition is annexed to a Feoffment, that if the Feoffee does not ſuch an Act, then he ſhall only have an Eſtate for Life, there if he does not the Act, the Eſtate in Fee which was granted is preſently in the Leſſor without Claim, becauſe he was privy to the Condition. But the Lord ſhall not have a Reverſion granted to his Villain, or in Mortmain, or to his Mother who conſents to a Raviſher, without Claim, for there is no Privity. But in the Caſes above if Waſt is brought againſt the particular Tenant by the Lord or his Son, perhaps the bringing of this Action ſhall countervail a Claim. And *Note*, that he ought to come upon the Land and make Claim, and he ſhall not be puniſhed for ſo doing, any more than the [a] Leſſor ſhall be puniſhed who comes to ſee if Waſt be done, for this is a Condition annexed by the Law to all theſe Caſes, ſo that an Entry to make ſuch Claim ſhall not be called tortious in Law. If the Heir makes a Feoffment upon Condition, and afterwards his Mother recovers Dower, and after that the Condition is broken, *quære* if he ſhall have the Reverſion by any Way, for many are of Opinion that if a Woman recovers Dower againſt an Abator, the Heir ſhall not gain the Reverſion by Claim, and if Tenant for Years be ouſted, and the Diſſeizor dies ſeized, and the Termor enters, many ſay that the Diſſeizee ſhall not have the Fee by Claim.

[a] S. P. Plowd. *Manxel's* Caſe 13 (c). and ſee the Books there cited in the Margin.

160. A Woman makes a Leaſe for Life, and grants the Reverſion to two, the one dies, ſhe marries the other, the Tenant for Life pays 1 *d.* to the Bailiff of the Grantee in Name of Attornment, and dies, the Huſband enters, and makes a Feoffment, and dies, and ſhe brings a *Cui in vita*.

161. If the Patron grants the next Avoidance, and afterwards he and the Ordinary and Incumbent make a Leaſe of the Rectory for 20 Years, the Incumbent of the firſt Grantee ſhall avoid the Leaſe, but if he dies during the Leaſe, the Leſſee ſhall have the Reſidue of the Term againſt his Succeſſor. As if Land is given to Huſband and Wife, and to the Heirs of the Huſband, and he makes a Leaſe for Years, and dies, and the Wife ouſts the Leſſee, after the Death of the Wife he ſhall have as much of the Term as remains againſt the Heir of the Huſband, as the Caſe is in 5 *Ed.* 4. and the Reaſon is, becauſe the Leaſe once took Effect. [b] But if a Man makes a Leaſe for Life, and afterwards makes a Leaſe to another for Years to commence preſently, there it is void both as to the Leſſor and as to the Leſſee, for it did not take Effect at the Beginning. If the Donor diſſeizes the Tenant in Tail, and makes a Leaſe for Years, and the Tenant in Tail dies without Iſſue, the Leſſee ſhall have the Reſidue of the Term againſt the Donor; but if the Tenant in Tail makes a Leaſe for Years, and the Donor confirms it, and the Iſſue ouſts the Termor, and dies without Iſſue, the Donor ſhall ouſt the Termor, for in the one Caſe he derives his Eſtate from the Donor, in the other from the Donee, and ſo is the Diverſity.

[b] S. P. accord Ante § 122. But ſee the Authorities there cited in the Margin to the contrary.

162. If a Leaſe is made for Years, upon Condition that the Leſſee ſhall not grant over his Eſtate without the Aſſent of the Leſſor, and the Leſſor aſſents that he ſhall grant over his Eſtate upon Condition, which he accordingly does, and re-enters for the Condition broken, after this he may grant it over without his Aſſent, for the Condition was performed by the firſt Aſſent. See the Caſe of Aſſociation 32 *H.* 6. 10. *a.*

163. If the Leſſor recovers in Waſt againſt the Leſſee for Life, who comes to the Seigniory after the Title of the Writ, *viz.* after the Waſt done, it is clear that the Seigniory ſhall be revived, but otherwiſe if the Waſt was done after the Seigniory accrued.

164. Lord, Meſne, and Tenant, the Tenant makes a Gift in Tail, Remainder in Fee, the Remainder eſcheats, upon whom ſhall the Lord avow, and of whom ſhall the Donee hold, is the Queſtion. So if the Tenant makes a Gift in Tail to the Meſne, Remainder in Fee, or makes a Gift in Tail to a Stranger, Remainder in Fee to the Meſne, how the Tenure ſhall be now, is the Queſtion. But in the firſt Caſe if the Meſne had releaſed to him in Remainder, or to the Donee in Tail, it ſeems that the Lord ſhould have avowed upon the Donee in Tail, and that the Donee ſhould have held immediately of the Lord paramount after the Releaſe. *Quære* if there be any Difference as the Caſe above is.

165. Tenant in Tail makes a Leaſe for 40 Years, and dies, the Iſſue in Tail takes a Wife, and dies, if ſhe ſhall avoid the Leaſe by Recovery of her Dower, is the Queſtion. If Tenant in Tail grants a Rent-charge in Fee, and makes a Leaſe for 40 Years, rendring Rent, and dies, and the Iſſue accepts the Rent, it ſeems clearly that the Grantee ſhall have the Rent during the Leaſe and the Life of the Iſſue, altho' the Leſſee ſurrenders: *Quære inde*, for the Reverſion is diſcharged. If Tenant in Tail grants a Rent in Fee, and dies, and the Iſſue having a Wife

dies

dies before Entry, and the Wife is endowed, it ſeems that ſhe ſhall hold it diſcharged. If the Father diſſeizes the Son, and grants a Rent-charge, and the Son endows his Wife in the ſame Land *ex aſſenſu patris*, and the Father dies, and the Son dies, and the Wife enters as Tenant in Dower, it ſeems that ſhe ſhall hold it charged, for ſhe does not claim from the Poſſeſſion in Law, as it ſeems, but from the Poſſeſſion charged. And if Tenant in Tail grants a Rent-charge, an Abator ſhall hold the Land charged. But if a Diſſeizor dies ſeized, and a Stranger abates, an Entry is not lawful upon him, for there the Point in Iſſue would be only the dying ſeized. And many are clearly of Opinion that the Rent is avoided in the Caſe of the Leaſe before, becauſe the Freehold is diſcharged; and now he ſhall not have an Aſſize of it, *cauſa patet*, nor can it deſcend, inaſmuch as it is not ſo of a Freehold. *Note* it is not charged, and conſequently it is extinct. As if the Father diſſeizes the Son, and grants a Rent in Fee, and makes a Leaſe for Years, and the Son confirms the Leaſe, and the Father dies, the Rent is gone. So if a Man grants a Rent in Fee, and makes a Leaſe for Years, and afterwards grants the Reverſion to the King or to the Grantee, the Rent is gone.

166. Father and Son and a third Perſon are Jointenants, the Father makes a Feoffment of the whole with Warranty, and dies, the Son dies, ſome ſay that the third ſhall have an Aſſize of one Part, and no more, and yet the Warranty commenced by Diſſeizin, as to the Son, nevertheleſs the third, *viz.* the Survivor, cannot deny but that it is a collateral Warranty, for he does not come under the Eſtate of the other. For if a Leaſe be made for Years to the Grandfather, Remainder for Life to the Father, Remainder in Fee to the Son, the Grandfather makes a Feoffment with Warranty, this Warranty commences by Diſſeizin as to the Father, and is collateral as to the Son, for the Feoffment was not a Diſſeizin to the Son. And if a Leaſe is made for Years to the Father, Remainder for Life to the Son, Remainder over for Life, Remainder in Fee to the Son, the Father makes a Feoffment with Warranty, this Warranty commences by Diſſeizin as to the Son, for the Freehold, but for the Fee it is collateral: *Quære bene inde.* But ſome are of Opinion that in all the Caſes aforeſaid, and in all other Caſes, every Man may avoid a Warranty which commences by Diſſeizin to any Perſon, and this they prove by the Caſe of 31 *Ed.* 3. *Fitz. Garranty* 28. where in a *Formedon* in Reverter the Tenant pleaded the Warranty of the Uncle of the Demandant, to which he ſaid that his Uncle and the Tenant came together upon the Land, and the Uncle enfeoffed him, ſo the Warranty commenced by Diſſeizin to the Donee in Tail, and it was held a good Plea, wherefore the Tenant ſaid that the Uncle was ſole ſeized, *quod nota.*

167. If two are bound jointly, and one of them delivers the Deed at one Time, and the other delivers it at another Time, this is a good joint Obligation. As if a Man makes a Leaſe for Life of Land in two Counties, rendring Rent, altho' the Liveries of Seizin are ſeveral, as they muſt of Neceſſity be, yet it is one entire Rent, and he ſhall diſtrain in Part in one County for the whole, and ſhall make one Avowry for the whole; but he ſhall have ſeveral Aſſizes, and in each County he ſhall make his Plaint for the whole Rent; but it ſeems that upon a Reſcous in one County he ſhall have an Aſſize in the other County, *quære inde.* In the ſame Manner if a Man makes a Leaſe of two ſeveral Acres in one County, rendring Rent, and makes Livery in both ſeverally, yet it ſhall be one Rent, notwithſtanding the one Acre paſſed by Livery before the other. So in a Feoffment of a Manor, if Attornment is made, the Services paſs *ab initio*; and if a Leaſe is made for Life, Remainder to the King, and Livery is made, and afterwards the Deed is inrolled, now the Remainder paſſes to the King as a Remainder *ab initio*, and yet before Inrollment it did not paſs, which ſee 1 *H.* 7. 19. *per Brian et Collow*, and other Matter there upon the like Ground. And if a Man makes a Feoffment of the Manor of *Dale*, with an Advowſon appendant, by Deed, and makes a Letter of Attorney to make Livery, it ſeems by the Intent that if Livery is not made, the Advowſon appendant ſhall not paſs as in Groſs by the Delivery of the Deed. So if one gives by Deed to A. the Manor of *Dale*, with all the Wood growing upon it, in Fee, and in the Deed there is a Letter of Attorney, if Livery is not made to A. then his Executors ſhall have the Wood, but if Livery is made, it ſhall deſcend with the Land. And if one makes a Feoffment of a Manor, and Livery is firſt made, and afterwards Attornment in the Manor, * but if it is by Deed, and Attornment is firſt made, and afterwards Livery, the Attornment ſeems to be void, or at leaſt it ſhall never be a Manor, for the Demeſnes are the Principal.

* Here ſeem to be wanting the Words *(then the Attornment is good)*, or Words to the like Effect.

168. If a Stranger makes Reſcous to the Lord, the Lord ſhall not have an Aſſize againſt him alone without the Tenant, becauſe he cannot be ſaid the Tenant of the Rent, but againſt the Pernor alone he may have an Aſſize. And if there be Lord, Meſne, and Tenant, and the Tenant makes Reſcous to the Lord, an Aſſize is not maintenable only againſt the Tenant. And if there be Lord, two Jointenants, Meſne, and Tenant, and the one Meſne and the Tenant makes Reſcous, the Lord ſhall not have an Aſſize againſt the one only, but both the Meſnes ought to be named.

169. If Huſband and Wife make a Feoffment of the Manor of the Wife to which an Advowſon is appendant, and the Feoffee makes a Feoffment of an Acre with the Advowſon, and the Huſband dies, and the Wife recontinues the Manor, ſhe ſhall preſent to the Advowſon before any Recontinuance of the Acre, for it was not appendant to the Acre. For if a Man makes a Feoffment of an Acre Parcel of a Manor, *cum pertinentiis*, nothing of the Advowſon which is appendant to the Manor paſſes, but if the Feoffment is made of the fourth Part, *cum pertinentiis*, the fourth Part ſhall paſs, becauſe it is not appendant nor can be appendant to one Acre only, for if a Feoffment is made of an Acre with the Advowſon, without Deed, the Advowſon does not paſs, which proves, *&c.* But if a Feoffment is made of a Manor, ſaving an Acre, with the Advowſon, this Saving is good without Deed. And ſee 22 *Aſſ.* in Error in the Caſe of

of *Thirdbald Grivel*, where it was held clearly that if the Patron is outlawed in Treſpaſs, and the Church becomes void, and a Stranger preſents, and his Clerk is in by ſix Months, and the King removes the Incumbent by *Quare Impedit*, the Patronage is re-continued to the true Patron. If a Stranger uſurps an Advowſon appendant to a Manor which the Diſſeizor hath, and the Diſſeizee enters into the Manor, the Advowſon is re-continued, or the Diſſeizee may preſent before his Entry into the Manor, notwithſtanding the Uſurpation. *Vide* 26 *H.* 8, 4. So ſhall it be of a Feoffment, as it is there.

170. A Woman is entitled to have Dower, and afterwards the Heir makes a Leaſe for Years, and Waſt is done, and afterwards the whole Land is recovered for her Dower, it ſeems that he ſhall have an Action of Waſt *quia tenuit*.

171. Leſſee for 20 Years makes a Leaſe over, and alſo makes another Leaſe of other Land in which he has a Fee, for 20 Years, rendering Rent, without Deed, it ſeems that the whole Rent ſhall iſſue out of the Land in which he has the Fee, for inaſmuch as he has granted over all his Eſtate in the other Land, there cannot be a Reſervation out of it.

172. Tenant in Tail in Uſe, Remainder to his own right Heirs, enters upon the Feoffees, and makes a Feoffment, and takes back an Eſtate-Tail, Remainder to his right Heirs, and afterwards the Statute of 27 *H.* 8. is made, and after that he dies, by what Method can the Iſſue avoid the ſecond Tail, and have the firſt Tail? It ſeems that he cannot have the firſt Tail by any Means, for when the Tenant entered upon the Feoffees, and made a Feoffment, then there was no Remainder in Fee in him, yet by his Feoffment a Fee-Simple paſſed, not determined by his Death, but defeaſible by Entry of the Feoffees, and then of Neceſſity the Fee-Simple of the Land paſſed, inaſmuch as he had the Uſe to his right Heirs, and when the Statute of 27 *H.* 8. was made, inaſmuch as the Uſe was not in *eſſe*, but there was only a Right of Uſe, the Poſſeſſion was executed according to the Right of the Uſe, and then when he died, there was no Remitter to the Eſtate, for it was not in *eſſe*. And this Caſe proves that if the Eſtate be not executed according to the Right of the Uſe, viz. if the Feoffee marries with the Wife of the *Ceſtuy que Uſe*, and makes a Feoffment, and afterwards the Statute is made, the Wife is without Remedy, if the Feoffee is without Notice of the Uſe, for the Feoffor has given his Right by the Feoffment, and the Wife ſhall not have the Poſſeſſion executed, *cauſa qua ſupra*. But if Tenant in Tail makes a Feoffment to his own Uſe for his Life, and afterwards to the Uſe of his Heir, viz. of the eldeſt Son, and afterwards the Statute is made, neither the Father nor the Son ſhall ever be remitted, for the Statute executes the Poſſeſſion according to the Uſe, which was made by the Agreement of the Party himſelf, but the Iſſue of the Son ſhall be remitted, *cauſa patet*. Further, here the Feoffees cannot enter during the Life of the Tenant in Tail, *cauſa patet*, and after his Death they cannot enter, for the Deſcent takes away their Entry, and they cannot have an Action, for the firſt Entry was lawful, but if they might enter or recover the Land, then they ſhould recover the firſt Uſe, which ſhould be executed preſently.

173. [a] If a Leaſe is made for the Life of A. and B. and A. dies, yet the Leſſee ſhall have it during the Life of B. in the ſame Manner as if a Leaſe is made to two, they ſhall have it during their Lives or the Life of the Survivor of them, and if they grant it over, the Leſſee ſhall have it during the Life of either of them. [b] But if two make a Leaſe for 60 Years, if they ſo long live, there if either of them dies, the Eſtate is determined, for this is not a Limitation, but a Condition, and ſo held the Juſtices at *St. Albans*. [c] But if a Leaſe is made during the Time that A. and B. ſhall inhabit in *London*, there if one of them inhabits in another Place, the Eſtate is determined, for it is a collateral Determination. So *Note* a Diverſity between a Determination for Life, and another collateral Determination.

[a] Ante § 82.

[b] Ante § 82.

[c] So if a Leaſe is made during the Time that A. and B. ſhall be Juſtices, and one of them is diſcharged, the Eſtate is determined, Ante § 82.

174. [d] If a Man grants a Rent for Life out of his Land, and afterwards by another Deed grants that it ſhall be lawful for the Grantee and his Heirs to diſtrain for the ſame Rent, this ſhall be taken for a Rent of the ſame Value, for the ſame Rent is determinable upon his Death, ſo that his Heirs cannot diſtrain for it, for which Reaſon the Grant would be void as to his Heirs, if it be not taken for a Rent of the ſame Value; and ſo it is adjudged 8 *H.* 4. 19. [e] And if the King grants to the Mayor and Commonalty of D. the ſame Liberties which the Mayor and Commonalty of L. has, this ſhall be intended Liberties of the ſame Nature. And if a Man grants to me, that whereas he hath made a Leaſe for 40 Years to J. S, I ſhall preſent during the ſame Term to an Advowſon which the Leſſor hath, there although J. S. ſurrenders the Manor, yet I ſhall preſent, for where the Grant was during the *ſame* Term, this ſhall be intended during the *like* Time. But if I confirm the Eſtate of my Leſſee for Life, to have and to hold his Eſtate to him and his Heirs, this ſhall not be called the like Eſtate, as to the Heir, for the Heir was not then in *eſſe*, and he ought to take it as a Purchaſer, &c. And the Juſtices do not preſcribe that all whoſe Eſtates, &c. for they have not the Eſtate of their Predeceſſors, &c. And if a Statute ſaith, [f] *they ſhall have the ſame Action as the laſt Predeceſſor ſhould have had*, this ſhall be intended the like Action. If a Tenancy eſcheats, and the Lord gives the Tenancy in Tail, to hold of him by the ſame Services as the other Tenant held, this is to be intended by other Services. And in 30 *Aſſ. pl.* 31. where the King grants to a Subject *Curiam ſuam regalem*, thereby is to be underſtood ſuch Pleas as the King's Court holds.

[d] 26 Aſſ. pl. 38. Fitz. Aſſize 241. Bro. Confirmation 15. Grants 73. Rents 14. Plowd. 273. And ſee the like Matter Ibid. 141 (h).

[e] S. P. Cro. E. 241. pl. 3. *Per Curiam*. 1 Finch 45. 2 Finch 62.

[f] See Weſtm. 2. cap. 5.

175. If the Diſſeizee makes a Feoffment by Deed, with a Letter of Attorney in it, it ſeems that the Attorney cannot execute the Command, for when he delivers the Deed of Feoffment as his Deed, at that Time he has nothing in the Land but a Right only, which cannot paſs by the Deed; but it ſeems to be the better if the Deed of Feoffment be delivered as an Eſcrow, to deliver Seizin after Entry, &c. And if a Man makes a Leaſe for Life, and afterwards makes a Feoffment with a Letter of Attorney, &c. and then the Tenant for Life dies, can he make Livery there?

176. If the Patron and Ordinary give Licenſe to the Parſon to grant a Rent in Fee, and he does ſo, this ſhall bind the Succeſſor, according to the Opinion in 7 *H.* 4. 18. But if before the Grant Confirmation had been made to the Grantee, the Grant had been void. The Diverſity lies here, that in the firſt Caſe there is no Need of any Thing but an Aſſent, which may be before, for an Aſſent may be given that ſuch a Thing may be done at a Time to come, and therefore it is ſaid that if a Biſhop makes a Gift in Tail by Deed, and the Dean and Chapter confirm the Deed, *et omnia quæ in eo ſunt*, according to the common Confirmation in ſuch Caſe, and afterwards Livery and Seizin is delivered, this has been held by all the Juſtices to be a void Confirmation, for the Aſſent was but to the Deed, but a Confirmation of an Eſtate ought to be after the Eſtate made. And ſo is the Diverſity.

177. The Huſband ſurrenders the Freehold, which the Wife has for Life, to him in Reverſion, who dies ſeized, if the Wife may enter after the Death of the Huſband, is the Queſtion, for it ſeems there is a Deſcent.

178. [a] The Father dies ſeized of two Acres, the Son enters into the one Acre, ſaying nothing, if this ſhall be ſufficient Poſſeſſion of the other Acre to make the Siſter to be Heir, was the Queſtion in a Moot. And it was ſaid that it ſhould not, for if the Acre, into which he did not enter, was upon defeaſible Title, and his Entry into the other ſhould be adjudged an Entry into both, from thence it would follow that he could not afterwards diſagree, but ſhould render Damages, which would be againſt Reaſon. To which it was anſwered, that he may enter claiming that Acre only; [b] but if there is a Diſſeizor of 20 Acres, and the Diſſeizee or Feoffor upon Condition enters into one of the Acres, ſaying nothing, it ſeems clear enough that he may have an Aſſize for the Reſidue, for the Poſſeſſion ſhall not be deveſted by the Conſtruction of Law, without a ſpecial Claim of the Party. But in the principal Caſe if the Acres had deſcended ſeverally, viz. the one from the Father, and the other from the Mother, then an Entry into the one without ſaying any Thing ſhould be adjudged an Entry but into that only. [c] But if a Man has a Title of Entry into two Acres ſeverally for the Breach of ſeveral Conditions, an Entry into the one in the Name of both ſhall not ſerve for both, but only for that into which he enters, which was granted by the Court in 9 *H.* 7. 25. And in the principal Caſe *Maudlin* ſaid at another Time, that by his Entry into the one Acre the Law will adjudge the whole Land, which deſcends upon the ſame Title, to be moſt for his Advantage, or elſe that he would not have entered, for which Reaſon his Entry into the one Acre ſhall be ſaid an Entry into the whole, but not where they deſcend upon divers Titles. But the Entry of the Baſtard into one Acre only, and his dying ſeized, ſhall but be effectual for that Acre, for he ſhall not diveſt any more from the *Mulier*, who had the Poſſeſſion in Law, without actual Entry; but *Quære* if it ſhall be ſo with reſpect to himſelf?

[a] See this Queſtion put M. 21 H. 7. 33. pl. 24. Co. Litt. 15. a. b. where the Lord *Coke* ſeems to be of Opinion that the Entry into the one Acre ſhall be a ſufficient Poſſeſſion of the other to make the Siſter to be Heir.

[b] Co. Litt. 15. b. 252. b.

[c] Co. Litt. 252. b.

179. If a Man makes a Gift in Tail, or a Leaſe for Life, rendering Rent with Re-entry for Default of Payment, and he has Cauſe of Entry, and afterwards the Tail expires, or the *Ceſtuy que vie* dies, and after that a Diſſeizin is done to them, or a Deſcent is caſt, or after the Determination of the Eſtate a Stranger enters, and dies ſeized, yet the Donor may enter, notwithſtanding that the Condition was never annexed to that Eſtate, but the Land was always re-continuable by Entry. And if Tenant for Years upon Condition be ouſted after the Term, and a Deſcent is caſt, the Leſſor may enter for the Condition broken, and yet neither the Eſtate nor the Condition *(quære hæc)* was bound by the Condition. But if a Warranty is made after the Eſtate ended, there is no Rebutter for it.

180. Land is given to J. and to A. his Wife, and to another Huſband and Wife in Fee, they are diſſeized, and J. releaſes to the Diſſeizor, and afterwards J. and A. are divorced for Cauſe which hath Relation, and A. and the Huſband and Wife bring an Aſſize of the Moiety, omitting J. it ſeems to be maintainable. Firſt, when J. and A. are divorced, yet the other Huſband and Wife ſhall hold the Moiety to them, for inaſmuch as the Purchaſe took Effect and the Eſtate veſted by the Livery, and at that Time the Huſband and Wife, not being divorced, took a Moiety, this ſhall remain afterwards, for as to all Strangers J. and A. ſhall be ſaid lawful Huſband and Wife at that Time, although they are now divorced, for if a Stranger had bought of the Huſband the Goods of the Wife, he ſhould have held them after the Divorce, as it is held in 26 *H.* 8. and if the Huſband had made a Feoffment, the Wife could not have had an Aſſize againſt the Feoffee, but ſhould have been driven to a *Cui ante divortium*, in which Caſe alſo her Entry is taken away. And then if the Feoffment of the unlawful Huſband ſhall be as favourable to the Feoffee as the Feoffment of a lawful one, inſomuch that it ſhall put the Wife to her *Cui in vita*, by the ſame Reaſon they ſhall be called lawful Huſband and Wife, with reſpect to another Huſband Wife, in which Caſe the other Huſband and Wife ſhall retain and hold their entire Moiety, ſeeing it veſted in them as a Moiety at the Beginning. And if Land is given to B. who is Abbot of D. and he is afterwards deraigned, yet it ſhall remain in the Houſe, for it veſted in the Houſe at the Time of the Livery. But if a Reverſion is granted to a Huſband and Wife, and to a ſingle Man and a Woman, in Fee, and the ſingle Perſons intermarry, and afterwards the Tenant attorns, now if the Man and Woman laſt married are divorced, the other Huſband and Wife ſhall have but perhaps the third Part, [d] for the Attornment ſhall not change the Grant which was to the ſingle Man and Woman by Moieties, and ſo after the Attornment the third Part ſhall be to each of them. [e] So if a Feoffment is made by Deed to a Man and a Feme ſole, and a Letter of Attorney to deliver Seizin, and before Livery they intermarry, and afterwards Livery is made, they take by Moieties, *cauſa qua ſupra*. Then in the principal Caſe by the Releaſe of the Huſband all his Right in the Moiety of a Moiety was extinct, and therefore he ſhall not be joined with the other Huſband and Wife but in Reſpect of the Moiety of a Moiety, and for ſo much they are Jointenants, and J. ſhall be omitted in the Action, and this by Reaſon of his Releaſe, inaſmuch as it is an Action poſſeſſory. As if the one Lord releaſes the Avowry,

[d] Poſt § 183, agrees herewith, but ſee the contrary Plowd. 483 (c), and the Books there cited in the Margin.

[e] Poſt § 183 accord.

Avowry, it ſhall be only in the Name of the other. And if a Remainder is appointed to the right Heirs of J. S. and he dies, ſo that the Remainder veſts, and afterwards the right Heir is proved to be a Baſtard, or is a Baſtard by Parliament, yet he ſhall hold the Land for ever: [f] As if the Daughter enters in ſuch Caſe, or for [g] Mortmain, and afterwards the Son is born, ſhe ſhall hold the Land, notwithſtanding his Birth, and yet he ſhall be Heir from the Beginning; but otherwiſe it is as to a Deſcent, and as to Things deſcended. And in the ſaid Caſe if the right Heir of J. S. had been attainted of Felony after the Death of the Faaher, yet the Remainder ſhould not have been deveſted out of him.

[f] P. 9 H. 7. 25. *Per Wood.* Bro. Entry congeable 92. Plowd. 56. (p). 1 Co. 95. a. 3 Co. 61. b. Litt. R. 316. Cro. E. 334, 335. 3 Lev. 408. Kitch. 215. Poſt § 227.

[g] Ante § 113.

181. The Son endows his Wife *ex aſſenſu patris*, and is attainted of Felony, if the Wife ſhall hold her Dower, is the Queſtion. [a] And it ſeems that ſhe ſhall not, for it is the Dower of the Son, for ſhe claims it from the Son, and if ſhe brings a Writ of Dower for it, *never accoupled in lawful Matrimony* is a good Plea, and if there be a Diſſeizin of it, a collateral Warranty fallen upon the Wife ſhall not be a Bar, for ſhe had not Title to it but by the Death of the Huſband, and then the Warranty deſcended before her Title accrued, but if it deſcended after her Title, ſhe ſhould be barred, wherefore, &c. And if after the Dower ſo aſſigned ſhe be attainted of Felony, and after that has a Charter of Pardon for her Life, and then the Huſband dies, ſhe ſhall have and retain her Dower, for her Intereſt in it came after the Charter, and yet by the Attainder ſhe forfeited all her Inheritance, Freehold, and Chattles real, wherefore, &c. [b] And it ſeems that if a Man endows his Wife *ex aſſenſu patris*, ſhe being of the Age of 6 Years, and no more, and afterwards the Huſband dies, ſhe being of the Age of 21 Years, ſhe ſhall hold this Dower, and yet at the Time of the Aſſignment ſhe was not dowable, but at the Time of the Death of the Huſband ſhe is dowable, and therefore ſhe ſhall have it, which proves that the Death of the Huſband is the moſt effectual Cauſe of ſuch Dower, and that ſhe claims it by him, wherefore, &c. * And *Britton* Tit. *Homicides* ſays that the Wives of Felons ſhall not hold any Dower of Tenements which were aſſigned to them by their Huſbands. And if a Seigniory is aſſigned in Dower *ex aſſenſu patris*, there needs no Attornment.

[a] Co. Litt. 37. a. But now ſee the Statute of 1 *Edw.* 6. *cap.* 12. as to Attainder of Felony, by which the common Law is altered.

[b] S. P. Co. Litt. 33. a.

* Britt. cap. 5. fo. 15. a.

182. If a Man reſerves upon a Gift in Tail Socage the firſt ten Years, and afterwards Knights-Service, and within the ten Years the Donee dies, his Heir within Age, now if he ſhall be in Ward during the firſt ten Years, or after if they expire during his Nonage, is the Queſtion.

183. If a Reverſion is granted by Deed to a Man and a Feme-ſole, and they intermarry, and afterwards the Tenant attorns, and the particular Eſtate for Life determines, and the Huſband and Wife enter, and make a Feoffment, and a Warranty collateral to the Wife deſcends to the Feoffee, and the Huſband dies, and the Wife brings a Writ of Dower, firſt, [c] it ſeems that after the Attornment there are Moieties between the Huſband and Wife, for the Attornment is grounded upon the Deed, and ſhall reduce the Inheritance according to the Courſe of the Deed, notwithſtanding that the Attornment is made after the Marriage, for which Reaſon there are Moieties between them. [d] As if a Deed of Feoffment is made to a Man and a Woman, and they intermarry, and afterwards Livery is made *ſecundum vim, formam, et effectum chartæ*, it ſeems that there are Moieties between them. And if a Reverſion is granted to an Infant, and Attornment is made at his full Age, yet when he is in Poſſeſſion he may diſagree to the Eſtate, inaſmuch as the Grant, which is the principal, was made during his Nonage. Further, admitting that there ſhall not be Moieties between them, but that it ſhall be deemed a Purchaſe during the Coverture, yet when his Right to have the Thing again is bound by the collateral Warranty, then it ſeems that ſhe cannot take Dower, for ſhe ſhall have no Election but were two Things remain whereof ſhe may chuſe the one, then a Warranty ſhall be no Bar, for it deſcends before the Wife's Title of Dower is conſummate and given, for the Eſpowſals, the Poſſeſſion, and the Death of the Huſband make her Dower, and the Warranty deſcends before her Title is conſummate, viz. before his Death. For if Huſband and Wife make a Leaſe for Life, and they pray to be received, and afterwards the Huſband makes Default, and upon his Default the Wife is received, as ſhe may be, in which Caſe ſhe admits the Diſcontinuance, there although ſhe is barred, yet ſhe ſhall afterwards have a *Cui in vita*, for at that Time ſhe had no Title to a *Cui in vita*, but it was given by the Death of the Huſband. It was ſaid alſo touching the Attornment, [e] that if a Feoffment with Warranty is made to a Man and a Feme-ſole, and they intermarry, and afterwards are impleaded, and recover in Value by Reaſon of the Warranty, and the Huſband dies, the Wife ſhall have Dower of the Land recovered in Value, for there ſhall not be Moieties between them. But if Land is bargained and ſold to a Man and a Feme-ſole, and they intermarry, and afterwards the Deed is enrolled, there they take by Moieties, for this has Relation. But if Huſband and Wife, Tenants for Life before the Coverture, recover in Value by Reaſon of a Reverſion with Rent, there ſhall be Moieties of the Value. And it was ſaid that if a Leaſe is made to a Man and a Feme-ſole for Life, upon Condition to have Fee, and they intermarry, and afterwards the Condition is performed, they ſhall not have Moieties in the Fee, but ſhall take it as Purchaſers during the Coverture. *Note*, it was ſaid that if a Man is ſeized of the Land of his Wife, and a Warranty is made to them and to the Heirs of the Huſband, and they recover in Value, this ſhall enure to them without Moieties and to the Heirs of the Wife; for if Tenant for Life recovers in Value by Reaſon of a Warranty made to him in Fee, this Recovery ſhall only be for Life, but if he had had an Eſtate in Fee, and had recovered in Value by Reaſon of a Warranty made for Life, he ſhould have recovered in Fee; from whence it follows here that inaſmuch as the Huſband had but in Effect an Eſtate for Life, and the Fee was in the Wife, this Recovery in Value ſhall enſue the Eſtate before. [f] And it was ſaid that if a Reverſion is granted to an Alien, and he is made a Denizen, and afterwards the Tenant attorns, he ſhall not take it to his own Uſe. If a Man has a Wife, and is ſeized of four Acres, and makes a Feoffment of three of the Acres with Warranty, and dies, and the Wife brings a Writ of Dower againſt the Feoffee,

[c] Ante § 180 accord, but ſee the contrary Plowd. 483 (c), and the Books there cited in the Margin.

[d] Ante § 180 accord.

[e] S. P. Plowd. 483 (a). Dy. 149. pl. 82. in Margine. Co. Litt. 187. b. Wing. Max. reg. 211. pl. 8. Vin. Abr. tit. Baron and Feme S. a. pl. 13.

[f] See L. P. Plowd. 482 (e). S. P. Contra Poſt § 371.

Feoffee, and he vouches the Heir, now if the Wife may ſtay the Judgment, viz. that ſhe ſhall not recover immediately againſt the Heir, is the Queſtion, for then ſhe has loſt her Dower of the fourth Acre. And it ſeems to ſome that by ſhewing this ſhe ſhall ſtay Judgment, but others are of a contrary Opinion, for ſhe ſhall be barred of Dower of the fourth Acre by her own Folly, for that ſhe did not firſt recover Dower of it.

184. A Woman Leſſee for Life takes Huſband, and they make a Leaſe to J. S. for his Life, rendering Rent, and afterwards the Huſband dies, and the Wife avows for the Rent, or accepts it in *Pais*, now the Leſſor may enter, and ſhe ſhall be barred of her *Cui in vita* or Entry for ever, for ſhe has agreed to the Forfeiture by her Avowry or Acceptance of the Rent. If a *Præcipe quod reddat* is brought againſt the Father for Land which the Son has by Purchaſe, and he appears, and loſes, and the Son brings Error againſt the Recoveror after the Death of his Father, as he ſhall be received by Eſtoppel, and the Judgment is affirmed, it ſeems clearly that the Recoveror may enter upon the Son, and eſtop him to purſue the Writ of Error, for by the bringing of it he ſhall be eſtopped to ſay otherwiſe but that the Father had the Land.

185. [a] A Gift in Tail is made with Warranty accordingly, the Donee releaſes the Warranty to the Donor, and afterwards the Reverſion is granted, and the Donee attorns, if the Iſſue in Tail is impleaded it ſeems that he ſhall not vouch, for the Releaſe has extinguiſhed the Warranty for ever, for the Statute ſpeaks of *Tenements given upon Condition*, and this is no Tenement, but a Covenant real, which the Releaſe extinguiſhes. [b] As if an Annuity is granted in Tail, it may be extinguiſhed by the Releaſe of the Donee, *causâ qua ſupra*. If a falſe Verdict paſſes againſt Tenant in Tail, a Releaſe of all the Right by the Tenant in Tail ſhall not bar the Iſſue of his Attaint, but if he releaſes all falſe Oaths to one of the Petty-Jury, *quære* if the Iſſue ſhall have an Attaint? And a *Partitione facienda* is maintenable by the Iſſues in Tail by the Equity of the Statute *de donis conditionalibus*, and alſo a *Contra formam feoffamenti*, and a *Contributione facienda*, and perhaps a *Quo jure*, and a Releaſe of them ſhall not bar the Iſſue, for it is of the Land, [c] and a Uſe in Tail is taken by Equity, *Vide* [d] 18 *H.* 8. [e] And Tenant by Copy ſhall be taken by Equity to have an Eſtate-Tail, and he ſhall have a Plaint in Nature of a *Formedon*. So ſome are of Opinion that in the principal Caſe this Releaſe is no Bar. But Tenant in Tail may by his Releaſe extinguiſh an Acquittal granted by the Donor, and Execution of a Recovery in Value by Reaſon of a Warranty, and not a Recovery *pro rata* againſt his Coparcener.

186. If a Man binds himſelf and his Heirs to me in 20 *l.* and dies, and his Executors have Aſſets, and I releaſe to the Heir all Actions of Debt, and afterwards the Executors pay the Aſſets to other Creditors, it ſeems that I may have an Action of Debt againſt the Heir, becauſe at the Time of the Releaſe I was not entitled to have an [f] Action of Debt againſt him; but if neither the Executors nor the Heir have Aſſets, and then the Debt is releaſed to the Heir, and afterwards the Heir recovers Land, ſo that he has Aſſets, it ſeems that the Releaſe is a Bar. A Man deviſes 20 *l.* to J. S. to be delivered to him when he is of the Age of 26 Years, and if he dies before that Age, then he deviſes it to A. J. S. releaſes to the Executors at the Age of 21 Years, now if he ſhall be barred of the ſaid Debt is the Queſtion. And ſee 21 *H.* 7. 41. where it is agreed that a Releaſe of an Annuity made to the Patron in the Time of Vacation extinguiſhes the Annuity, but *quære* if there was a Parſon. And if Tenant for Life does Waſt, and grants over his Eſtate, and the Leſſor releaſes all Actions to the Grantee, yet it ſeems that he ſhall have an Action againſt the Grantor, becauſe he was not entitled to have any Action againſt the Grantee. So of Tenant in Dower or by the Curteſy, who have granted over their Eſtates, or an Abbot who has made a Feoffment, ſuch Releaſe made to the Feoffee ſhall be no Bar to a *Contra formam collationis*, otherwiſe it is of a Releaſe of Land. See where a Releaſe ſhall be a Bar in a *Scire facias*.

187. *Note*, if the Lord procures one to diſſeize the Tenant, who does ſo, and afterwards the Diſſeizor ceſſes, and the Lord recovers againſt him in a *Ceſſavit*, he ſhall hold the Land againſt the Diſſeizee, for by the Procurement he is not a Diſſeizor, as it appears 50 *Ed.* 3. 2. But ſee *Littleton* cap. *Remitter* contrary, as it ſeems. And the Reaſon here is, for that he has Cauſe to recover of late Time, ſo that his Title is accrued to him ſince the Procurement, but it had been otherwiſe if he had had Title of *Ceſſavit* at the Time of the Procurement and Diſſeizin. *Quære* if he had ceſſed a Year before the Diſſeizin, and another Year after the Diſſeizin? As if the Iſſue in Tail procures one to diſſeize the Diſſeizor of his Father, whoſe Heir is in by Deſcent, againſt whom the Heir recovers, and dies, the Iſſue ſhall hold the Land, but if he himſelf had recovered againſt the Diſſeizor upon Title which he had in *eſſe* at that Time, he ſhould not have been remitted. *Quære* in that Caſe if his Father Diſſeizee dies, and he recovers againſt the Heir or Diſſeizor by *Formedon*, if he ſhall be remitted, for the Wrong was done to the Tail at that Time. And if one has Title to a *Formedon*, and procures another to ouſt the Tenant, to the Intent that he may recover againſt him, and the Stranger ouſts him, and afterwards another Stranger recovers upon Title *puiſne* to the Procurer, and the other recovers againſt him by *Formedon*, he is there remitted. And if two Jointenants have Title of Action where their Entry is taken away, and one of them procures a Stranger *ut ſupra*, againſt whom they two recover, and he who was Party dies, the other is remitted to the whole, but if he who did not procure had firſt died, the other ſhould only have been remitted to the Moiety. *Quære inde.*

188. By *Bradbury* Reader, if a Man enters lawfully upon Tenant for Life, upon Title paramount, into one Acre for Condition broken, having the ſame Title to the whole Land, or if he enters into one Acre by Reaſon of a Title for Mortmain, or for Conſent to a Raviſher, or the like, or if the Leſſor himſelf enters into one Acre by Reaſon of a Condition broken, or for that he was within Age at the Time of the Leaſe, where perhaps Part of the Leaſe is good by Reaſon of a Cuſtom which enables an Infant to make a Leaſe, or if the Leſſor accepts a Surrender of

[a] S. P. Contra Plowd. Manxel's Caſe 2 (b). Poſt § 321 *Per Plowden*. Co. Litt. 20. a. 392. b.

[b] S. P. Plowd. *Manxel*'s Caſe 3 (a). Co. Litt. 20. a.

[c] S. P. Plowd. *Manxel*'s Caſe 2. Co. Litt. 20. a. Crompt. J. C. 60. a.

[d] *Quære* if the Caſe here intended is not T. 19 H. 8. 13. cited in Plowd. *Manxel*'s Caſe 3.

[e] Plowd. *Manxel*'s Caſe 2.

[f] *Quære*, for at this Day the Law ſeems to be, that though the Executors have Aſſets, yet the Obligee may have an Action of Debt againſt the Heir, if he will, Plowd. 439. 1 And. 7. pl. 13. 3 Lev. 304. though anciently the Law was otherwiſe from the 18 *Ed.* 2. till. 7 *H.* 4. when it was changed in this Point, O Bendl. 162. Poph. 155 *Per Dodder.* J. And therefore in Debt againſt the Heir, *Aſſets in the Hands of the Executors the Day of the Writ purchaſed* is no Plea at this Day. T. 27 Ed. 3. 6. pl. 23. T. 7 Ed. 4. 13. a. *Per Brian.* M. 10 H. 7. 8. b. *Per Vaviſor.* Plowd. 439. Dy. 204. pl. 2. 3 Lev. 289, 304, 305.

Parcel,

Parcel, or recovers Parcel in Waſt, or if he or a Stranger enters into the Moiety, or into a third Part not known in certain, as the Caſe is in 21 *H.* 6. 48. or if one Jointenant enters into his Moiety for Condition broken, in all theſe Caſes the Rent ſhall be apportioned. But if at the Time of the Leaſe the Land was diſcharged of a Rent which is afterwards revived, ſo that the Value of the Land is impaired to the Leſſee, there the Rent ſhall not be apportioned, for the Land, out of which the Rent iſſues, remains entirely, and ſo is the Diverſity. But if a Man has Title of Entry upon his Leſſee for Life into 20 Acres in two Counties, and he enters into one Acre only, *quære* if the Rent ſhall be apportioned in that Caſe?

189. A Tenant who holds by Homage and 10*s.* Rent makes a Leaſe for Life, Remainder in Tail, without ſaying any Thing of any Reſervation, it ſeems that the Tenant for Life, although he ſhall not hold by Homage, ſhall hold by Fealty and 10*s.* inaſmuch as both the Eſtates are now but one; but if a Gift had been made in Tail, Remainder for Life after the Tail determined, the Tenant for Life ſhould not have held by the like Services as the Donee, *cauſa patet.* If two Jointenants and to the Heirs of the one, who hold *ut ſupra*, make a Gift in Tail, the Donee ſhall hold of them both by the like Services, and yet the Freehold is not the Cauſe of the Tenure; *quære* there, for ſome ſay that he who has the Fee ſhall have the entire Tenure, becauſe the Inheritance paſſes only from him, *quære inde.* And if Tenant for Life and he in Reverſion make a Gift in Tail, *quære* how the Donee ſhall hold. If a Leaſe for Life is made, Remainder for Years with Warranty, *quære* if this Warranty ſhall give Benefit to him in Remainder, ſeeing that the Eſtate precedent is of another Nature. If a Leaſe is made for Life, Remainder in Frank-Marriage, it ſeems that the Tenant for Life ſhall hold by Fealty only until the fourth Degree be paſt. But if a Leaſe is made for Life, the Heir of him in Remainder ſhall not be in Ward during the Life of the Tenant for Life, *quod nota.*

190. A Reverſion is granted to one for Life, and before Attornment it is granted to him again in Fee, and afterwards the Tenant attorns, it ſeems that the Grantee may chuſe to take the one Eſtate or the other at his Pleaſure to be afterwards determined. But if a Reverſion is granted to one Man, and afterwards it is granted to another, and the Tenant comes to both, and ſays, "My Maſters, I attorn to you," it ſeems that for the Incertainty neither of them ſhall have it, for it is incertain which of them ſhall be preferred. [a] If a Reverſion is granted to a Man and to his Heirs, and afterwards by another Deed it is granted to him and to his Succeſſors, and then the Tenant attorns, *quære* in what Capacity it ſhall veſt. If a Feoffment is made with a Letter of Attorney, &c. and the Deed is delivered to the Grantee, before Livery of Seizin the Feoffor may countermand Livery, but if he ſays to the Feoffee, "it is my Intent that you ſhall not take by Livery," this is nothing to the Purpoſe. If Land is given to a Man and a Feme-ſole, upon Condition that whichever of them firſt marries ſhall have Fee, and they intermarry, neither of them ſhall have the Fee for the Incertainty. So in the Caſe before [b] if the Reverſion of *Black-Acre* or of *White-Acre* is granted, to be choſen by the Grantee, it is worthy of Conſideration whether the Attornment be good or not, inaſmuch as the Thing is incertain, and does not paſs preſently. And *Note* the Opinion of *Brook* in the principal Caſe, that the Grant ſhall be void for the Incertainty, as 20 *H.* 6. and this ſeems to be very reaſonable. [c] And *Note* in 21 *R.* 2. the Avowries abated, as if a Man brings two Writs of *Præcipe quod reddat* returnable at one and the ſame Day, both the Writs ſhall abate, as it appears.

[a] Vide Co. Litt. 310. b.

[b] S. P. Co. Litt. 310. b. ſays that the Attornment is good.

[c] P. 21 R. 2. Fitz. Avowry 262. Bellew's C. 58. P. 3 H. 6. 44. b. *Per Martin.* Bro. Avowry 6, in fine. 5 Co. 19. a. 38. b. Plowd. *Manxel's* Caſe 10. Poſt § 210.

191. A Feoffment is made upon Condition that the Feoffee ſhall make a Gift in Frank-marriage to ſuch a Woman who is Couſin to the Feoffor, and not to the Feoffee, *quære* if he is bound to make any other Eſtate than for Life, ſeeing that the Intent of the Feoffor cannot be performed by Law? So if the Condition be to make a Gift in Frank marriage to a religious Man, &c.

192. [d] A Man makes a Leaſe for Life, and grants a Rent out of the Reverſion, now if the Grantee grants it over, it ſeems that the Grantor ought to attorn, and not the Tenant for Life, becauſe the Rent is nothing to him, for a Releaſe made by the Grantee to him does not extinguiſh the Rent: So if a Rent be granted by Tenant for Life out of Land, &c. a Releaſe made by the Grantee to him in Reverſion does not extinguiſh the Rent, &c.

[d] S. P. Co. Litt. 311. b.

193. The Reverſion of Tenant for Life with the Rent is granted, the Tenant for Life grants his Eſtate to another to hold of the Grantee, it was ſaid at Lecture that this was an Attornment, for when he grants it to hold of him, the Tenant for Life takes Notice of the Grant, and it is an Agreement to the Grant as lawful. And although ſome ſay that this is not proved but by the Grant, at which Time the Eſtate, which he had, paſſed from him, ſo that he is not Tenant for Life, and therefore it cannot be ſaid an Attornment by him, although this is true, yet it ſhall be an Attornment by the Grantee of the Eſtate of the Leſſee, foraſmuch as he accepted it; for which Reaſon there is nothing that ſtands in the Way, unleſs it be that it was ſpoken in the Abſence of the Grantee, and that is nothing to the Indenture, for a Man may agree to a Thing ſpoken in his Abſence. As if one diſſeizes another to the Uſe of J. S. or ſurrenders to the Steward of J. S, for J. S. or gives Goods to J. S. in his Abſence, he may take the ſame by a ſubſequent Agreement. But a Diſagreement cannot be made in the Abſence of the Party as in [e] *Wheeler's* Caſe.

[e] Vide H. 14 H. 8. 17. b.

194. In Debt upon a Recovery in Treſpaſs, if the Plaintiff recovers in the Court where the Action of Debt is brought, pending a Writ of Error in the King's Bench upon the Treſpaſs, and after the Judgment given in Debt, the Judgment in Treſpaſs is reverſed, *quære* what Remedy he ſhall have for the Debt recovered, for this is a Recovery in the Common Bench, which he cannot reverſe in another Court, and although he might, yet ſeeing that Execution of the Debt is had, he cannot be reſtored to it by the Reverſal in the firſt Writ of Error upon the Treſpaſs.

195. After

195. After the Death of the Inteſtate A. gets Poſſeſſion of the Goods, and gives them to B. and afterwards is made Adminiſtrator, now he ſhall not take the Goods out of the Poſſeſſion of B. The Reaſon hereof is, that by the firſt Seizure he had the Goods to the Uſe of the Inteſtate, as the Law ſays, for he was chargeable as Executor of his own wrong, and ſo after the Adminiſtration committed he ſhall be ſaid to have them to the ſame Uſe, and therefore he has no other Capacity, for which Reaſon he cannot take them. But if J. S. wrongfully takes the Goods of K. and gives them to L. and afterwards K. makes J. S. his Executor, now he may take the Goods out of the Poſſeſſion of L. for he has another Capacity now than he had at the Time of giving them, viz. the Intereſt of another Perſon. As if a Diſſeizor makes a Feoffment, and afterwards intermarries with the Diſſeizee who is a Woman, now he may enter. But in the firſt Caſe if after the Adminiſtration committed A. had releaſed to a Debtor of the Inteſtate's, he ſhould have had an Action notwithſtanding his Releaſe, for of Things in Action he cannot gain Poſſeſſion, nor can he be ſaid Executor of ſuch Things, but only of thoſe which a Man may ſeize, as Goods, or into which he may enter, as a Leaſe for Years. But if there was a Leaſe to commence at *Eaſter*, and before the Day A. had granted the Term over, and afterwards, and before *Eaſter* he had taken the Adminiſtration, and afterwards had granted it to another, the ſecond Grantee ſhould have enjoyed it. So if a Rent-Charge had been granted for Years to the Inteſtate, and A. had compelled the Tenant by Coercion of Diſtreſs to pay it to him, and he had granted it over, and afterwards had taken the Adminiſtration, there he ſhould have avoided his ſaid Grant, becauſe the Poſſeſſion which he had ſhall not be called the Poſſeſſion of the ſame Term, but it ſhall be called a Kind of voluntary Payment of the Tenant, and not a Payment to him of the Rent which was granted to the Inteſtate, for none can be ſaid to have it but only he who has Right to have it.

196. If the Tenant makes Reſcous to the Lord, and afterwards enfeoffs A. of one Parcel of the Tenancy, and B. of another Parcel, and dies, the Lord has no Remedy by Action for the Rent. If the Tenant makes Reſcous to the Lord, and he brings an Aſſize of the Seigniory, and afterwards the Tenant dies, leaving Iſſue two Daughters, who make Partition of the Land, the Lord has no Remedy for the Seigniory by Action.

197. A Man grants a Rent-Charge out of his Land to A. upon Condition, and afterwards the Grantor makes a Feoffment of the Land, and after that the Condition is broken, and the Rent is behind, and the Grantee diſtrains, and Reſcous is made, and he brings Aſſize, if the Condition is extinct by the Feoffment, ſeeing that the Feoffor cannot have the Land again, by the Breach of the Condition, in the ſame Manner as he might when the Grant was made, or who ſhall have Benefit of the Condition, is the Queſtion. But divers are of Opinion that if the Grant be upon Condition, and for the Non-performance the Rent ceaſes, there the Feoffee ſhall have the Benefit, for the Rent is extinguiſhed. As if a Man makes a Leaſe for Years upon Condition, and for the Breach of it that the Eſtate ſhall ceaſe, and he grants the Reverſion, and then the Condition is broken, the Grantee may enter. *Quære inde.* See *Richill*'s Caſe in *Littleton.*

198. A Leaſe is made to A. and B. for their Lives, and afterwards the Reverſion is granted to C. during the Lives of A. and B. they make Partition, A. dies, the Queſtion is if the firſt Leſſor or C. ſhall have A's Part after his Death. Firſt, it ſeems that the Grant of the Reverſion was good, for if the Tenants for Life had entered into Religion, C. ſhould have had the Land. *Note* the Reverſion paſſed, and the Tenant ſhall have the Rent as a Rent-Service, and he ſhall have Fealty by the paſſing of the Reverſion, and if the firſt Eſtate had been upon Condition to ceaſe, for which it had ceaſed, C. ſhould have had it during their Lives, wherefore, &c. Then, further, it ſeems that the Partition ſevered the Reverſion, for although by the firſt Grant he was intitled to have the Reverſion as long as either of them was alive, this was in Reſpect of the Jointure, and when that was ſevered, ſo was the Reverſion. So the firſt Leſſor ſhall have it again after the Death of the Tenant for Life, and not C. *Quære.* If a Leaſe is made for 20 Years, rendering Rent, and the Reverſion is granted for 10 Years, this is a good Grant, and he ſhall diſtrain for the Rent, *Nota.*

199. If a Feoffment is made to A. to the Uſe of B. in Fee, it was ſaid that the Wife of A. ſhall be endowed, for the Land cannot be in Abeyance but in Reſpect that it veſts in A. For it is not like to the Caſe where before the Statute *Ceſtuy que Uſe* entered, and made a Feoffment, becauſe there he had no Poſſeſſion, but only a Power to make a Feoffment, as an Attorney, or as he who is appointed by Will to ſell the Land; but now the Feoffee has Poſſeſſion. For if one who is attainted of Felony is enfeoffed to the Uſe of another, the Poſſeſſion ſhall never veſt in the other, foraſmuch as it is once ſettled in him, and cannot be deveſted out of him who is attainted, all whoſe Lands veſted eſcheat. But yet he who is ſo attainted may be Attorney, ſo is the Diverſity. And if he who has Land on the Part of his Mother makes a Feoffment to the Uſe of the Feoffor, it ſhall reſort to the Heir on the Part of the Father, if he dies without Iſſue.

200. If a Man makes a Feoffment upon Condition, and the Feoffee makes a Leaſe for Life, and dies, ſo that the Reverſion deſcends to the Feoffor, if the Condition is extinct, is the Queſtion.

201. If Goods ſtolen are ſold *bona fide* in Market-overt, and the Vendor afterwards buys them again, the firſt Owner cannot take them, for by the firſt Sale the Property was clearly gone for ever, inaſmuch as it was without Covin, for he could not have an Action for them then. But if the Diſſeizor comes to the Poſſeſſion again after a Deſcent, the Entry of the Diſſeizee is revived, for an Action remained to him after the Deſcent, for he might have a Writ of Right, or a Writ of Entry, ſo note the Diverſity. So if a Feoffee to Uſe upon Condition enfeoffs a Stranger ignorant

ignorant of the Uſe, who re-enfeoffs him, he ſhall not be ſeized to the firſt Uſe, for the Uſe was extinct by the Feoffment to the Stranger, inaſmuch as no *Subpœna* lay againſt him, and the Feoffee ſhall be in the ſame Courſe. So if the Tenant enfeoffs a Stranger by Covin to enfeoff his Heir, and he makes a Feoffment over upon Conſideration *bona fide*, and the Tenant dies; and afterwards the firſt Feoffee is re enfeoffed, now the Lord ſhall not aver Colluſion, as it is ſaid in 33 *H.* 6. 15. for inaſmuch as a Writ of Right of Ward was not maintenable againſt the Feoffee *bona fide*, it ſhall not be maintenable againſt the other, for the Covin ought to purſue, and ſhall not be revived. But if a Stranger had made the Feoffment upon Condition, or the Sale of the Goods; or if the Feoffment by *Ceſtuy que Uſe* had been upon Condition, and a Re-Entry had been made for the Breach of it, there the Property, Uſe, and Covin ſhould have been revived. But if a Baſtard dies ſeized, having Iſſue, who endows his Mother, there the *Mulier* may enter, and yet he had no Action nor other Remedy before the Endowment, but the Wife is endowed upon an elder Title, and ſo the Right is revived, ſo that it differs from the other Caſes. And if the Diſſeizee enters upon a Deſcent, and dies ſeized, and his Heir enters; now the other has no Remedy, but if the Heir endows his Mother, the Entry of him who was in by Deſcent is revived, *cauſa qua ſupra.* If one diſſeizes another to the Uſe of J. S. and makes a Feoffment *bona fide*, and takes back an Eſtate, he ſhall not be ſeized to the firſt Uſe.

202. Land is given to two Women *quamdiu ſimul vixerint*, Remainder to the right Heirs of her who dies firſt, one of them takes Huſband, and has Iſſue, and dies, it ſeems that the Huſband ſhall not be Tenant by the Curteſy, for ſhe had not the ſole Poſſeſſion. Further, it ſeems that the Remainder is good, notwithſtanding the Incertainty. But if this Remainder ſhall be Aſſets in a *Formedon*, or in Debt againſt the Heir, is the Queſtion. And it ſeems that it ſhall not; for the Remainder was never in the Mother becauſe it commenced by the Death of the Mother, ſo that the Death preceded the Remainder, and at the ſame Inſtant that the Death happened, the Remainder alſo happened, ſo that it never veſted in the Mother. * As if a Leaſe is made for Life, upon Condition that if the Leſſee does ſuch an Act he ſhall have Fee, now the Condition precedes the Performance which veſts the Fee. So the Death veſts the Fee in the principal Caſe. And it is not like the Grant of a Rent-Charge in Fee to J. S. to commence after his Death, for there the Heir ſhall have it by Deſcent, although the Anceſtor could never take it. And if one grants a Rent-Seck to A. for Life, and afterwards by another Deed grants that he and his Heirs ſhall diſtrain for the Rent, now during the Life of the Grantee the Rent is ſeck, although he may diſtrain for it, but the Heir ſhall have it as a Rent-Charge, and that by Deſcent. * Plowd. 41.

203. Mortgagee makes a Feoffment in Mortgage to the Heir of the Mortgagor to be firſt paid, after the firſt Day the firſt Mortgagor dies, the Heir tenders the Money to the firſt Mortgagee at the Day, and he refuſes, and he tenders the Money to the Heir, &c. at the Day, and he refuſes, the firſt Mortgagee enters, and the other ouſts him, and he brings Aſſize, it ſeems not to be maintenable. Firſt, it ſeems that the Son may perform the Condition, for it is not ſuſpended, inaſmuch as it is a collateral Condition; ſee for this the Caſe of the Corody in 21 *Ed.* 4. Then, it ſeems, the Payment ought to be made to the Mortgagee, notwithſtanding he has made a Feoffment of the Land, as it ſhould be to the Executors, and not to the Heir, and 17 *Ed.* 3. 2. is not Law. Further, upon the firſt Refuſal the Heir is not remitted, for he ſhall not be remitted upon a Title, but if he had taken an Eſtate only for Life or for Years, he ſhould have had it in Fee, which ſee 20 *Ed.* 4. But the chief Point is, when the Mortgagee has entered upon the Son, as he may, if the Son may enter upon him for the firſt Condition broken. And it ſeems that he may, for if the Tenant enfeoffs the Heir of the Lord upon Condition, and the Lord dies, and afterwards the Condition is broken, and an Entry made, the Seigniory is revived. So ſhall the Condition here be. So if the Diſſeizor enfeoffs the Heir of the Diſſeizee upon Condition, and the Diſſeizee dies, and the Condition is broken, and afterwards the Diſſeizor enters as he may, now the Heir may enter upon him, becauſe the Right ſhall be revived, otherwiſe it is, if the Diſſeizee had releaſed to his Heir, for there the Right is extinct, and not revived by the Entry of the Diſſeizor. But in the principal Caſe if the Condition upon the ſecond Feoffment had been that the Son ſhould not do ſuch an Act, and the Condition had been broken by him, it ſhould have been otherwiſe, as it ſeems, becauſe it was the Act of the Son himſelf, for this ſhould not abate a *Præcipe* brought againſt him, where an Entry is made for the Condition broken.

204. [a] If a Man takes a Wife, and ſells his Land, and afterwards the Wife comes to the Age of nine Years, and the Huſband dies, it ſeems that ſhe ſhall have Dower of the Land, notwithſtanding the Huſband had no Poſſeſſion of it after ſhe was of the Age of nine Years. [b] For if the Huſband aliens his Land, and afterwards the Wife is attainted of Felony, and after that has a Charter of Pardon, and the Huſband dies, ſhe ſhall have Dower. And if the Wife elopes, and afterwards the Huſband purchaſes Land, and aliens it, and afterwards the Wife is reconciled, and the Huſband dies, ſhe ſhall have Dower, and yet at the Time of the Alienation ſhe was barrable, but her Title was not conſummate until the Death of the Huſband, and then lawful Poſſeſſion, and Eſpowſals, and the Death make her Dower. [c] But if a Man takes an Alien to Wife, and afterwards aliens his Land, and then ſhe is made a Denizen, and the Huſband dies, ſhe ſhall not be endowed. *Quære.*

[a] S. P. Co. Litt. 33. a.

[b] S. P. Co. Litt. 33. a.

[c] S. P, Co. Litt. 33. a. Poſt § 371.

205. Upon a Plea in Bar of Aſſize the Parties are adjourned, and afterwards the Tenant pleads a Releaſe made after the laſt Continuance bearing Date in a foreign County, and afterwards at the Return of the *Venire facias* the Tenant pleads that after the laſt Continuance he had purchaſed the Manor to which the Plaintiff is a Villain, he ſhall not have this Plea, for he ſhall not delay the Plaintiff but by one Plea or Matter in Deed happening of late Time, and he ſuffers no Miſchief thereby if he is ſure that his Plea is true: But in ſhewing of a Record he ſhall afterwards plead,

if they are in the ſame Court, ſo that the Plaintiff ſhall not be delayed by ſhewing of them; and here the Villain ſhall not be infranchiſed, for the Plea was pleaded before he ought to maintain it; but if he anſwers, his Villain *de novo*, thereby he ſhall be infranchiſed.

206. A Man makes a Leaſe for Life, rendering Rent in Fee, and afterwards grants the Reverſion with Attornment, and reſerves the Rent in Fee, and dies, the Rent is extinguiſhed, for it cannot deſcend, inaſmuch as it is reſerved upon an Eſtate but for Life. So if Tenant in Tail of Rent grants it in Fee, this is no Diſcontinuance to the Heir of the Grantee, for it was but granted during the Life of the Grantor.

207. If two Acres in ſeveral Counties are held by one entire Rent, no *Ceſſavit* lies, for it cannot be brought but upon the entire Tenure, and for the whole Land out of which the entire iſſues. So *Note* that after Ceſſer if the Tenant makes a Gift in Tail of Parcel, no *Ceſſavit* lies, for although the Seigniory is now ſevered, yet he ſhall not have a *Ceſſavit*, becauſe he cannot ſuppoſe the Ceſſer in the one only, for they two ceſſed, and he cannot have a *Ceſſavit* in the Degrees. But if a Tenant of two Acres ceſſes, and afterwards makes a Feoffment of one of the Acres, yet a *Ceſſavit* remains for the Acre in his Poſſeſſion, for he alone ceſſed in that Acre: But *Quære*, for the Seigniory is now divided, and he cannot ſuppoſe that he holds the Acre of him by any certain Rent.

208. If a Feme-Tenant in a *Præcipe quod reddat* takes Huſband pending the Writ, all the Reſidue of the Pleading and of the Proceſs, as the *Grand Cape*, ſhall be awarded againſt the Wife only. But it ſeems that ſhe ſhall not bind the Vouchee to Warranty, for the *Summoneas ad warrantizandum* is a new original, and the Vouchee is a Stranger to the firſt Original, and therefore he may ſay that ſhe is a Feme-Covert, but her Recovery by the Warranty ſhall be by *Warrantia Chartæ*. But if a Reverſion is granted to a Woman, who takes Huſband, he ſhall join with his Wife in a *Quid juris clamat*, as it ſeems in 11 *H.* 4. for that does not iſſue out of an original Writ, as in the principal Caſe.

209. If Attornment be made upon Condition, which is broken by the Grantee upon Condition, yet the Reverſion is not deveſted, for the Aſſent cannot be [a] conditional, becauſe he does not claim the Reverſion from him who attorns, but from the Grantor, and it cannot be made conditional by the Act of a Stranger to the Grant. For if Tenant in Tail makes a Leaſe for Years, rendering Rent, and the Iſſue accepts the Rent, upon Condition that it ſhall be no Prejudice or Hindrance to his Entry to avoid the Leaſe, yet he ſhall never defeat the Leaſe, for the Aſſent is a Thing executed, which will not admit of any Condition to be performed or broken by any Act to come, [b] but if the Condition precedes the Aſſent, and the Aſſent is ſubſequent, then the Condition is good, but if the Aſſent precedes, and the Condition follows, the Condition is void, becauſe it is the Nature of the Aſſent to be executed. And therefore if a Woman Tenant for Life takes Huſband, who attorns to the Grantee of the Reverſion, and afterwards they are divorced, yet the Attornment ſhall bind the Wife. And if Feoffee upon Condition attorns to the Grantee of a Seigniory, and the Feoffor enters for the Condition broken, yet the Attornment ſhall bind him. And as the Law ſays that the Attornment of the Feoffee upon Condition ſhall not be avoided by the Condition, ſo for the ſame Reaſon the Law ſays that an Attornment upon Condition ſhall not be deſtroyed by the Condition. [c] But a Releaſe of a Right may be upon Condition, as a Seigniory may be releaſed to the Tenant upon Condition, and ſo one Jointenant may releaſe to his Companion upon Condition, for there the Thing veſted in his Perſon is deveſted, to which a Condition may be annexed; but not ſo of an Aſſent. And if the Patron aſſents upon Condition to the Charge of the Parſon, this is a good Condition, becauſe the Aſſent is an Intereſt in Law, for if he had but the Patronage in Tail, for Life, or upon Condition, and his Eſtate in the Patronage is avoided, the Aſſent is void as to the ſecond Patron. And if the *Mulier* attorns to the Grantee of the Seigniory, although the Baſtard dies ſeized, ſo that the *Mulier* ſhall never be Heir, yet the Attornment remains good. So an Attornment by a Deviſee, or by him to whom a Remainder is appointed, remains good, notwithſtanding they afterwards diſagree to the Eſtate, and yet it ſhall never be called a Tenancy. If the Reverſion of Tenant in Tail, or of Tenant for Life with Remainder for Life, is granted, and the Iſſue in Tail, or he in Remainder for Life, attorns, having nothing but this Poſſeſſion in Law, it is void, as it ſeems. And in the Caſe of the Deviſee and Remainder-Man, they have but a Poſſeſſion in Law, for they have not Poſſeſſion in Deed before their Entry, and conſequently he in Reverſion has not Poſſeſſion in Deed of the Reverſion, but Poſſeſſion in Law. And alſo in one of the Caſes the Grantee had a Reverſion depending upon the Eſtates of two Tenants for Life, which is altered when one of them is dead. But he who has only a Poſſeſſion in Law may attorn to the Grantee of a Seigniory well enough, for no other can attorn but he who was Tenant at the Time of the Grant, as *Quintin*'s Caſe is in [d] 26 *Aſſ.* And ſo note the Diverſity.

[a] That an Attornment cannot be upon Condition, Co. Litt. 274. b. 1 Rol. Abr. 412. M. 5 Co. 81. a. b.

[b] Co. Litt. 274. b.

[c] Co. Litt. 274. b.

[d] 26 Aſſ. pl. 38.

210. Before the Statute of *Quia emptores terrarum* a Man makes a Feoffment of an Acre, to hold of two Manors which the Feoffor has, after the Statute he enfeoffs A. of the one Manor, and B. of the other, the Tenant dies, his Heir being within Age, who ſhall have the Wardſhip of him is the Queſtion. And firſt it is to be conſidered if the Tenant ſhall hold the one Moiety of the one, and the other of the other, or if he ſhall hold ſeverally the Parcels of Land, and if the Rent ſhall be apportioned, *viz.* the one to have ſo much, and the other ſo much. (But it ſeems that there is no Apportionment by the Grant of the Seigniory, but only by the Feoffment of the Tenancy). And it ſeems here that he ſhall hold by Moieties, and then there is no Priority. It was ſaid that if a Woman be endowed of a Villain in groſs, and afterwards the Tenant in Dower and the Heir enter together into Land purchaſed by the Villain, it is good to be conſi-

dered in whom the Freehold ſhall be. *Note* the Caſe of * 21 *R.* 2. of Diſtreſs by two ſeverally of one Horſe for Damage-feaſant and for Rent, where both Avowries abated. So if he had been a Villain to an Abbot and a ſecular Man, for his entire Body is an entire Villain to each of them, for each ſhall diſable him in any Action. So ſhall the Heir and the Tenant in Dower be. But in the firſt Caſe if he had not made a Feoffment of the ſaid Manors, but had died ſeized of them, having two Daughters and Heirs, and one of them had been in Ward, or if they two had been in Ward, and the Lord had committed the one Manor to one, and the other Manor to another, and then the Tenant had died, his Heir being within Age, *quære* which ſhould be prefer'd. And if the Grantee for Life of a Villain and he in Reverſion enter into Land purchaſed by the Villain, it ſeems to me that the Tenant for Life ſhall gain the whole, but many think that he in Reverſion in an Action ſhall diſable him.

* P. 21 R 2. Fitz. Avowry 262. Bellew's C. 58. Ante § 190. and the other Books there cited in the Margin.

211 If there is a Leaſe for Life, Remainder for Years, and he in Remainder releaſes all his Right in the Land to the Tenant for Life, the Years are extinct, but if the Releaſe is, to have and to hold the Land to him during the Years, then the Years are in *eſſe*. As if a Man makes a Leaſe for Life, and afterwards releaſes to the Tenant for Life, to have and to hold the Land to him for 40 Years after the Leaſe for Life ended, he ſhall have it as the Words are. And if a Man leaſes Land to J. for Life and 20 Years over, it ſeems that he ſhall have the Years, notwithſtanding Livery of the Land is not made. And ſome ſay that a Releaſe of Tenant for Years to the Leſſor extinguiſhes the Term, otherwiſe of a Releaſe of Tenant for Life, as if Tenant for Years being ejected releaſes to the Diſſeizor, the Leſſor may enter, otherwiſe of the Releaſe of Tenant for Life. And if a Man makes a Leaſe for Years to commence at *Eaſter*, and before *Eaſter* he releaſes all his Right to the Leſſor, the Years ſhall be extinct in the Land, as in the principal Caſe. And if a Man makes a Leaſe for 20 Years without Impeachment of Waſt, and afterwards confirms it for 40 Years, the Leſſee ſhall be diſpuniſhable of Waſt for 20 Years. And if a Woman has a Leaſe for 20 Years, and the Leſſor confirms it to the Huſband for 40 Years, who dies, ſhe ſhall have the Reſidue of the 20 Years, *quod nota*.

212. If the Diſſeizor makes a Gift in Tail or a Leaſe for Life to J. S. to whom the Diſſeizee confirms, yet after the Eſtate is determined he ſhall enter upon him in Reverſion, for that Eſtate only was fortified; but if the Confirmation was only to the Diſſeizor who was in the Reverſion, he ſhould not enter upon the particular Tenant, any more than if a Warranty had been made to him in Reverſion, and it had deſcended, in which Caſe he ſhould not have entered upon the particular Tenant. But if the Diſſeizor had given the Land to A. and B. and to the Heirs of B. and the Diſſeizee had confirmed the Eſtate of A. *quære* in that Caſe? but it ſeems clearly that if he had confirmed the Eſtate of B. he ſhould never have entered upon the Heir of B. but the Eſtate which A. had was but for Life only, and therefore perhaps it ſhall not go beyond it, but where the Confirmation is made to B. it ſeems to be otherwiſe. For if the Diſſeizor gives Land to C. in Tail, the Remainder to the right Heirs of C. and the Diſſeizee confirms the Eſtate-Tail to C. this goes alſo to the Fee clearly. And if the Diſſeizor gives Land to A. for Life, Remainder to B. for Life, Remainder to A. in Fee, and the Diſſeizee confirms the Eſtate for Life to A. only, *quære* there.

213. If the Huſband has a Term of 50 Years in Right of his Wife, and grants to a Stranger all the Years which remain after the Death of him and his Wife, if this Grant is good is the Queſtion.

214. If I diſſeize one to the Uſe of me and J. S. who afterwards agrees to it, we are Jointenants, ſo that by the Agreement the Moiety ſhall be in him, *&c.* And this is proved by the Caſe of 21 *Aſſ. pl.* 49. where the one Siſter in Tail entered upon the Diſcontinuee of her Father, claiming to herſelf and to her Siſter, and the Diſcontinuee ouſted her, and ſhe recovered in Aſſize againſt him, and it was there adjudged that the other Siſter ſhould have the Moiety by her Agreement. But if I diſſeize one to the Uſe of A. after 20 *l.* levied by me of the Profits of the Land, or to the Uſe of myſelf for Life, and afterwards to the Uſe of A. in Fee, or to the Uſe of A. for Life, and afterwards to the Uſe of myſelf in Fee, there he ſhall have nothing by his Agreement, becauſe I cannot apportion the Wrong ſo, for he ought to have the whole Eſtate or nothing in the Part appointed. And if the Diſſeizin was to the Uſe of A. if he pays me 20 *l.* it ſeems that the Condition is good, for the Eſtate is not divided. And ſo if the Condition was, to the Uſe of A. if he will agree to it, this is a good Condition. And if I diſſeize my Tenant for Life to the Uſe of J. S. he ſhall have but a Freehold by his Agreement. And it was ſaid that if the Iſſue in Tail within Age by Covin commands A. to diſſeize the Diſcontinuee of his Father, and A. diſſeizes him to the Uſe of B. for Life, and afterwards to the Uſe of his own Right Heir, and B. agrees, and A. dies, and B. dies, and the Heir of A. enters, and enfeoffs the Iſſue in Tail, he is remitted, becauſe he is now within Age.

215. The Huſband is bound in a Statute-Merchant, and afterwards he and the Wife levy a Fine of the Land of the Wife to J. S. and the Huſband dies, Execution of the Statute ſhall not be made in the Land in the Hands of J. S. becauſe nothing paſſed from the Huſband but the Eſtate which the Huſband had during the Coverture, which is determined by his Death, and J. S. ſhall have the like Benefit as the Heir ſhould have, or as he himſelf ſhould have had if the Wife had been diſcovert, and had granted the Land, for it is lawful for a Feme-covert to grant her Eſtate by Fine, and then if the Grantee ſhall not have the ſame Advantage as the Wife herſelf ſhould have, it would be againſt Reaſon. But if the Huſband had made a Leaſe for Years, or had granted a Rent-Charge in Fee before the Grant to J. S. J. S. ſhould never have avoided the Term nor the Charge, any more than if the Land had been in Execution, for there the Thing is executed, and veſts at the Time of the Grant of the Land to J. S. in ſuch Manner and Degree as the Act is, for J. S. ſhall ever be ſaid to be in in the *Per* by the Huſband

and Wife, and the Death of the Huſband does not alter it, for the Degree of the Act was given and veſted at the ſame Inſtant, and the Title was executed, but the Execution, *ut ſupra*, is executory. And if Tenant for Life and he in the Reverſion give the Land by Fine to A. this ſhall be liable to a Statute made by the Tenant for Life, during his Life only, and ſhall never be liable to a Statute made by him in Reverſion, for notwithſtanding the Words of the Fine are joint, yet he may confeſs and avoid them by ſhewing the Truth of the Matter. So in the principal Caſe he may ſhew that the Eſtate on the Part of the Huſband was during the Coverture only, and altho' the Huſband had the Fee in Right of his Wife, yet the Fee ſhall not be ſaid to paſs from him longer than during the Coverture, for the Law annexes ſuch a Condition to his Eſtate, &c. And if the Huſband and Wife accept a Fine of the Wife's Land from B. *ſur conuſance de droit come ceo*, &c. and render back to him in Tail, yet the Reverſion is in the Wife only, and the Huſband has nothing but by Reaſon of the Coverture, *et Vide diligenter* 40 *Aſſ. pl.* 4. And *Note*, if Tenant in Tail makes a Leaſe for Years to commence at *Eaſter*, rendring Rent, and dies, and the Iſſue in Tail enters, and makes a Feoffment before *Eaſter*, many are of Opinion that the Feoffee ſhall never avoid the Leaſe, becauſe the Leaſe was not avoided by the Entry of the Iſſue, for the Acceptance of the Rent affirmed the Leaſe, but the Leaſe was voidable, wherefore, *&c.* So if Huſband and Wife make a Leaſe to commence at a Day to come, and before the Time the Huſband dies, and the Wife makes a Feoffment, the Feoffee ſhall not avoid it, *cauſa qua ſupra*. So if an Infant makes a Leaſe *ut ſupra*, and before the Time he being within Age or at full Age makes a Feoffment, the Feoffee ſhall never avoid the Leaſe, *&c.* But many others are of a contrary Opinion, for they ſay that an Infant, or the Iſſue in Tail, by his own Act, or by the Act of the Anceſtor, ſhall not have any thing executory againſt him, for if he does not avoid it by his Poſſeſſion before the Commencement of the Term, he has no Means to avoid it, *&c.* before, *&c.* But it is clear enough that if Tenant in Tail dies after he has diſcontinued, and the Diſcontinuee makes a Leaſe for Years to commence, *&c.* and dies, the Heir in Tail being his Heir, who enters, and makes a Feoffment, there the Leaſe is avoided, becauſe the Iſſue is remitted, and has another Eſtate than the Diſcontinuee had, and not any Privity of that Eſtate which is avoided, *&c.*

[a] See the whole of this Section accord, Co. Litt. 102. a. b. And ſee 2 Bac. Abr. 362.

216. [a] Upon a Judgment in Debt Execution ſhall only be had of the Land which the Party has at the Time of the Judgment given, and not of that which he has at the Day of the Writ purchaſed. So in Caſe of an Amercement of the Plaintiff for a Nonſuit, the Land which he has at that Time ſhall only be charged, and not the Land which he had when he found Pledges, by 22 *Aſſ. pl.* 32. But in Debt againſt the Heir, if he aliens pending the Writ, this ſhall be liable to Execution, altho' the Alienation was before the Judgment, for there the Action was brought againſt him in Conſideration of the Land. So Iſſues ſhall be levied againſt the Feoffee of a Juror, altho' the Alienation was before the Iſſues forfeited, for he was ſworn in Reſpect and by Reaſon of the Land. But in the firſt Caſe the Action was brought in Reſpect of the Perſon, and not in Reſpect of the Land, and ſo it is not like to the other Caſes. *Note* the Diverſity.

217. If a Man makes a Gift in Tail, upon Condition that the Donee ſhall make a Feoffment in Fee to J. S. and he accordingly does ſo, yet the Iſſue ſhall have a *Formedon*, for if he had not performed the Condition, the Donor could not have entered, but when he has performed it, yet the Condition ſhall not defeat the Eſtate of the Iſſue, *&c.* And if a Man makes a Leaſe for Life, upon Condition that the Leſſee ſhall make a Feoffment to J. S. and he accordingly does ſo, the Leſſor may enter for the Condition in Law, *viz.* for the Forfeiture. So if the Leaſe had been upon Condition that he might make a Feoffment, it had been all one. If a Man enfeoffs an Infant, upon Condition that he enfeoffs another, and he does ſo, yet the Infant may afterwards enter and hold in Fee, for he has performed the Condition.

218. If Tenant in Tail makes a Leaſe for the Life of the Leſſee, and afterwards diſſeizes him, and makes a Feoffment in Fee, and the Leſſee dies, and afterwards the Tenant in Tail dies, this ſeems to be no Diſcontinuance, becauſe the Fee was not executed by lawful Means. As if Tenant in Tail makes a Leaſe for Life, and afterwards grants the Reverſion, and the Grantee diſſeizes the Tenant for Life, and the Tenant for Life dies, and afterwards the Tenant in Tail dies, this is no Diſcontinuance, for the Fee was not executed according to the Grant, any more than in the Caſe in *Littleton* of the Eſcheat of the Grantee. But withont Doubt if Tenant in Tail makes a Leaſe for his own Life, and afterwards diſſeizes the Tenant for Life, and makes a Feoffment, this is no Diſcontinuance, for by the Diſſeizin he was ſeized in Fee, and he diveſted the Fee out of the Donor, and then he was not Tenant in Tail, and conſequently there was no Diſcontinuance. And it ſeems that the firſt Caſes are more clear, if the Tenant in Tail dies in the Life of the Leſſee for Life. If Tenant in Tail makes a Leaſe for the Life of the Leſſee, who is diſſeized, and the Tenant in Tail releaſes to the Diſſeizor without Warranty, and the Tenant for Life dies, and afterwards the Tenant in Tail dies, this is a Diſcontinuance in Fee, becauſe the Diſſeizor had the ſame Fee executed in the Life of the Tenant in Tail which was firſt made, as if he had releaſed after the Death of the Tenant for Life, in which Caſe it would have countervailed an Entry and Feoffment, by *Anthony Brown*. But *quære*, and ſee *Littleton* to the contrary in the laſt Caſe.

[b] S. P. Co. Litt. 13. a.

219. [b] If there are Grandfather, Father, and Son, and the Father is attainted of Treaſon, and dies, and afterwards the Grandfather dies ſeized of Land, the Lord of whom the Land is held ſhall have it by Eſcheat, and not the King, becauſe the Father had it not at the Time of the Attainder, and inaſmuch as the Grandfather died without Heir, the Land ſhall eſcheat. So if the Father is attainted of Treaſon, and the Grandfather dies in the Life of the Father, it ſhall eſcheat to the Lord of whom, *&c.* and the King ſhall not have it.

220. If

220. If there are two Jointenants for Life, and one of them makes a Leaſe for 20 Years, and dies, the other, who has the Freehold by Survivorſhip, ſhall not ouſt the Leſſee, becauſe the ſame Eſtate which the Leſſor had continues now, and there is no Difference between this Caſe and if they were Jointenants in Fee, for there the Eſtate is determined in the Leſſor, and continues in the Survivor, and ſo it does in the other Caſe. But many are of Opinion to the contrary, becauſe in the one Caſe the Survivor has the Eſtate in Fee of his Companion, but here the Survivor has not the Freehold of his Companion, *viz.* the Leaſe for the Life of him who is dead, but for his own Life, for by the Death of his Companion his Freehold is determined, but the Fee which he had yet remains. But all agree that if a Leaſe is made to A. and B. for the Life of C. and A. makes a Leaſe for Years, and dies, B. ſhall not ouſt the Leſſee, becauſe the Eſtate which he had continues.

221. If a Man makes ſeveral Teſtaments of ſeveral Dates, and dies, and the Executor of the laſt Teſtament refuſes before the Ordinary, yet the firſt Teſtament is clearly annulled, and yet the Refuſal is peremptory. But it is not ſo where one Executor refuſes, and his Companion proves the Teſtament, for the Probate by him is ſufficient for both. And the Reaſon of it's being annulled is the Intent of the Teſtator, for altho' by the Refuſal the ſecond Teſtament is as it were null, yet the Intent is apparent. And if an Executor releaſes a Debt due to the Teſtator, this is an Adminiſtration in Law, but if afterwards he avoids the Releaſe becauſe he was unletter'd, and it was read to him in other Form, then he may refuſe, for the Reaſon why he has accepted the Adminiſtration is void, and ſo *nihil operatur*. But in the firſt Caſe altho' the Cauſe of the firſt Teſtament's being annulled is avoided, yet the Intent of the Teſtator is not avoided, and the ſecond Teſtament was a Teſtament before the Refuſal, for which Reaſon it was ſufficient to avoid the firſt Teſtament. And if a Man makes a Letter of Attorney to A. to deliver Seizin, and afterwards makes another Letter of Attorney to B. to deliver Seizin, and B. dies before Livery, yet the firſt Power is determined. If a Man makes a Leaſe at Will, and afterwards makes a Feoffment by Deed, and Livery is not made, yet his Will is determined in Deed, altho' the Leaſe is not avoided, and he ſhall have an Action of Treſpaſs againſt the Leſſee for the Occupation afterwards. If a Woman makes a Letter of Attorney to deliver Seizin, and afterwards ſhe takes Huſband, and he dies, the Attorney cannot make Livery, for the taking Huſband was a Countermand. [a] And if a Woman makes a Teſtament, and afterwards takes Huſband, who dies, *quære* if this be a Countermand of the Teſtament?

[a] See S. P. put by *Manwood* in the Negative, Plowd. 343 (c).

222. If a Feme-Covert is enfeoffed, the Huſband being beyond Sea, who returns, and diſagrees to the Feoffment, yet before Entry made the Freehold ſhall not be diveſted, but the Feoffor may enter; but if the Huſband dies before his Entry, then is the Wife remitted, and the Title of Entry, which the Feoffor had, is taken away, ſo that now he ſhall not avoid the Eſtate.

223. If a Man ſeized of the Manor of *Dale* grants a Rent-Charge out of it, provided that the Grantee ſhall not charge the Manor, this is good, for he may charge the Perſon; but if the *Proviſo* was, that he ſhall not charge ſuch Parcel of the Manor, that is a void *Proviſo*, for the *Proviſo* ought to diſcharge his Perſon or the whole Land charged. But others are of a contrary Opinion, and ſay that true it is if the Grant be out of Acres, he ſhall not diſcharge Part of them, but otherwiſe it is if the Grant be out of a Manor. [b] For a Feoffment of a Manor, except an Acre, is good, [c] but if a Feoffment be made of 20 Acres, except one, it is a void Exception. But if the *Proviſo* was, that he ſhall not charge the Manor, nor any Thing but 20 Acres only of the Demeſns, that ſhould be a void *Proviſo*, for it diſcharges the groſs Name of the Manor. So if Rent is granted out of a Manor, *percipiendum* in two Acres of it, this Limitation does not diſcharge the Manor. 17 *Aſſ. pl.* 10. A Leaſe was made of Land and Wood for Life, rendring 20*s.* Rent, *viz.* 10*s.* for the Land, and 10*s.* for the Wood, and by this Declaration the Rents were ſeveral.

[b] S. P. Dy. 264. b. Margine. Co. Litt. 47. a.

[c] S. P. Plowd. 153 (c).

224. If a Man makes a Leaſe for Life, upon Condition that if the Leſſee does ſuch an Act he ſhall have Fee, and he warrants the Land *in forma prædicta*, now this Warranty extends to the Fee, but if the Feoffor dies, and afterwards the Condition is performed, then if the Warranty is available is the Queſtion, inaſmuch as the Leſſor was not bound to warrant during his Life, and then the Warranty which was annexed to the Freehold is gone, ſeeing that the greater Eſtate merges the leſſer, *viz.* the Freehold, and ſo diſcharges it of the Warranty. For if a Man deviſes Land with Warranty, this Warranty is void, inaſmuch as the Deviſor was not bound to the Warranty during his Life. And to prove that the greater ſhall merge the Warranty, it was ſaid that if Tenant in Tail be with Warranty to him his Heirs and Aſſigns, his Feoffee in Fee ſhall not be ſaid Aſſignee, nor ſhall vouch, becauſe he has no Part of the Eſtate-Tail. Alſo it was ſaid that in the firſt Caſe if the Condition had been performed in the Life of the Leſſor, the Warranty ſhould not extend to it, for it cannot be annexed to any Thing but to that which is in Poſſeſſion. But a Leaſe for Years upon Condition to have Freehold diſpuniſhable of Waſt ſhall make the Leaſe diſpuniſhable of Waſt, for that may commence by Parol without Deed, as it is ſaid in 5 *Ed.* 3. Others take a Diverſity, *viz.* where a Leaſe is made for Years upon Condition to have Fee, the Warranty *in forma prædicta* does not extend to the Fee when it is performed, becauſe the firſt Eſtate was but for Years, and of another Nature than a Freehold, but if it was an Eſtate for Life, it ſhould be otherwiſe, and ſo there ſeems to be a good Diverſity, for in the one Caſe he ſhall only have an Action of Covenant upon the Warranty. And it was ſaid that if a Man makes a Leaſe for Years, Remainder in Fee with Warranty, he in Remainder ſhall not take Advantage of the Warranty, becauſe he is not privy to the firſt Deed, and then he ſhall not take it as an immediate Warranty, becauſe the firſt Eſtate was of another Nature. And *Note* that this Caſe was put at Lecture, *viz.* the Reverſion deſcends to Huſband and Wife Leſſees for Life, as to the Iſſues of two Parceners (as it way well enough), and the Huſband dies, the Wife

ſhall

ſhall have the entire Freehold as Survivor, and the Fee ſhall be executed for the Moiety, becauſe the other Moiety goes another Way, *viz.* to the Heir of the Huſband, and he ſhall deraign the Warranty annexed in Deed to the firſt Eſtate for the Moiety, and not for the other Moiety, becauſe the Fee is executed, and ſo the Eſtate of Freehold is merged, and conſequently he is in of another Eſtate. As if Parceners after Partition make a Feoffment, and take back an Eſtate in Fee, the one ſhall not have Aid, nor recover *pro rata*, becauſe ſhe is in of another Eſtate, for if ſhe recovers in Value of that Moiety, it ſhall be in Fee-Simple, for ſhe has not now an Eſtate for Life in poſſeſſion, and the Fee was not warranted, wherefore, *&c.* If Land is bargained and ſold by Indenture in Fee with Warranty, and the Indenture is delivered, and afterwards it is inrolled within ſix Months, it was moved whether or no he ſhould vouch, becauſe it is the Nature of a Covenant to take Effect preſently by the Delivery of the Deed, and then the Warranty was void, for that the Land did not paſs at that Inſtant, and altho' the Inrollment ſhall make the Land to paſs by Relation from the Beginning, yet it ſhall not make a void Warranty to be good: To which it was ſaid that if one makes a Feoffment with a Letter of Attorney, and there is a Warranty in the Deed, by the Livery the Warranty ſhall be good, and yet the Deed was delivered before.

225. A. being ſeized in Fee of three Acres of Land, *viz.* of two Acres at the Common Law, and of the third in Borough-Engliſh, gives one of the two Acres to a Stranger in Tail, and dies, the Donee is impleaded, and vouches to Warranty the eldeſt Son, and recovers in Value the ſaid Acre out of his Poſſeſſion, (as he ſhall do in this Caſe, foraſmuch as he vouches him alone, and not the youngeſt Son, where the eldeſt has Aſſets) the Queſtion is, if he being impleaded of the Acre which he has recovered ſhall vouch the eldeſt and the youngeſt Son; and if the Acre in Borough-Engliſh ſhall be liable by the ſaid Warranty in Law, ſeeing it is not the Warranty which deſcends, *viz.* the Reverſion which the Father made, but the Warranty in Law commenced firſt in the eldeſt Son, for altho' the Recovery in Value ſhall be deemed in lieu of the firſt Land given, yet this is always to be intended (having Regard to the Eſtate of the Reverſion deſcended from the Father) the Reverſion left in the eldeſt Son, and then the Acre of the youngeſt is not liable to that Warranty. So if the Father gives a Seigniory to the eldeſt Son in Tail, and dies ſeized of Land in Borough-Engliſh, which deſcends to the youngeſt Son, and afterwards the Tenancy eſcheats, the eldeſt being impleaded ſhall vouch himſelf to ſave the Tail, but if the Land of the youngeſt ſhall be liable, is the Queſtion.

226. Before Partition one Coparcener leaſes an Acre to J. S. for 20 Years, and afterwards they make Partition, ſo that the other has this Acre allotted to her, it ſeems that ſhe may ouſt the Leſſee of the whole Acre, becauſe the Partition ſhall have Relation to the Death of the Anceſtor, and yet at that Time ſhe had full Power to make a Leaſe of a Moiety of it. So it ſeems that ſhe ſhall avoid the Grant of a Rent-Charge made by her Siſter, as if the Huſband makes a Leaſe or grants a Rent out of an Acre which is afterwards aſſigned to his Wife by Recovery in Dower upon Title which ſhe had at that Time, ſhe ſhall avoid the whole Leaſe or Charge. *Quære* in both Caſes if the one Coparcener recovers *pro rata* againſt her Companion, if ſhe ſhall avoid a Charge made by her in the Land recovered, as an Exchangee ſhall do.

227. It ſeems that if a Leaſe is made to one for Life, Remainder to the right Heirs of J. S. who is then dead, having Iſſue a Daughter, and his Wife *enſeint* with a Son, and he warrants the Land *in forma prædicta*, and afterwards the Son is born, the Daughter ſhall never vouch by Reaſon of the Warranty, and yet clearly the Son ſhall * not ouſt her out of the Land, becauſe it was executed in her, and veſted before the Birth of the Son, but the Warranty is a Thing executory, which ſhall not be deraigned but by the right Heir of J. S. which the Daughter is not. For if a Feoffment is made with Warranty to a Son, who dies without Iſſue, ſo that the Land comes to the Uncle, and from the Uncle to the Father, he ſhall not deraign the Warranty as Heir to his Son. So tho' *poſſeſſio fratris* makes the Siſter to be Heir, yet ſhe ſhall not vouch, as *Danby* ſays 35 *H.* 6. 34. But ſhe may be vouched as Heir of the Poſſeſſion, and ſo may the Father in the Caſe before, and ſo may the youngeſt Son in Borough-Engliſh, but ſhe ſhall not vouch by Reaſon of a Warranty anceſtrel. See this well debated *Fitz Voucher* 94. in the like Matter, and 35 *H.* 6. 33. in the Caſe of Eſtoppel. If Land is given to two Brothers in Fee, with Warranty to the eldeſt, and the eldeſt dies, having Iſſue, and afterwards the youngeſt dies without Iſſue, the Iſſue of the eldeſt being his Heir, by Reaſon whereof he enters, he ſhall not take Advantage of the Warranty by Voucher nor Rebutter, becauſe the Warranty was void with Regard to the Survivor, for that his Title has Relation antecedent to the Warranty, and does not come under the Warranty, as that of a Diſſeizor does.

* S. P. Ante § 180, and ſee the Books there cited in the Margin.

228. *Note* that *Carus* in his Reading ſaid that the Tenant ſhall not recover in Value by Warranty of Homage anceſtrel, becauſe the Warranty is anceſtrel, and no Land ſhall be put in Value but that which deſcends from the ſame Anceſtor, and it cannot be tried from whom the *lien* deſcended, becauſe it is by Preſcription, and ſo foraſmuch as it is not triable from whom the *lien* deſcended, for that it deſcended from no certain Perſon, for the ſame Reaſon it is not triable from whom the Land, which ſhall be put in Execution of the Aſſets, deſcended; and therefore I cannot preſcribe againſt the Heir to have an Annuity, becauſe it cannot be known whether or no he has Aſſets by Deſcent from the ſame Anceſtor by whom the Annuity commenced. So *Note* a good Reaſon.

229. A. dies, leaving three Daughters, two of whom enter after the Death of the Father, and afterwards one of them dies, and the other enters, if the third ſhall have a *Nuper obiit*, or two Writs, *viz.* the one upon the firſt Deſcent, and the other upon the ſecond Deſcent, is the Queſtion. It was ſaid that if three Coparceners make Partition, and are ſeverally impleaded, and each of them prays in Aid of the other ſeverally, and afterwards one of them dies without

Iſſue, and the others enter, now it ſeems that the one ſhall not recover againſt the other *pro rata* but of the third Part againſt the one only, and not for the Part laſt deſcended, without praying in Aid *de novo*, as it ſhould have been done if the Iſſue of the other had entered; and it ſeems that by the New-praying in Aid, altho' Partition of the third Part laſt deſcended is not made, yet ſhe ſhall recover, becauſe ſhe comes under the firſt Partition, in Reſpect of which Aid ſhall be granted. And ſee this Matter well touched 9 *Ed.* 3. 9. as it was ſaid, and ſee alſo 17 *Ed.* 3. 12. *et nota diligenter, aut non percipies.* And it ſeems clearly that if the Prayer in Aid had been of the half Blood, ſo that the whole had deſcended to the other, by the new Praying in Aid ſhe ſhould have recovered *pro rata*, and of this laſt Part alſo.

230. If a Parſon is Patron of a Church, and the Parſon with the Aſſent of the Ordinary grants a Rent Charge, or makes a Leaſe for Years, the Aſſent of the Patron is not good to make this endure for ever, without the Aſſent of his Patron and Ordinary, any more than the Aſſent of the Biſhop who is Patron is good without the Aſſent of his Chapter, or than the Aſſent of Tenant in Tail or for Life who is Patron, for that is not good, as *Littleton* ſays; but if the Parſon has a Fee, then it is otherwiſe.

231. If there are two Coparceners, and one of them makes a Leaſe for Life, yet the Lord ſhall avow upon them both, but if there are two Jointenants, and one of them makes a Leaſe for Life, now the Lord ſhall make ſeveral Avowries upon them, becauſe the Jointure is ſevered, and perhaps the Lord ſhall have two Hawks, if the Tenant before held by one Hawk. So if there are two Femes Coparceners Meſnes, and one of them takes the Tenant to Huſband, the Avowry of the Lord is not ſevered, but if they had been Jointenants, it had been otherwiſe, for by the taking Huſband the Moiety of the Meſnalty had been ſuſpended, and could not be in Jointure with the other Moiety which was not in *eſſe*, ſo that it is a Partition in Law for the Time, and the Jointure is ſevered, and conſequently the Lord ought to make two ſeveral Avowries. And if A. holds a Manor of B. and makes a Leaſe of the whole Manor, except an Acre, now the Inheritance or Fee of the Acre is diſappendant to the Manor during the Leaſe for Life, by 38 *H.* 6. and the Lord ought to make two ſeveral Avowries; but the Diſappendancy was only a Condition, and it ſhall be appendant again after the Leaſe is determined.

232. If Tenant in Tail of a Rent grants it in Fee, and dies, and his Iſſue, having a Wife, dies, and his Iſſue recovers in a *Formedon*, it ſeems that the Wife of the Father ſhall be endowed, becauſe the Rent was in her Huſband, for the Grant of the Rent was determined by the Death of the Grandfather, and then the Poſſeſſion in Law was preſently caſt upon the Father, and notwithſtanding the bringing of the *Formedon* by the Son, the Wife being a Stranger may ſay that her Huſband had the Poſſeſſion in Law, as if the Iſſue recovers by Annuity a Rent Charge granted to the Father, yet the Wife ſhall have Dower. But *quære* if in the principal Caſe the Tenant in Tail had purchaſed the Land, and made a Feoffment, ſhould the Wife of the Father have had Dower? And if the Poſſeſſion in Law is caſt upon the Heir who has a Wife, and a Stranger abates, and he dies, altho' his Iſſue recovers in a Writ of *Ayel*, yet the Mother ſhall have Dower, and the Abatement ſhall not have Relation to take away her Dower, and if after ſuch Poſſeſſion in Law caſt he dies, and his Brother of the half Blood enters, ſhe ſhall have Dower againſt him.

233. [a] If a Rent is granted to one until he has received 20*l.* of it, and the Rent is 20*s.* *per Ann.* the Grantee has not an Eſtate for Life, but only for 20 Years, becauſe it is certain that he will receive the Money in that Time. So if a Rent is granted to one until J. S. is of full Age, he has but an Eſtate for Years. [b] But if Land of the Value of 20*s.* *per Ann.* is given to one until he has received 20*l.* of the Iſſues of it, and Livery is made, there he has an Eſtate for Life. But if a Leaſe is made for Years, and Livery is made according to the Form of the Deed, the Eſtate ſhall only be for Years, becauſe the Livery does not increaſe nor diminiſh the Eſtate, if the Determination of it is certain. But the Reaſon why he ſhall have a Freehold in the Caſe next before is, in Reſpect of the Incertainty of the Iſſues, which ſee 21 *Aſſ.* So it ſeems that the Eſtate of the Guardian, who recovers for the double Value, and the Eſtate of Tenant by [c] Statute-Merchant, ſhall be more than for Years. [d] And if a Leaſe is made for Life, rendring Rent, and if it be behind, that he ſhall enter and hold the Land until he has received the Rent out of the Iſſues of the Land, the whole Eſtate of the Leſſee is there defeated, for he ſhall have an [e] Action of Debt for that which was due before, as it is in 30 *Ed.* 3. 7. in the like Caſe: *Nota, ſequitur* as before. And if Waſt is done by a Stranger, and afterwards the Tenant for Life (in the Caſe before put) enters after the Leſſor has received the Rent, or is paid, *quære* if this Waſt be then puniſhable in him?

[a] S. P. Plowd. 273 (e) Co. Litt. 42. a. 6 Co. 35. b. 3 Bac. Abr. 431.

[b] S. P. Co. Litt. 42. a.

[c] Contra Co. Litt. 42. a.

[d] Contra Co. Litt. 203. a.

[e] Contra Ibid. and that the Book of 30 *Ed.* 3. 7. here cited is falſe printed, and the true Caſe there was of a Leaſe for Years.

234 [f] If the Executor has a Villain which his Teſtator had, and he enters into Land purchaſed by the Villain, it ſhall be Aſſets, altho' he have the Fee, as Land in Fee deſcended to the Heir ſhall be Aſſets to a Chattle, *viz.* to the Debt of a Stranger; and the Reaſon why he ſhall have it to the Uſe of the Teſtator is, becauſe he had the Villain in Right of another, and therefore he ſhall have the Perquiſite in the ſame Right. So if a Guardian in Socage of a Manor, to which a Villain is regardant, enters into Land purchaſed by the Villain, it ſhall be to the Uſe of the Infant. [g] So if a Biſhop enters into Land purchaſed by a Villain, whom he had in Right of his Church, he ſhall have the Land to the ſame Uſe, as appears in 42 *Ed.* 3. 24. becauſe it ſhould be Mortmain, if it was the Purchaſe of the Villain. [h] But if a Man has a Villain for Years in his own Right he ſhall have a Fee in the Land purchaſed by his Villain. It was ſaid that if a Man is entitled to be Tenant by the Curteſy of a Villain, and he enters into Land purchaſed by him, he ſhall be ſaid to be ſeized of it to his own Uſe, and not in Right of his Wife, becauſe he has the Villain in his own Right: But *quære* if ſo be he was not entitled to be Tenant by the Curteſy.

[f] S. P. Plowd. 292 (f), and ſee the Books there cited in the Margin.

[g] M. 41 Ed. 3. 21. pl. 8. Fitz. Mortmain 5. Bro. 5. Plowd. 235 (c), and ſee the other Books there cited in the Margin.

[h] Dr. and Stud. lib. 2. cap. 18. fo. 170. Co. Litt. 117. a.

235. Tenant in Tail levies a Fine, and takes back an Eſtate in Fee upon Condition, and dies, the Heir enters, and is remitted, and afterwards the Proclamations paſs, if this takes away the Remitter, and if the Condition remains, is the Queſtion.

236. If a Man deviſes Land which he has for Years, and dies, and his Executors do Waſt, and afterwards deliver the Leaſe to the Deviſee, an Action of Waſt lies againſt the Executors for the Waſt aforeſaid in the *tenuerunt*, &c. notwithſtanding that againſt the Executors it ſhall have Relation. So if Tenant for Years grants his Term upon Condition, and afterwards the Grantee commits Waſt, and then the Tenant for Years enters for the Condition broken, an Action of Waſt ſhall be maintenable againſt the Grantee.

237. If Huſband and Wife make a Leaſe for Life, rendring Rent, Remainder for Life, the Huſband dies, the Wife accepts the Rent, if ſhe ſhall ouſt him in Remainder after the Death of the firſt Leſſee, is the Queſtion. And it ſeems that ſhe ſhall not, becauſe the whole is but the ſame Eſtate, and by her Acceptance ſhe affirmed the whole, for ſhe agreed to it, and an Agreement cannot be to part of an Eſtate, and not to the Reſidue. [a] For if a Reverſion is granted for Life, Remainder for Life, and the Tenant attorns to the firſt Grantee, ſaying that he will not attorn to the Remainder, yet this Declaration is nothing to the Purpoſe, for the Attornment is good for the whole. And ſo if the Tenant makes a Feoffment to divers, the Agreement to and Acceptance of the Services of the one ſhall be ſufficient for the whole, becauſe the whole is but one Eſtate. So if Huſband and Wife make a Leaſe of the Land of the Wife to two for their Lives, rendring Rent during the Life of the one, and after the Death of the Huſband the Wife accepts the Rent, ſhe ſhall not ouſt the other Leſſee being Survivor, *cauſa qua ſupra*. Same Law if an Infant who accepts at his full Age a Rent reſerved upon ſuch a Leaſe made by him within Age. But in the principal Caſe if the Rent had iſſued out of both the Eſtates, there had been no Doubt but the Acceptance ſhould have bound the Wife, as the Acceptance of Fealty ſhall do, and ſo of an Acceptance of Homage upon an Eſtate-Tail where the Remainder is over in Tail, but if for Life, it is as in the principal Caſe. But here if there had been a Confirmation in Deed made by the Wife, or if the Infant at full Age had confirmed the one Eſtate, this ſhould not have extended to the Remainder, any more than in the Caſe in *Littleton*. *Quære* if there is not a Diverſity, for a Confirmation is only of the Eſtate rehearſed. *Note* 29 *Aſſ. pl.* 17.

[a] Co. Litt. 310. a.

238. It ſeems that if an Acre is given to A. *habendum* in Fee or in Tail, he ſhall chuſe the Eſtate, and ſhall have it by his Election. And as to the Caſe where he commits Waſt in both Acres, it ſeems that by the doing of Waſt he has determined his Election, *viz.* that he ſhall have a Fee in it, for the Law ſays that he ſhall have a Fee in it rather than he ſhall be puniſhed. [b] And if Tenant in Tail makes a Leaſe for Life, the Law ſays that it is for his own Life, rather than for the Life of the Leſſee, becauſe that would be a wrongful Eſtate. So by the firſt Waſt the Election was clearly determined. And if A. binds himſelf in an Obligation to B. or covenants with B. to enfeoff him of the Manor of *Dale* or *Sale*, there the Election is given to the Obligor, becauſe he is Agent, and ought to do the Act, and to ſuch is the Election given: So if the Obligation or Covenant was to wait upon him on *Monday* or *Friday*, the Election ſhall be given to the Agent, and not to B. [c] But if I give my black Horſe or my white Horſe, there the Donee ſhall take which he pleaſes, becauſe no Act is to be done by me, but by the Donee only, *viz.* by taking him, ſo that he is Agent therein; but if the Words had been that I ſhould deliver alſo, *&c.* then I had been Agent, and ſhould have had the Election. And if I enfeoff A. and B. and warrant the Land to the one or to the other, this is a void Warranty, becauſe the Election is not given to any. But if a Man is bound in an Obligation to me to pay Money to A. or B. he ſhall pay it to which of them he pleaſes, becauſe here paying is the firſt Act, but in the other Caſe taking and demanding are the firſt Acts, ſo that each will ſtrive to demand, and ſo there is a great Diverſity. A. gives two Acres to B. *habendum* the one for Life, the other in Fee, rendring Rent, without Deed, or a Robe, and does not ſhew in certain which Acre the Donee ſhall have for Life, *&c.* and afterwards B. makes a Feoffment over of both Acres, and then the Rent is in Arrear, and A. diſtrains in the one Acre only, and makes Avowry for the Robe in that Acre; *quære bene*.

[b] Co. Litt. 42. a. b.

[c] Co. Litt. 145. a. 1 Finch 43. 2 Finch 60.

239. If a Man makes a Leaſe for Life of arable Land, rendring Rent at *Michaelmas* and at the *Annunciation* of our Lady by equal Portions, and the Land is all ſown at *Michaelmas*, and the Leſſee dies, now if the Executors ſhall have the Land until the Corn is ripe, the Queſtion is if they ſhall pay Rent for it. And many are of Opinion that by an Action on the Caſe the Leſſor ſhall recover the Rent for the Land, becauſe the Executors ſhall have the Profits of the Land until, *&c.* and there is no Folly in the Leſſor, conſequently by common Reaſon they ſhall render the Value of the Land for the Time, altho' the Eſtate is determined. As if a Man makes a Gift in Tail, rendring 30*s.* *&c.* and the Donee dies without Iſſue, and his Wife is endowed, ſhe ſhall be attendant by 10*s.* and yet the Eſtate is determined, but ſhe claims affirming the Eſtate, *&c.* So is it in the other Caſe, notwithſtanding that ſome make a Diverſity between the Caſes, becauſe the Wife has the Land itſelf, [d] for if I will licenſe one to occupy my Land until ſuch Corn is ripe, this is a Leaſe, wherefore, *&c.* Same Law if the Leſſee at Will will relinquiſh the Land, ſaving the Corn. But perhaps if the Leſſor will determine his Will, the Leſſee ſhall have the Corn without giving any Recompence for the Land, becauſe it happens by the Default of the Leſſor. *Quære* if any may determine his Will for the Land which is ſown, during the Time that it is ſown, and upon good Conſideration? It ſeems that they cannot for that Land. But perhaps the Executors of Tenant in Fee-Simple ſhall have the Corn without paying for it. It was ſaid that if Tenant at Will is outlawed by the Leſſor, his Will is determined; ſee for this 5 *H.* 5. 3. in a *Quare Impedit*, where Tenant at Will was outlawed.

[d] Vide M. 5 H. 7. 1.

240. *Note*,

240. *Note*, if a Gift in Tail is made, with Warranty to him his Heirs and Aſſigns, and the Donee makes a Feoffment, and dies without Iſſue, this Warranty ſhall be no Bar in a *Formedon* in Reverter, as it ſeems to me, notwithſtanding 39 & 45 *Ed.* 3. 4. for the Cauſe of Action came after the Warranty made, and altho' the Gift, which was firſt, was but Conveyance, yet it is not the Subſtance of his Action. And if the Lord confirms the Eſtate of the Tennat, with Warranty, and afterwards the Tenant ceſſes, the Warranty ſhall be no Bar in a *Ceſſavit*, notwithſtanding that the Seigniory, which was in *eſſe* before the Warranty made, was the Conveyance to his Action, for the Action ariſes upon Cauſe afterwards. So in Waſt, *&c.* And further in the principal Caſe the Warranty is but in Tail, which is ended, for the Word (*Aſſigns*) is of the ſame Nature and Time as the Eſtate was before. For if I give Land to one and to his Aſſigns for ever, and further grant to him and to his Aſſigns that they ſhall have annually 20 Loads of Wood for ever, and the Tenant for Life grants over his Eſtate, and dies, the Aſſignee ſhall not have them, *cauſa qua ſupra*. It ſeems that the Warranty is a Fee-Simple conditional, and cannot be within the Equity of the Statute, becauſe the Statute abridges the Eſtates, *&c.* as a Cuſtom, or Condition, and then if it is out of the Statute, the Condition is not performed, becauſe he is dead without Iſſue, and then the Warranty is determined, ſo that without Iſſue *non habuit poteſtatem alienandi.*

241. In Debt againſt Executors they plead that the Releaſe of the Plaintiff bore Date after the Death of the Teſtator, with Averment that it was delivered to the Teſtator, and they cannot have Averment of the Delivery before the Date, for they who plead a Deed ſhall not ſay that it has a falſe Date, and ſee the Caſe adjudged 12 *H.* 6. 1. So if a Feme-Sole at the Feaſt of *Michaelmas* makes a Writing bearing Date at the Feaſt of *Chriſtmas* next afterwards, and before *Chriſtmas* ſhe takes Huſband, the other ſhall never take Advantage of this Deed, for the Huſband, and, after his Death, the Wife, ſhall ſay that ſhe was covert, *&c.* and he ſhall not aver the Delivery before, *cauſa qua ſupra*. So perhaps it ſhall be if one makes and delivers an Obligation at the Feaſt of *Michaelmas*, which bears Date at the Feaſt of *Chriſtmas* after the Delivery, and at the Feaſt of *All Saints* he releaſes all Actions to the Obligor, and after *Chriſtmas* he brings an Action of Debt, it ſeems that he ſhall plead the Releaſe, and ſay that the Obligation was delivered at *Michaelmas*, and that his Releaſe was delivered at the Feaſt of *All Saints* according to the Date thereof, and he, *viz.* the Obligor, ſhall not be eſtopped, but ſhall have this Plea, for altho' he who uſes the Deed ſhall be eſtopped to ſay that it has a falſe Date, as in the Caſes before, yet he who pleads againſt the Deed ſhall not be eſtopped, altho' he made the Deed, for the Falſity ſhall be in him who uſes the Deed having a falſe Date. But it is clear that if an Obligation is made and delivered at the Feaſt of *St. Michael*, and bears Date at the Feaſt of *Chriſtmas* afterwards, there if he uſes the Deed before the Feaſt of *Chriſtmas* (as he may well enough), the Date ſhall be void, but if he ſuffers the Feaſt to paſs, then he ſhall be eſtopped. But both Parties ſhall be eſtopped to vary from the Place of the Date contained in the Obligation. But it ſeems clearly that if an Infant makes and delivers an Obligation which bears Date two Years afterwards, and at the End of the two Years he is at full Age, he ſhall not be eſtopped to ſhew the Delivery before the Date, any more than a Feme-Covert ſhall, and this is clear, altho' there be ſome Doubt in the ſaid Caſe of a Releaſe, for otherwiſe every Infant might be deluded.

242. If the Grantee of a Rent-Charge dies without Heir, the Land ſhall be bound by a Statute-Merchant made by him, becauſe altho' it is determined, the Determination ſhall not have Relation, for if the Tenant is bound in ſuch Statute, and dies without Heir, the Statute ſhall be executed againſt the Lord by Eſcheat, ſo it ſhall not have more Relation in the other Caſe. And if one manumiſes a Villain, a Statute in which he was bound ſhall be executed upon him, if ſo be that a Writ of Execution iſſued before againſt him. And it was ſaid that if the Grantee of a Rent-Charge in Fee grants to a Stranger that if he pays ſuch a Sum to him or his Executors at ſuch a Day, he ſhall have the Rent in Fee, and the firſt Grantee dies without Heir, and the ſecond Grantee pays the Money to his Executors, it ſhall revive the Rent; but it was ſaid that inaſmuch as there was no Eſtate given to which a Condition might be annexed, both the Condition and the Grant are void, but if upon ſuch Condition he grants a Rent out of his Land, there the Condition and Grant are good. And many were of a contrary Opinion in the principal Caſe, and yet they ſaid that the Wife of the Grantee ſhould be endowed, for they ſaid if the Tenancy eſcheats, the Wife of the Lord ſhall not be afterwards endowed of the Seigniory; *tamen quære*, for the Caſes are not alike, as it ſeems to me.

243. *Note* that Juſtice *Hinde* ſaid in C. B. if I deviſe that my Executors ſhall ſell my Land, and one of them ſells the one Moiety, and the other ſells the other Moiety, this Sale is not warranted by the Teſtament, and if the Vendee enters, he is a Diſſeizor, becauſe the Authority ought to be jointly executed, as a Letter of Attorney to two to make Livery ought to be jointly executed. But if I deviſe my Land to my Executors to ſell, and one of them ſells the one Moiety, and the other ſells the other Moiety, this is warranted well enough, becauſe here the Executors have the Land by the Deviſe, and then they cannot properly be called Inſtruments, and inaſmuch as the Intent is performed, it is good enough. And therefore if I enfeoff two, upon Condition that they ſhall enfeoff J. S. and one of them enfeoffs him of the one Moiety, and the other enfeoffs him of the other Moiety, this is a Performance of the Condition, which *Montague* and *Shelley* denied. And if a Man makes two Attornies *conjunctim*, or if the King makes two Commiſſioners to hear and determine, *&c.* and one of them dies, the Power of the other is determined. But if two make a Feoffment, upon Condition to re-enfeoff one, and one of the Feoffees dies, the other may perform the Condition, *ergo* they are not in the Caſe of Miniſters. *Vide* 35 *Aſſ. pl.* 1.

244. If a Man being ſeized of two Acres in Fee has Iſſue two Daughters, and grants a Rent-Charge out of one of the Acres to the eldeſt Daughter, and dies, and the Land deſcends to them,

and

and they make Partition, by which the eldeſt has the Land charged allotted to her, and the other being impleaded recovers againſt the eldeſt *pro rata*, ſhe ſhall hold the Land recovered in Value *pro rata*, with the Portion of the Rent.

245. If two Jointenants in Fee are diſſeized by the Father of the one, who dies ſeized, and his Son enters, it ſeems clearly that he is remitted to the whole Land, and his Companion ſhall enter with him; and it is not like to the Caſe where two are diſſeized, and a Deſcent is caſt during the Nonage of the one, and he enters, and is remitted for the Moiety, for there his Companion ſhall not enter, becauſe the Advancement is given to him in Reſpect of his Perſon more than in Reſpect of the Land; neither is it like as where Tenant in Tail enfeoffs the one Daughter, and dies, ſhe being within Age, for there ſhe is remitted, and her Companion ſhall not have Advantage of it, becauſe the Right was not in them before, nor is it like as where they have a joint Title of *Formedon* by Deſcent, and the Land deſcends to one only, there his Companion perhaps ſhall not take Advantage of it, becauſe the Tail was taken away, whereas here it was not. But perhaps if the Grandfather had diſſeized, *&c.* and the Land had deſcended to the Father, and from the Father to him, it had been otherwiſe, for there his Companion ſhould not have had Advantage of it, becauſe the Entry was taken away before. So if they had been diſſeized by a Stranger, who had died ſeized, and his Heir had entered, and had made a Leaſe for Life, Remainder over, and the Tenant for Life had died, now the whole ſhould have gone to him to whom the Remainder was appointed, *quod Nota.*

246. If Feoffee to Uſe bargains and ſells the Land to another, who has no Notice of the firſt Uſe, and Livery is not made, it ſeems clearly that the Bargainee ſhall have no Uſe in the Land, becauſe if he ſhould have a Uſe, there would be two Uſes of one and the ſame Land, which there ſhall never be, and here it cannot be ſo, for inaſmuch as the Land itſelf ſhall not paſs, the firſt Uſe cannot be extinct nor altered, becauſe there is no Tranſmutation of the Poſſeſſion. But if a Feoffment had been made to a Stranger upon good Conſideration, who had had no Notice, he had been ſeized to his own Uſe, and the firſt Uſe had been extinct, becauſe the Subſtance, *viz.* the Demeſn, is changed, and altered, and tranſpoſed. But if a Man commits a Diſſeizin to the Uſe of J. S. and bargains the Land, *&c.* it ſeems that the Bargainee has a Uſe, and J. S. may alſo agree, becauſe this Uſe is not of the Nature of another Uſe, *quod Nota.*

247. If the Iſſue in Tail is attainted of Felony, and is pardoned, and his Father dies, and a Stranger has Cauſe of Action, the Queſtion is, againſt whom he ſhall bring it before Entry by any. And ſome ſay that the Donor has the Freehold in Law, as if Tenant in Tail dies, having Iſſue *in Ventre ſa mere*, before the Birth of the Iſſue the Donor ſhall have the Land, ſo it is here, inaſmuch as for the Time he is dead without Heir. And others are of a contrary Opinion, *viz.* that there is none againſt whom, *&c.* as if Tenant for Life grants over his Eſtate to B. who dies, now before Entry there is none againſt whom, *&c.*

248. If a Man makes a Leaſe for Life, rendring Rent, upon Condition that if the Rent be behind, he ſhall enter and retain the Land until he be ſatisfied of the Arrears, and the Rent is behind, and he enters, and dies ſeized, it ſeems that the Executors ſhall not retain the Land, becauſe altho' by the Statute of 32 *H.* 8. they ſhall have the Arrears, yet foraſmuch as at the Beginning the Arrears were not a Chattle, they ſhall not retain the Land as a Pledge, as they ſhall do for the double Value, which was a Chattle at the Beginning. And here the Heir ſhall not retain it, becauſe he ſhall not have any Thing for which the Retainer ſhould be. As in 15 *Ed.* 4. 10. in Reſcous, it is ſaid that if the Defendant in Replevin avows for Rent due to him and his Wife, and thereupon has a Return, and dies, the Tenant ſhall have his Cattle again without any Agreement, becauſe the Executors cannot have Diſtreſs, inaſmuch as they cannot have the Rent itſelf, but the Wife ſhall have it, and the Wife cannot retain the Diſtreſs, for altho' ſhe ſhall have the Rent itſelf, yet ſhe is not Privy; ſo here.

249. If a Man makes a Feoffment by Deed of three Acres, and afterwards purchaſes another Acre, and makes Livery in that Acre, in the Name of that and of the other three, if the other three ſhall paſs, is the Queſtion.

250. If a Leaſe is made for Years, Remainder in Tail, and he in Remainder in Tail grants it over in Fee, and the Leſſee attorns, and the Years expire, and the Grantee enters, and dies ſeized, and the Tenant in Tail dies, his Iſſue may enter, becauſe the Grant was only during the Life of the Tenant in Tail, and then he did not die ſeized in Fee: And it ſeems that if the dying ſeized had been after the Death of the Tenant in Tail, it ſhould not have taken away his Entry, *quære.* But if the Iſſue of the Iſſue of the Grantee had entered, and died ſeized, his Entry had been taken away. And if Tenant in Tail enfeoffs his Donor, who dies ſeized, many are of Opinion that this Deſcent takes away the Entry of the Iſſue.

251. If there are two Diſſeizors, and one of them grants a Rent-Charge to a Stranger, and the Diſſeizee releaſes to the other in Fee, it ſeems that he ſhall hold the Land diſcharged, becauſe he claims merely from the Diſſeizee, and not from his Companion. But if a Man has two Sons by divers Venters, and dies, and before Entry the eldeſt grants a Rent Charge, and dies without Iſſue, and the youngeſt of the half Blood has the Land, now he ſhall be ſaid to be in immediately from the Father, and he does not claim from the Brother, and yet he ſhall hold the Land charged, by the Opinion of many, becauſe the eldeſt ſhall hold the Eſtate, *&c.* for if the Son, who granted the Rent-charge, had died without Iſſue, and the Land had gone to the Uncle, and from the Uncle to the Father, there altho' the Father could not be ſaid Heir to the Son, yet inaſmuch as the Land was charged, he ſhould have held it charged; ſo in the other Caſe. *Quære*, for in that Caſe there is a mean Deſcent, and it has no Relation.

252. If Land is given to A. and B. for their Lives, Remainder to the right Heirs of him who ſurvives, and B. grants a Rent-Charge in Fee out of the Land, and afterwards A. dies, the

Queſtion is, if the Heir of B. ſhall hold the Land diſcharged, or not. If the Land had been given to them *quamdiu inſimul vixerint*, Remainder to the Heirs of him who dies firſt, it ſeems that the Heir ſhould not have taken the Land by Deſcent, but ſhould have taken the Fee by Purchaſe.

253. If Land is given by Deed to J. S. and to a Dean and his Succeſſors, and Livery is made to J. S. only in the Name of both, this does not veſt the Land in the Dean, becauſe they take it ſeverally, *viz.* [a] in common, and not jointly, inaſmuch as their Capacities are ſeveral, ſo that there is no Privity between them, for a Releaſe to one Tenant in common ſhall not enure to his Companion. But if the Diſcontinuee in Tail enfeoffs the Iſſue in Tail within Age and another, and makes Livery to the Infant in the Name of both, altho' the Infant ſhall be remitted for the one Moiety, yet the other Moiety veſts in the other, and they ſhall be Tenants in common, for their Capacities are not ſeveral, but they take it ſeverally by Operation of Law, and it enures to the Infant ſecondarily in Point of Operation, for firſt it veſts in him, and then he is remitted, ſo *Note* the Diverſity. So if the Reverſion is granted to the Tenant for Life and another, [b] or if the Seigniory is granted to the Tenant and another, this Acceptance ſhall be a ſufficient Attornment to the other, and yet the Jointure is ſevered in both Caſes; ſo *Note* the Reaſon thereof. But if there are two Tenants for Years, and the Reverſion is granted to one of them in Fee, *quære* if he ſhall take any more than the Moiety without the Attornment of his Companion, becauſe the Jointure was there ſevered by the Grant.

[a] Vide Litt. § 297.

[b] Co. Litt. 313. a.

254. If a Rent is granted to two, *habendum* to the one until he is married, and to the other until he is advanced to 10 *l. per Ann. quære* if they are Tenants in common, or Jointenants, and if they are, then when the one performs the Condition, *quære* if the other ſhall have the whole. So if a Rent is granted to two, *habendum* to the one for his Life, and to the other for his Life, *quære* if they are Tenants in common.

255. If a Rent-Charge iſſues out of two Acres, and the Tenant of the Land makes a Feoffment of one of the Acres, ſo that the one of them is in the one Perſon, and the other in the other Perſon, now the Grantee of the Rent may diſtrain in either of the Acres for the whole, but if the one Tenant pays him the Rent, and the other is diſtrained, he ſhall plead Payment by his Companion, becauſe it diſcharges the whole Tenancy. So, as it ſeems, was the Law before the Statute of *Quia emptores terrarum*, if the Tenant had made a Feoffment of Parcel, *quære inde*. So if a Man has a Wife, and makes ſeveral Feoffments with Warranty, and the Wife brings Dower againſt one of the Feoffees, he ſhall plead that the Heir has endowed her, having Regard to the whole Land; but *Note* that in that Caſe there is great Privity between the Tenant and the Heir, for the Tenant might have vouched the Heir, and if he had not come in, the Wife might have had immediate Judgment againſt him, and perhaps this ſhall be the Reaſon there; but it ſeems to me that he may alſo plead that one of the Feoffees had endowed the Wife, *ut ſupra*, becauſe this goes in Diſcharge of the Tenancy. So if the Conuſor in a Statute-Merchant makes a Feoffment of one Parcel to one, and of another Parcel to another, it ſeems that if he ſues Execution againſt the one Feoffee, he ſhall have an *Audita Querela* againſt the Conuſee, and ſhall ſay that the other Feoffee has paid him, and ſo has diſcharged his Land.

256. If a Woman entitled to have Dower enters into the ſame Land, and diſſeizes the Tenant, and afterwards ſhe is diſſeized by another to whom the Diſſeizee releaſes, it ſeems clearly that the Wife ſhall never have her Dower, for when ſhe was diſſeized, her Dower was ſuſpended in the Poſſeſſion of the Diſſeizor, as well as it was in her own Poſſeſſion; for the Diſſeizor came in in the *Poſt*, and ſhall be in as the Wife was, for if the Wife had charged the Land, the Diſſeizor ſhould have held it charged alſo, which proves that he ſhall be in the ſame Caſe as the Wife was; and altho' her Dower ſhould have been revived if the Diſſeizee had entered, yet the Releaſe ſhall not countervail an Entry in this Caſe.

257. Land is given to Huſband and Wife and to a third Perſon in Fee, the Huſband makes a Leaſe for Years, and dies, and the Wife dies, if the third Perſon ſhall avoid the Leaſe is the Queſtion. Some ſay clearly that the Leaſe is determined by the Death of the Huſband, but if ſhe had joined in the Leaſe, altho' no Rent had been reſerved, yet if ſhe had done no Act afterwards to diſprove it, it ſeems that he ſhould not avoid it. And where Huſband and Wife are Tenants in Tail, and the Huſband makes a Leaſe for Years, and dies, and the Wife dies, the Queſtion is, if the Acceptance of the Rent by the Iſſue ſhall make the Leaſe good.

258. *Note* upon the Caſe of 35 *Aſſ. pl. ult.* &c. if two Femes Jointenants in Fee have Huſbands, who make ſeveral Feoffments of their Moieties, and die, the Women ſhall not join in a Writ of Right, becauſe their Right was diſcontinued at ſeveral Times. So if one Jointenant diſſeizes the other, and afterwards being within Age makes a Feoffment, and dies, or if two Infants Jointenants in Fee make ſeveral Feoffments, and the one dies, the other ſhall have no Remedy for the Moiety; but if the Wrong had been done to them at one Time, altho' it had been by ſeveral Ways, it had been otherwiſe. For if the one Jointenant within Age makes a Feoffment of the whole Land, and dies, or if the two Huſbands join in the Feoffment, there the Survivor ſhall have it, becauſe they might join in a Writ of Right, ſo it ſeems that the Right ſhall ſurvive. And if two Jointenants are diſſeized, the one being within Age, and a Deſcent is caſt during the Non-age, and the other dies, the Infant may enter into the whole, for when he ſurvives, it is as if he had been diſſeized of the whole. But in the principal Caſe the Survivor does not claim under the Diſcontinuee, nor ſhall take away the Diſcontinuance, but he claims upon Title paramount.

259. If two Parceners make Partition, and the one of them has one Acre in Tail, and the other has another Acre in Fee, and he who has the Acre in Tail makes a Feoffment thereof, and a Stranger enters into the Acre upon Title paramount, it ſeems that the Iſſue of him who had the Fee cannot enter, but is driven to his *Formedon* for the Moiety of the Acre in Tail: Yet

quære, for, as to him, the other was not ſeized in Tail of the whole Acre, but only of the Moiety.

260. If A. exchanges Land with B. in Fee, who makes a Feoffment over to a Stranger, and one enters upon Title paramount into the Land of A. it ſeems that he cannot enter upon the Feoffee of B. becauſe the Privity of the Exchange is utterly annulled by the Feoffment of B. As if two Coparceners make Partition, and one of them aliens in Fee, and a Stranger enters upon the other upon Title paramount, ſhe ſhall not enter and occupy the Land with the Feoffee, becauſe the Privity is diſſolved, for ſhe ſhall not recover thereof *pro rata* after the Feoffment, as appears in 11 *H.* 4. in a *Cui in vita*; ſo in the other Caſe the Privity of the Exchange is merely diſſolved. And *Note*, if A. and B. make an Exchange, and A. leaſes for Life, and B. is impleaded, and recovers in *Warrantia chartæ*, and has Execution of other Land, as he ſhall have, and afterwards the Tenant for Life dies, and A. enters, upon whom a Stranger enters upon Title paramount, it ſeems that he has no Remedy for the Land rendered in Value, for that does not go in Privity, as the Exchange does. But yet in Dower if a Recovery is had in Value, and the Tenant in Dower dies, he may enter into the Value again, as it ſeems. If A. and B. exchange Land, and A. dies, and in a *Præcipe* againſt B. he vouches the Heir of A. who enters into the Warranty, and cannot bar the Demandant, by which he recovers, and B. recovers over in Value, and the Demandant enters, the Queſtion is, if B. may enter upon the Heir, or ſhall be driven to an *Habere facias ad valentiam*. And it ſeems that he may enter, for the Deſcent is not material againſt ſuch a Condition as this is, for if there had been an expreſs Condition, he might have entered, and ſo he may now, and the one Coparcener may enter upon the Iſſue of the other after a Deſcent, if an Entry is had upon her. Further here put the Caſe that the whole Land is recovered, there he might waive the Benefit of Voucher, and enter, if an Entry was made upon B. without Suit brought, and ſo may he now, for if he ſhould be driven to an *Habere facias ad valentiam*, he might be greatly hurt thereby, becauſe perhaps the Land which the Demandant recovers is leſs in Value than the whole Land of the other, ſo that by that Means he ſhould but have according to the Portion. But if Part of the Land given in Exchange had been recovered againſt B. he could not have entered, becauſe he ſhall not be his own Judge of the Portion, but where the whole is recovered, the whole Exchange is annulled, for which Reaſon he may enter, as if after Partition the whole Land is recovered againſt the one Coparcener, who has prayed in Aid of her Companion, ſhe may enter upon her Siſter, and avoid the whole Partition, without ſuing Execution *pro rata*, notwithſtanding that ſhe had the leſſer Part, and was of full Age at the Time of the Partition, ſo that Folly might be imputed to her; *Nota*. And it ſeems clearly that if the one Exchangee makes a Feoffment of his Part, the other ſhall not enter upon the Feoffee, for the Condition is broken and diſſolved, as it is between Coparceners, *&c. quod vide* 11 *H.* 4. But *quære* if after a Feoffment made by one Exchangee, the other vouches him, if he ſhall recover of his own Land. If two Acres are exchanged for a Manor, and a Stranger enters into one of the Acres upon Title paramount, he ſhall enter into the whole Manor, becauſe it is an entire Thing, and *quære* if he ſhall retain the other Acre.

261. Tenant by the Curteſy of a Seigniory, to which a Tenancy eſcheats, makes a Feoffment thereof with Warranty, if this ſhall be a Bar to the Iſſue without Aſſets is the Queſtion.

262. *Note*, if a Dean has a Rent-Charge in Fee out of Land, and the Tenant aliens the Land to the Dean in Fee, and the Lord enters for Mortmain, it ſeems that he ſhall hold the Land diſcharged of the Rent, becauſe when he enters for Mortmain, he has not annulled the Livery, but he affirms it by his Entry, for he ſhall not diſprove the Cauſe of his Entry. So if the Dean, before the Feoffment, had been bound in a Statute-Merchant, the Lord, who enters for Mortmain, ſhould hold it diſcharged of Execution. But if Tenant for Life aliens in Fee to him who has a Rent-Charge iſſuing out of the Land in Fee, and the Leſſor enters for the Forfeiture, it ſeems that the Rent ſhall not be extinct, for there the Leſſor has the ſame Fee Simple which he had before the Leaſe made, and he is in of his own Eſtate, and not of the Eſtate which the Leſſee gave to the Feoffee, and ſo is the Diverſity. And if a Woman Tenant for Life takes Huſband, who aliens in Fee, and the Leſſor enters, and the Huſband dies, it ſeems that the Wife may enter, *vide de hoc*. But many are of the contrary Opinion in the firſt Caſe, for his Eſtate in the Land was always defeaſible. If a Feme-Covert be enfeoffed, and diſſeized by a Stranger, and afterwards the Huſband diſagrees to the firſt Eſtate, and dies, the Wife may enter, and retain it againſt the firſt Feoffor, for the Diſagreement was frivolous, the Wife having then a Right only, *quod Nota*.

263. If a Man dies ſeized of one Acre in Tail, and of another Acre in Fee, having Iſſue two Daughters, and they make Partition, ſo that the youngeſt has the Acre in Tail, and the eldeſt enters into the Acre in Fee, it ſeems that the Lord, of whom the Acre in Fee is held, ſhall take Notice of this Partition, and is compellible to take the eldeſt for his Tenant, and to avow upon her; otherwiſe it ſeems as to the Donor of the Acre in Tail, for he ſhall not be bound by this Partition unduly made, any more than the Iſſue in Tail ſhall, notwithſtanding that between the Parties who made the Partition, being of full Age, it ſhall be concluſive. But if one Acre in Tail be allotted to one, and another to the other, the Donor ſhall be bound thereby.

264. If a Leaſe for Life is made, rendring Rent, the Remainder for Life, and the Leſſor grants the Reverſion to him in Remainder, and the firſt Tenant for Life attorns, he ſhall not have the Rent, becauſe the Fee-Simple merges the Remainder to ſome Purpoſes, yet for this Purpoſe it is in *eſſe*, and he is in the firſt Eſtate, others contrary, and that he ſhall have an Action of Waſt now, *Nota*.

265. * *Note* if a Feme Jointenant for Years with another takes Huſband, and dies, it ſeems that the Survivor ſhall have the whole Term, for if ſhe alone had had the Term, and the Huſband had died, ſhe ſhould have had it, and not his Executors, *ergo* ſhe had it alone, and he had

* S. P. Plowd. 418 (b). Co. Litt. 185. b.

it

it in right of his Wife. * But otherwiſe it is of Chattles perſonal. But if an Obligation is made to a Feme-Sole and another, and ſhe takes Huſband, and dies, the Survivor ſhall have the whole Duty, for the Huſband cannot have a Choſe in Action due to the Wife unleſs as her Executor, &c. And it ſeems to ſome that if a Feme-Sole has a Term for Years, and takes Huſband, and dies, the Ordinary may commit Adminiſtration thereof to a Stranger, for the Huſband ſhall not have it unleſs as Executor or Adminiſtrator of the Wife, for otherwiſe he cannot retain it againſt the Ordinary; but the Law ſeems to be contrary, for the Marriage is a Gift in Law of it as ſtrong as a Gift in Deed.

* Plowd. 418(g), and ſee the Books there cited in the Margin.

266. If Land is given to Huſband and Wife in Fee, and the Huſband dies, and the Wife waives the Poſſeſſion, and recovers in Dower againſt the Heir, ſhe ſhall have Damages, for when ſhe refuſes, the Huſband ſhall be ſaid to die ſeized, and ſo within the Compaſs of the Statute. And if a Man has a Wife, and makes a Feoffment, and takes back an Eſtate to him and another in Fee, and the Huſband dies, the Wife ſhall not recover Damages, for he did not die ſeized of ſuch Eſtate for which ſhe ſhall recover, but her Dower was of the Eſtate before; ſo if he had taken back an Eſtate in Fee upon Condition, &c. for the Law ſays that ſhe is endowed of the firſt Eſtate, and not under the Condition.

267. A Man has two Sons, the youngeſt has two Daughters, and the Grandfather is ſeized of two Acres at the Common Law, and of twenty Acres in Borough-Engliſh, and gives the two Acres to the youngeſt Daughter in Frank Marriage, the youngeſt Son dies, and the Grandfather dies ſeized, it ſeems that the twenty Acres ſhall deſcend equally to the two Daughters, and the two Acres ſhall not be put in Hotchpot, becauſe the Deſcent merely is not their Title, but the Cuſtom alſo. As if the Grandfather was the Donor, where the Father ſurvives him, who dies before Entry, there the Land deſcended from the Grandfather ſhall be equally divided between them, becauſe they claim the Poſſeſſion as Heir to the Grandfather, but the Right from the Father, ſo that the Deſcent does not come entirely from the Grandfather. So if Part of the Lands which deſcend on the Part of the Mother be given to one of the Heirs on the Part of the Mother, and the Donor dies without Iſſue, this Land ſhall not be put in Hotchpot, *cauſa qua ſupra.*

268. Lord, Meſne, and Tenant by 10*s.* and Owelty, the Meſne grants the 10*s.* for Term of Life, ſo that it is a Rent-Seck, this is recovered, and afterwards the Tenant enfeoffs the Lord, if he ſhall have a *Quod ei deforceat* is the Queſtion.

269. A Man grants a Rent-Charge in Tail, and afterwards enfeoffs the Grantee of the Land in Fee, who makes a Gift in Tail of the Land, rendring to him as many Services as he pays over to the Lord paramount, and dies, it ſeems that the Iſſue ſhall not have a *Formedon* of the Rent, inaſmuch as here he has a Warranty, *viz.* the Reverſion of the Land, which is a good Warranty, becauſe the Land is diſcharged at the Time of the Gift in Tail, as 31 *Ed.* 3. *Scire facias* and it is not like to the Caſe of 38 *Ed.* 3. for the Reverſion of the ſame Thing demands no Aſſets, here it is of another Thing, *viz.* of the Land, and the Demand is of the Rent, and the Services reſerved are beneficial to the Heir by the Covin of the Father, altho' the Law would have reſerved them without thoſe Words. And then it is to be ſeen if this Service, which is allowed barely to be conveyed over to the Lord, and ſo not beneficial to the Heir, may be Aſſets. And it ſeems that it is, becauſe it is eſpecially reſerved for the Land; but without ſuch Aſſets the Reverſion upon a Gift in Tail cannot be Aſſets, becauſe ſubject to a common Recovery. The ſame Reaſon holds as to the Rent, as it ſeems. Further, this Reverſion here, in which the Rent was ſuſpended, is deſcended to the Iſſue, ſo that during that Suſpenſion there is no Action to charge the Poſſeſſion, becauſe he hath the Reverſion diſcharged, as a Confirmation ſhall go to the Benefit of the Poſſeſſion. See alſo if this may be a Waiver of the Reverſion, as 13 *R.* 2. *Scire facias*, *Brief* 645.

270. Leſſee for 20 Years makes a Leaſe for 10 Years to J. S. who purchaſes the Reverſion of the firſt Leſſor, with Attornment of the firſt Leſſee, the Executor of the Leſſee for 10 Years ſhall not have the Reſidue of the Term, but the Heir, and yet he ſhall pay the firſt Rent reſerved to the Leſſee for 20 Years, in Nature of a Rent-charge granted by him, for the Term is in *eſſe* with Reſpect to that; *mirum eſt* if the firſt Leſſee cannot diſtrain.

271. *Note* that the Goods of thoſe who are attainted by Verdict, or Outlawry, or Confeſſion, are called *Catalla felonum.* And if a Man flies for Felony, the Goods which he has at that Time are called *bona waiviata*, and if he is attainted afterwards, yet they ſhall be ſo called. But if a Man flies for Felony, and afterwards is taken and acquitted, there his Goods are forfeited as *catalla fugitivorum*; ſo in all theſe Caſes the Property was in him who fled or was a Felon. And alſo, by ſome, *bona waiviata* are thoſe Goods which are ſtolen by a Felon who leaves them; and no freſh Suit ſhall be but by Appeal. *Vide* 29 *Ed.* 3 *et* 12 *Ed.* 4. 6.

272. Land is given to Huſband and Wife and to a third Perſon, and to the Heir of the Huſband begotten upon the Wife, they have Iſſue, the Huſband dies, the Tenant for Life aliens the Moiety in Fee, the Wife makes continual Claim, the Iſſue dies without Iſſue, *quære* if the Wife may enter afterwards upon the Heir of the Feoffee who dies within the Year after continual Claim. It ſeems that altho' at the Time of the continual Claim ſhe had a Right of Entry, yet now the Eſtate is changed, and ſhe ſhall not enter. *Quære* how continual Claim may be made by a Tenant in common for the Poſſeſſion *pro indiviſo.* *Note*, if the Diſſeizee makes continual Claim, and dies, and after his Death a Deſcent is caſt within a Year after the Claim, the Heir of the Diſſeizee cannot enter, becauſe it ſhall only give Title for the Advantage of the Perſon who durſt not enter; but if the Deſcent had been in the Life of the Diſſeizee, then the Heir of the Diſſeizee might well have had Benefit of it, becauſe a Title of Entry deſcended. But if Tenant for Life with Remainder over be diſſeized, and makes continual Claim, and dies, he in Remainder ſhall avoid a Deſcent happening within a Year after the Claim, becauſe by the continual Claim his Intereſt was reduced. Otherwiſe it is of the Son in the Life of the Father, for he has no Title, for his Title

Title is only by the Death of the Father, but he in Remainder claims by the firſt Livery. *Quære* if two Jointenants are diſſeized, and one of them makes continual Claim, and dies, and afterwards a Deſcent is caſt? *Littleton* puts the the Caſe of him in Remainder, that the Deſcent is had in the Life of the Tenant for Life, and then clearly the Remainder over. It ſeems that if the Diſſeizee makes continual Claim, and dies, and within the Year afterwards a Deſcent is had, the Lord ſhall alter his Avowry before Notice, for he is not Privy to this paravail, nor ſhall he have the Iſſue in Ward, nor ſhall he have any Eſcheat after the Deſcent upon the dying of the Diſſeizee without Heir.

273. If there are two Coparceners of Land in Tail, and one of them grants a Rent to the other for Equality of Partition, this Rent is in Tail, and of the ſame Condition as the firſt is, 2 *H.* 7. 5. This is true by *Plowden*, but *Note* that he held that the Eſtate in the Rent ſhall be of the ſame Nature with the Eſtate in the Reſidue received, and not of the ſame Nature with the Eſtate in the Land out of which it iſſues. And therefore if there are two Coparceners of one Acre in Fee, and of another Acre in Tail, and upon Partition ſhe who has the Acre in Fee grants a Rent to the other who has the Acre in Tail, this Rent ſhall be in Tail, and not in Fee; but if ſhe who has the Acre in Tail grants a Rent to the other who has the Acre in Fee, this Rent ſhall be in Fee, and not in Tail, for if ſhe dies without Iſſue, her Heir ſhall have it as long as the other has an Heir of her Body, for until that Time the Partition ſhall ſtand in Force on each Side. But if there are four Acres, three of which are in Fee, and one in Tail, and ſhe who has two Acres in Fee grants a Rent to the other for Equality, this Rent ſhall be in Fee, and not in Tail, *quia ſequitur magis principale, quod Nota.*

274. If the Seignioreſs ſeizes the Wardſhip of the Body and Land of the Heir of the Tenant, and afterwards intermarries with the Villain in groſs of the Heir, and they do Waſt, and the Heir brings an Action of Waſt, it ſeems clearly that his Body is out of Ward; and alſo foraſmuch as the Reaſon why the Land is in Ward, is, becauſe Knight's-Service cannot be done by the Infant, ſo that the Cauſe is executory, and in Conſideration that the Seigniory remains, and now, during the Coverture, by the Intermarriage with the Villain the Seigniory is determined in the Tenancy without any Claim, and ſo the Freehold and Inheritance of the Seigniory is merged in the Tenancy by the Act of Law, notwithſtanding that the Chattle and Poſſeſſion of the Seigniory is ſuſpended by Reaſon of the Chattle in the Tenancy, *viz.* the Wardſhip of the Land, becauſe the Huſband ſhall be Tenant by the Curteſy of it, and it may be granted over, notwithſtanding this Suſpenſion, by Reaſon of the Chattle in the Tenancy, and by the ſame Reaſon it ſhall be a Releaſe in Law to the Lord of the Villain by the Act of the Law, and therefore the Land ſhall be out of Ward, *nam ceſſante cauſa*, &c. And yet if they had granted the Seigniory to another, he ſhould have remained in Ward, but when it comes to the Infant himſelf, it is extinguiſhed for the Time, and therefore he ſhall be out of Ward. But here perhaps the bringing of the Action of Waſt notifies the Election of the Infant, *viz.* that he will not take Advantage of the Seigniory by Extinguiſhment, and againſt his Will it ſhall not be in him. For if there is Lord, Meſne, and Tenant, and the Tenant holds by 12*d.* and the Meſne by 20*s.* and the Villain of the Tenant purchaſes the Meſnalty, or it deſcends to him, there if this ſhould be a Diſcharge of the Meſnalty in the Tenancy by a Releaſe in Law againſt his Will, then he ſhould hold by 20*s.* and perhaps he would rather manumiſe the Villain than do ſo, for which Reaſon the Law ſays that where there is no Prejudice done, there ſhall be Extinguiſhment without Claim, otherwiſe not. *Quære* wherefore, for the Infant ſhall not reſeize the Land for a Perquiſite, as if Leſſee for Years of the Father marries with the Villain in Groſs of the Heir who is an Infant, the Infant may clearly enter into the Term as a Perquiſite.

275. If a Woman who has a Rent-Charge in Fee marries with the Tenant of the Land, and a Stranger releaſes to the Tenant with Warranty, it ſeems that no Remedy can be had for the Warranty, as to the Rent, either by Voucher or by *Warrantia chartæ*, becauſe the Warranty does not extend to the Land diſcharged of the Rent, for the Rent was ſuſpended by Act of the Law, and neither the Wife, after the Death of the Huſband, nor the Heir of the Wife, in the Huſband's Life-Time, can have any Action for the Rent upon Title before the Warranty made, for if the Heir of the Wife brings a *Mortdanceſtor*, this is of later Time, and ſubſequent to the Warranty. So if the Grantee of a Rent grants it to the Tenant upon Condition, who makes a Feoffment of the Land with Warranty, this Warranty cannot extend to the Rent, and yet the Land was diſcharged of the Rent, but all the Actions ſhall be conſidered as a Cauſe of Action ariſing afterwards, for if the Condition is broken, and afterwards an Action is given, this ariſes after the Warranty made. But if a Woman who has a Rent intermarries with the Tenant, who makes a Feoffment of the Land with Warranty, and dies, and the Wife brings a *Cui in Vita* of the Rent, the Feoffee ſhall vouch as of Land diſcharged. So if Tenant in Tail of a Rent purchaſes the Land, and makes a Feoffment, and the Feoffee aliens with Warranty, or if the Tenant in Tail of a Rent releaſes to the Tenant of the Land, who aliens over with Warranty, there if the Iſſue brings a *Formedon*, he ſhall vouch as of Land diſcharged. So if an Infant has a Rent, and diſſeizes the Tenant, and is diſſeized by another, who aliens with Warranty, this Warranty extends to the Rent, becauſe in all theſe Caſes the Land was diſcharged of the Rent at the Time of the Feoffment in Fee, and the Action is conceived upon an Action paramount the Warranty. But if a Man grants a Rent-Charge out of Land to commence at *Michaelmas*, and the Tenant makes a Feoffment with Warranty, or if Reſcous is made, and afterwards a Feoffment is made of the Land with Warranty, as in 31 *Ed.* 3. *in Warrantia chartæ*, there the Warranty does not go to the Rent, becauſe the Rent was not in *eſſe* at that Time; but if upon Reſcous he brings Aſſize, and is non-ſuited, and afterwards the Tenant makes a Feoffment of the Land with Warranty, this Warranty does well extend to the Rent, *quod Nota.*

276. If there is Lord and Tenant, and the Lord grants the Seigniory, and the Tenant is diſſeized, and afterwards attorns, it is good; but if the Lord grants the Rent, ſaving the Seigniory, and the Tenant is afterwards diſſeized, and attorns, it is void, becauſe it is now a Rent-ſeck, in which there is no Attendancy, but a Charge to the Land. And if a Man grants a Rent reſerved upon a Leaſe for Life, ſaving the Reverſion, this is a good Rent-ſeck, if Attornment of the Tenant be had; but if a Rent reſerved upon a Leaſe for Years be granted over, ſaving the Reverſion, it is void, for Debt ſhall not lie for the Grantee, and he cannot have any other Action, *nota ideo.*

277. Tenant in Tail makes a Feoffment in Fee, and dies, the Feoffee makes a Leaſe for Life, and grants the Reverſion to the Iſſue, he ſhall not have a *Formedon* againſt the Tenant for Life, for he has aſſented to the Reverſion expectant upon the Leaſe for Life. But if Tenant in Tail makes a Leaſe *pur auter vie*, and dies, notwithſtanding the Deſcent of the Reverſion in Fee, the Iſſue ſhall have a *Formedon*, for the Reverſion is waived by the bringing of the Action. And therefore if a Man aliens in Fee upon Condition, and the Feoffee makes a Leaſe for Life, and afterwards grants the Reverſion to the Feoffor, he ſhall not enter upon the Tenant for Life for the Condition broken, becauſe the Condition was annexed to the whole Fee, and he cannot avoid the whole, *ergo* he ſhall not avoid Part, and if he has Cauſe to have a Writ of Right, or other real Action, he cannot have it againſt the Tenant for Life, the Reverſion being in himſelf by his own Acceptance. And therefore if the Diſcontinuee makes a Leaſe to the Iſſue in Tail and another, with Livery to the other, and afterwards grants the Reverſion to the Iſſue, and the other dies, ſo that the Freehold is caſt upon the Iſſue without his Folly, yet he ſhall not be remitted, *cauſa qua ſupra.*

278. Diſſeizor dies without Heir, his Wife *priviment enſeint*, the Lord enters, the Son is born, the Diſſeizee enters upon the Lord, and he brings Aſſize, if the Entry had been before the Birth of the Son, it had been clearly lawful, and he had been remitted, and the Birth afterwards ſhould not have avoided the Remitter. As if the Diſcontinuee makes a Gift in Tail, Remainder to the Iſſue in Tail, and the firſt Donee dies without Iſſue, his Wife *priviment enſeint*, now the Iſſue of the firſt Tenant is remitted, and although the Iſſue of the ſecond Donee be afterwards born, the Remitter continues. But in the firſt Caſe the Entry is not until after the Birth of the Son, for if a Stranger had abated, the Diſſeizor having Iſſue, or if after Abatement the Son had been born, the Diſſeizee could not have entered, for the Abator might ſay that the Land deſcended to the Iſſue, whoſe Eſtate he hath; but here the Lord is not puniſhable for his firſt Entry, becauſe it was then lawful, and the ſame Eſtate continued until an Entry in Deed, for if a Guardian holds himſelf in at the full Age of the Heir, and afterwards, no *Mortdanceſtor* lies againſt him at the common Law, *quod nota et quære.*

279. If the Diſſeizee releaſes all Actions to the Diſſeizor, and dies, and afterwards the Diſſeizor dies, and his Heir enters, and dies, and the Land deſcends to the Heir of the Diſſeizee, is he remitted? It ſeems that by the Releaſe all Actions which he had or might have afterwards by Reaſon of the ſame Right are releaſed, ſame Law of Actions which his Heir might have for the ſame Diſſeizin, ſo that a Writ of Entry in the *Quibus* is releaſed, although the Heir had not Cauſe of Action at that Time, and therefore the Caſe is the ſame, as to the Extinguiſhment of Action, as if he had releaſed after the Deſcent. Then it ſeems that inaſmuch as he had Right, notwithſtanding this Releaſe, ſo that he might have entered, this Right ſhall not be gone by the Deſcent afterwards, but he ſhall be remitted. And yet ſome ſay that a Remitter ſhall never be where there is a Cauſe of Action, ſo that without his Folly there is nobody againſt whom he may bring his Action, but although he has no Action here, he has not loſt it by the Law, but by his own Act, and the Right remains, which is the Cauſe of the Remitter, and in many Caſes a Right ſhall remain without an Action. As if there be Tenant for Life of a Seigniory, and the Tenancy eſcheats, and a Stranger intrudes, and the Tenant for Life dies before Entry, he in Reverſion cannot have any Action, but he may enter as upon the Diſſeizor of his Tenant, but if he dies, and his Heir is in by Deſcent, there he cannot enter, and yet he has a Right, and ſhall be remitted upon the Deſcent. And if a Man deviſes Land, and afterwards a Deſcent is had, there is no Entry in this Caſe for the Deviſee, that is, when a Stranger intrudes, &c. and not upon a Deſcent in the Heir of the Deviſor to his Heir, and perhaps in this Caſe upon a Deſcent to the Deviſee afterwards there is no Remitter, becauſe he had not a Right but only a Title. And it ſeems that a Releaſe of Actions is but a Concluſion which goes in Privity of Blood, and not of Eſtate, and therefore after ſuch Releaſe to the Diſſeizor, if he aliens over, this Releaſe is not pleadable by the Alienee, becauſe he is not Privy, and it does not go with the Eſtate. So if the Diſſeizor makes a Leaſe for Life, Remainder over, and Diſſeizee releaſes all Actions real to the Tenant for Life, who dies, he in Remainder ſhall never plead this, as he ſhould have done if it had been a Releaſe of Right, and therefore if a Releaſe of all Actions had been made to him in Remainder, it had been merely void to all Purpoſes, and he ſhould never have pleaded it. So it ſeems that ſuch Releaſe of Actions does not extinguiſh the Right, if the Entry be taken away, otherwiſe than by Eſtoppel, which being removed by the Deſcent in Law, the Releaſe ſhall ceaſe to be concluſive afterwards. And it ſeems that if the Heir of the Diſſeizor enfeoffs two, and the Diſſeizee releaſes all Actions to one of them, and he dies, the other ſhall never plead this Releaſe. And ſo if two are diſſeized, and one of them releaſes all Actions to him who is in by Deſcent, and dies, the other, as Survivor, ſhall have an Action for the whole Land. And it was ſaid that if a Man dies without Heir, his Wife *priviment enſeint*, and the Lord by Eſcheat enters, and afterwards the Iſſue is born, he ſhall have no Action againſt the Lord, for a *Mortdanceſtor* does not lie but againſt an Abator, but his Remedy is by Entry.

280. If a Man has Iſſue Baſtard *eigne* and *Mulier puiſne*, and makes a Leaſe for Years, and dies, and the Years expire, and the Baſtard enters, and dies ſeized, and his Iſſue enters, the Right of the *Mulier* is not bound, becauſe the Poſſeſſion of the Tenant for Years before the Expiration of the Term was the Poſſeſſion in Deed of the *Mulier*, and then inaſmuch as he was once ſeized in Deed, ſo that he ſhall have an Aſſize, and not a *Mortdanceſtor*, and ſuch Poſſeſſion ſhould make *poſſeſſio fratris*, from thence it follows that this ſhall not take away the Right of the *Mulier*. And if a Man has Iſſue Baſtard *eigne* and *Mulier puiſne*, and dies ſeized of a Manor, and the Baſtard enters, and gets Seizin of the Services of all the Tenants, and afterwards one of the Tenants makes a Leaſe for Life to the Baſtard, who dies ſeized, and his Iſſue enters into the Manor, it ſeems that the *Mulier* may diſtrain the Tenant, who made the Leaſe for Life, for all the Services due after the Death of the Father, becauſe his Entry was not taken away for the Service of this Tenancy, the Seigniory of the ſame Tenancy being ſuſpended in the Eſtate for Life, and therefore there was no Deſcent thereof: But if the Leaſe had been for Years it had been otherwiſe. And if a Man has Iſſue Baſtard *eigne* and *Mulier puiſne*, and is diſſeized, and dies, and the Baſtard ouſts the Diſſeizor, and dies ſeized, now foraſmuch as no Poſſeſſion in Law deſcended from the Father, but a naked Right which veſted in the *Mulier*, for this Reaſon the Deſcent of the Baſtard ſhall not take away the Right of the *Mulier*. But if the Father had died ſeized, and a Stranger had abated, upon whom the Baſtard had entered, and died ſeized, there the *Mulier* ſhould have been barred by many, becauſe the Poſſeſſion in Law deſcended: But *Quære*, for the Entry of the Abator veſts a Right of Action in the *Mulier*, which cannot be deveſted by the Entry of the Baſtard, who by his own Entry ſubjects himſelf to an Aſſize by the Abator, and therefore if the youngeſt Son enters upon the Abator, and dies, the eldeſt cannot enter upon the Son of the youngeſt, but is anſwerable to the Action of the Abator, and ſo in another Courſe than the Caſe in *Littleton*. And if a Man has a Son who is Baſtard *eigne*, and a Daughter who is *Mulier puiſne*, and dies ſeized of a Rent, the Daughter having a Huſband, and afterwards the Baſtard gets Seizin of the Rent, and dies ſeized thereof, and it deſcends to his Iſſue, yet the Huſband ſhall be Tenant by the Curteſy, and many are of Opinion that the *Mulier* ſhall not be bound thereby, becauſe at the Time of the Deſcent the Rent was in *eſſe* in the Daughter, although ſhe had not Aſſets, and the Daughter might chuſe whether ſhe would be out of Poſſeſſion of the Rent, or not, and therefore it was at her Election whether or no any Wrong ſhould be done to her of the ſame Rent. [a] And if a Man dies ſeized, having a Son Baſtard *eigne*, and a Daughter *Mulier puiſne*, who is Covert at that Time, and the Baſtard enters, and dies ſeized without Interruption, and his Iſſue enters, and the Huſband dies, perhaps the Wife ſhall not be bound any more than an [b] Infant ſhould in ſuch Caſe; but if the Baſtard had entered, and afterwards ſhe had taken Huſband, and then the Baſtard had died, it had been otherwiſe. And if a Man has a Daughter Baſtard *eigne*, and a Son *Mulier puiſne*, perhaps there the Maxim does not hold Place, becauſe ſhe had not Colour by any Law.

[a] Contra Co. Litt. 241. a.

[b] See the Books cited *pro et con*, as to this Point, Plowd. 372, in the Margin. Ante § 100.

281. Three Coparceners in Tail make a Feoffment with Warranty, firſt the eldeſt and then the youngeſt die without Iſſue, the middle Parcener has Iſſue and dies, and the Iſſue brings a *Formedon*, it ſeems that he ſhall recover the Moiety of the Part of the eldeſt, and alſo the Moiety of the Part of the youngeſt, and no more, becauſe the Warranty of the eldeſt was collateral to the middle Parcener, as to the Part of the middle, for that, as to her Part, he cannot make himſelf Heir to her who made the Warranty, but yet as to the Part of the eldeſt, the Warranty is lineal both to the middle and to the youngeſt, becauſe they may inherit it as Heir to the eldeſt, and with Regard to the Part of the youngeſt, as to the youngeſt herſelf and her Heirs for their third Part, the Warranty of the eldeſt is collateral, becauſe neither the youngeſt nor her Heirs can poſſibly make themſelves Heirs of the third Part thereof to the eldeſt who made the Warranty, and ſo the Warranty of the eldeſt ſhall enure in Manner as aforeſaid. Then when the youngeſt afterwards died, her Warranty was collateral as to the Part of the middle, and as to her Iſſues alſo, becauſe they could not by any Poſſibility make themſelves Heirs to the youngeſt for that Part, and the Warranty of the youngeſt was lineal, as to a Moiety of the eldeſt, and collateral, as to another Moiety, becauſe by Poſſibility the youngeſt and the middle might have had the Part of the eldeſt by Deſcent, if the eldeſt had died firſt (as ſhe did), and then if the youngeſt had died without Iſſue, the Moiety of the third Part, which deſcended to her from the eldeſt, ſhould have deſcended to the middle, as Heir to the youngeſt, and then, as to the other Part of the eldeſt, the Warranty of the youngeſt was collateral to the middle, becauſe, as to that Moiety of the third Part, the middle could not have had it as Heir to the youngeſt who made the Warranty, but ſhould have been in as immediate Heir to the eldeſt; and as to her own Part, her Warranty, as to the middle, was lineal, becauſe by Poſſibility ſhe might have had this third Part as Heir to the youngeſt, and ſo the Warranty of the youngeſt ſhall enure to the whole Land in Manner as is aforeſaid. Then inaſmuch as the youngeſt is dead without Iſſue, the Warranty of the eldeſt as to a Moiety of the Part of the youngeſt, is lineal, and as to the other Moiety of this Part, it is collateral to the middle, becauſe by Poſſibility the youngeſt might have died firſt, and then her Part had deſcended to the eldeſt and to the middle, and ſo the Moiety thereof might have deſcended from the eldeſt to the middle, as Heir to the eldeſt, and therefore by Reaſon of this Poſſibility the Warranty of the eldeſt ſhall be lineal for the one Moiety of the youngeſt, and collateral for the other Moiety of the youngeſt, and ſo the Warranty of the eldeſt, which upon the Deſcent was collateral to the youngeſt, for the Part of the youngeſt, and to her Iſſues, is now changed for the Moiety, and become a lineal Warranty for the Moiety. As if Tenant in Tail has Iſſue three Sons, and diſcontinues, the Warranty of the middle ſhall

be collateral to the eldeſt for the whole, but to the youngeſt it ſhall be lineal for the whole, and if the eldeſt dies without Iſſue, then the Warranty of the middle, which deſcends only upon his Heir, is lineal for the whole to his Iſſue, becauſe the Iſſue might by Poſſibility convey the whole Land as Heir to the middle, who might ſurvive the two others. And as to the Warranty of the eldeſt and youngeſt Parcener in the firſt Caſe, they are to the Iſſue in the ſame Degree as they were to his Mother, viz. as it is ſaid above, ſo that for the third Part which belonged to his Mother, there is a double Bar to the Iſſue, viz. the Warranty both of the eldeſt and of the youngeſt, and for the Moiety of the one Aunt and of the other he is barred by their ſeveral Warranties, and ſo he ſhall recover the third Part of the whole Land, as it is ſaid before. *Note* at firſt, that the Warranty of each goes to every Part, as you may ſee 9 *H.* 5. 12. in a *Scire facias*, and therefore in [a] 4 *H.* 7. 18. *b.* it is ſaid that if three Coparceners alien in Fee with Warranty, each Warranty ſhall be collateral to the other, by *Brian et Fairfax*, and *Huſſey* ſaid, although it be ſo, it ſhall ſerve nothing; *quære bene.*

[a] Fitz. Garranty 6. Bro. 56, *quære.*

282. [b] If a Feoffment is made by one Deed in Fee and by another Deed in Tail to one and the ſame Perſon, and Livery is made according to both Deeds, it ſeems that it ſhall enure by Moieties, for otherwiſe the Livery could not enure upon each Deed, becauſe if he ſhould have the whole Land in Tail, the Remainder in Fee, then the Livery would only operate upon the Deed in Tail, and the other would be but a Deed of Confirmation, and ſo the Livery would not enure upon both Deeds, but only upon one Deed. And if Livery had been made only upon the Deed in Tail after the Delivery of both Deeds, he ſhould have been Tenant in Tail, with Remainder in Fee, becauſe if there is Tenant in Tail, and the Donor confirms in Fee, this is a Grant of the Reverſion in Law, and in this Caſe the Lord in his Avowry ſhall not make Mention of the Eſtate-Tail, but in the other Caſe he ought, becauſe the Fee paſſes in the ſame Inſtant that the Tail is created by the Livery, and therefore it ſhall be a Remainder. Then in the principal Caſe inaſmuch as there ſhould have been a Remainder, if no Livery had been made upon the Fee, for this Reaſon it cannot now enure as a Remainder, becauſe Livery is made according to both Deeds, and therefore it ſhall paſs an Eſtate upon both Deeds, and ſo of Neceſſity it muſt enure by Moieties.

[b] S. P. Co. Litt. 21. a.

283. A Feme-ſole has a Rent-ſeck, and takes Huſband, the Tenant of the Land grants to the Huſband that he and his Heirs may diſtrain for the Rent, the Huſband and Wife die without Iſſue, it ſeems that the Diſtreſs is now extinct, becauſe the Heirs of the Huſband are only Privies to diſtrain, and they cannot diſtrain for a Rent due to another, viz. to the Heirs of the Wife, any more than one may enter by Force of a Condition for Rent due by Law to another. But if a Man has a Rent ſeck on the Part of his Mother, and the Tenant grants that he and his Heirs may diſtrain for the Rent, and he dies without Iſſue, the Diſtreſs ſhall go with the Rent, viz. to the Heirs on the Part of the Mother, and if they grant the ſame Rent to a Stranger, the Grantee may well diſtrain. Yet if the Tenant grants to the Lord of the Manor that he may diſtrain, *ut ſupra*, and he aliens the Manor, the Grantee ſhall not diſtrain out of the Manor, and in this Caſe the Penalty of Diſtreſs by the Deed is gone, ſo in the other Caſe the Grant being of a Diſtreſs in the ſame Place out of which the Rent iſſues, it is now a Rent-Charge, and conſequently the Diſtreſs ſhall paſs to the Grantee; but if the Grant of Diſtreſs had been in another Place, then it had been only a Penalty, and conſequently ſhould not have gone to the Heir on the Part of the Mother, nor to the Aſſignee of the ſame Rent, and therefore by the Severance of the Penalty by Act in Law or in Deed from the Subſtance in which it ſubſiſts, the Penalty ſhall ceaſe. And if there be Lord and Feme-Tenant, and the Lord grants Acquittal to the Huſband of the Feme in Fee, and the Huſband and Wife have Iſſue, and die, perhaps the Iſſue ſhall take Benefit of the Acquittal in one Right, viz. as Heir to the Father, although he has the Tenancy on the Part of the Mother, but if the Huſband had been dead without Iſſue, then clearly it had been extinct, and if, after the Acquittal, the Land had deſcended upon the Son of the Huſband and Wife, and upon the Death of the Son without Iſſue the Land had come to the Heir on the Part of the Mother, the Acquittal alſo ſhould have been attendant to the ſame Intereſt, becauſe it was once veſted in the ſame Subſtance in one Perſon. *Quære de hoc*, for 38 *Ed.* 3. 10. is, that if a Feme-ſole binds herſelf to Acquittal of the Tenant in Fee, and takes Huſband, to whom the Tenant releaſes, and grants that neither he nor his Heirs ſhall demand Acquittal of the Huſband and his Heirs, and they die, leaving Iſſue, this Iſſue, who is charged as Heir to the Wife, ſhall not be diſcharged as Heir to the Huſband, but ſhall be bound to the Acquittal. And in 18 *Ed.* 3. 9. Land is given to Huſband and Wife and to the Heirs of the Huſband, who makes a Gift in Tail, the Wife recovers againſt the Donee in Tail in a *Cui in vita*, ſuppoſing that ſhe had the Fee, and dies, and the Donee in Tail dies, and the Iſſue of the Huſband and Wife brings a *Formedon* in Reverter againſt the Feoffee, now, notwithſtanding he is Heir to the Wife, he ſhall be eſtopped to ſay that he has a leſſer Eſtate than a Fee, yet the Iſſue who claims by the Huſband ſhall not be bound by an Eſtoppel made by the Wife, *ergo*, if the Iſſue claims from the Father, he ſhall not claim further, nor ſhall he be prejudiced by Acts or Eſtoppels made by the Mother.

284. If a Diſſeizee, where his Entry is taken away, and a Stranger enters upon the Heir in by Deſcent, and the Diſſeizee confirms the Eſtate of the Stranger, it ſeems that though the Confirmation gives no Poſſeſſion of the Freehold to his Companion, yet his ancient Right is gone for ever, ſo that if the Heir re-enters, he ſhall hold it for ever, if he can ſhew his Deed of Confirmation. But if the Heir who is in by Deſcent is diſſeized by A. who leaſes for Life to B. whoſe Eſtate the firſt Diſſeizee confirms, and afterwards the Heir enters, the Diſſeizee ſhall have no Remedy during the

the Life of B. for the Confirmation continues ſo long, and no longer, as *Littleton* ſays, and then the Heir has the Right of B. and by the ſame Reaſon that the Diſſeizee cannot have an Action againſt B. by the ſame Reaſon he cannot have an Action againſt him who has his Eſtate, in Reſpect of the firſt Diſſeizee. Same Law if the Heir who is in by Deſcent makes a Leaſe to the Diſſeizee and a Stranger for their Lives, and the Diſſeizee confirms the Eſtate of his Companion, no Action lies for the Diſſeizee during his own Life, although the Heir re-enters, *cauſa patet*, but his Heir ſhall have good Remedy, although there had been no Remedy if the Stranger had ſurvived; but ſome ſay that after the Entry of the Heir the Diſſeizee ſhall have Remedy, becauſe it was but a Concluſion which goes in Privity, and not in Extinguiſhment of the Right, as it ſhall be upon a Releaſe. And in the firſt Caſe ſome ſay that the Confirmation does not extend to the Right which is ſuſpended, as a Releaſe ſhall do, any more than if one who has a Rent-Charge and a Stranger diſſeize the Tenant of the Land, and he who had the Rent confirms the Eſtate of his Companion, and the Diſſeizee re-enters, the Rent is revived, becauſe as the Rent was not grantable, it being ſuſpended in the Inheritance, ſo could not the Confirmation extend to it nor touch it.

285. If the Tenant makes a Feoffment, pending a *Præcipe* againſt him, and afterwards the Demandant recovers, after which Recovery the Feoffee dies ſeized, and the Heir is in by Deſcent, it ſeems that the Demandant cannot enter upon the Heir, for although his Tenancy was made pending the Writ, yet the dying ſeized was after the Judgment, and tantamount as if the Feoffment and Deſcent had been both after the Judgment, and then the Entry is clearly taken away, and the Deſcent is the Title, and not the Feoffment, for that would be double, and therefore the Deſcent being after the Judgment is ſufficient; but if the dying ſeized had been pending the Writ, it is clear that the Entry of the Demandant had not been taken away. But if there is Tenant for Life, Remainder over in Fee, and a Recovery is had againſt the Tenant for Life, and he dies, and afterwards he in Remainder enters, and dies ſeized, this Deſcent ſhall not take away the Entry of the Recoveror, becauſe the whole Eſtate was recovered, and he in Remainder is as much Privy as if the Recovery had been immediately againſt himſelf, ſo of him in Reverſion. *Bro. Entry congeable* 116.

286. If Tenant for Life grants over his Eſtate, rendering Rent by Indenture with Re-entry, and a Title of Entry is given, and the Grantee makes a Feoffment in Fee, and the Leſſor in Reverſion in Fee enters for the Forfeiture, ſome think that the firſt Leſſee for Life may re enter upon him. As if an Infant Tenant for Life grants over his Eſtate by Livery of himſelf, and his Aſſignee aliens in Fee, and the Leſſor enters for the Forfeiture, yet the Right of the Infant is not taken away, but he ſhall have a *Dum fuit infra ætatem.* So if a Feme covert Tenant for Life and her Huſband alien in Fee, ſhe ſhall have the Land again by *Cui in vita.* And if Tenant for Life leaſes for Years, and makes a Feoffment, and the firſt Leſſor enters, yet the Term continues during the Life of the Tenant for Life, although his Waſt ſhall forfeit the Term, as *Ceſſer* ſhall do after his Leaſe; but herein note a Default of the Leſſee in not preſerving the Poſſeſſion without ſuch Prejudice to the firſt Leſſor, and in all the Caſes aforegoing the Waſt by the Aſſignee of the Infant or Feme-covert ſhall take away their ſpecial Right of Infancy, Coverture, or for Condition, otherwiſe of Waſt done by themſelves, and an Action brought againſt them for it. But in the firſt Caſe the Title of Entry for Forfeiture is merely by the common Law, which ſhall never deſtroy another Title for Rent reſerved coming in Reſpect of the Eſtate, and not merely as a Grant. And if the Leſſee or Grantee had granted over the Rent, it is clear that the Forfeiture ſhould never have taken away that Intereſt; but, it being in Reſpect of the Eſtate, therefore ſome hold that the Rent ſhall be gone.

287. Lord and Tenant, the Lord dies, having a Son, the Tenant makes a Feoffment, the Son has Seizin of the Rent by the Hands of the Feoffor, if this Seizin be ſufficient to enable the Son to have an Aſſize againſt his Diſſeizor afterwards, is the Queſtion. It ſeems that the Son cannot have Cuſtoms and Services againſt the Feoffor after the Feoffment made, nor is his Attornment ſufficient, and a Releaſe to him does not extinguiſh the Seigniory, but that he may avow upon the Feoffee, for theſe Acts are in the Right. So upon Reſcous by a Stranger, an Aſſize is not maintenable againſt the Reſcouſor and the Feoffor, becauſe the Tenant is not named; and in Aſſize the Surpluſage encroached ſhall be avoided by Plea. Nevertheleſs it ſeems that the Seizin is good by the Hands of the Feoffor, after the Feoffment and before Notice, becauſe he is Tenant to the Avowry, and ſhall charge the Feoffee, for it is reaſonable that it ſhould be a good Seizin by his Hands upon whom he is to avow, for Avowry is an Action in the Poſſeſſion. And yet a Releaſe made to the Feoffee is available to the Feoffor, and he ſhall plead it, and not the Feoffee, becauſe the Feoffor, being Tenant to the Avowry, ought to plead to the Action of Avowry; as if Tenant for Life does Waſt, and grants over his Eſtate, in Waſt brought againſt him he may well plead a Releaſe in the Land, and yet he has nothing in the Land, ſo ſhall Tenant in Dower do in Waſt, and Vouchee in a *Præcipe quod reddat*, and Feoffee in a *Contra formam collationis.* And if the Feoffee upon Condition pays 10 *s.* to the Lord, where the Tenure is by 5 *s.* the Feoffor, after his Entry for the Condition broken, ſhall be bound thereby in Replevin. So if there is Leſſee for Life upon Condition to have Fee, and the Leſſor gives more Rent to the Lord than he ought, and afterwards the Condition is performed, the Leſſee is bound in Replevin. So if a Seigniory of 20 *s.* is granted by Fine, and the Tenant aliens over, and afterwards pays 40 s. to the Lord, this ſhall bind the Feoffee.

288. If there is Lord and Tenant, and the Tenant aliens in Mortmain, and within the Year the Lord confirms the Eſtate of the Feoffee, and the Year expires, the Queſtion is if the next

Lord

Lord ſhall have another half Year, becauſe he (the next Lord) has loſt his Advantage by the Confirmation. And it ſeems that he ſhall, becauſe the Statute is, that he ſhall enter to avoid the Mortmain, and Power is not given to him to approve of it, for then by ſuch Means if the Tenant and Lord immediate would aſſent, they might amortiſe the Land without the Conſent of any other Lord, which is not convenient.

289. A Gift is made to a Man and to two Women Couſins of the Donor in Frankmarriage, or to a Man and two Women, and to the Heirs of their Bodies begotten, or to two Men and two Women, and to the Heirs of their Bodies, in every of theſe Caſes each has an Eſtate-Tail ſeverally in the one Part, and they ſhall be Jointenants of the Freehold, and none of theſe Caſes ſhall be a ſpecial Tail. So when Land is given to three, the one Moiety to Huſband and Wife in Frankmarriage, or in ſpecial Tail, and the other Moiety to the ſame Man and another Woman in ſpecial Tail, or when it is given to a Man and two Women, or to two Men and two Women, and to the Heirs of their Bodies, this is as much as to ſay, the Heirs of all their Bodies, ſo that by the Words the Heir, who ought to inherit, ought to be Heir of all their Bodies, which is impoſſible, and therefore inaſmuch as the Words cannot be literally performed, the Law will make the beſt Expoſition of them, viz. that there ſhall be ſeveral Tails in each of them, and a joint Freehold, *quod nota* clearly.

290. If A. by Parol requires or authoriſes B. to write, ſeal, and deliver a Grant of a Rent-Charge of 20*s.* out of the Land of A. and this in the Name of A. and B. accordingly does ſo, it ſeems that the Grant is effectual. For if I make a Grant of a Rent-Charge, and command A. to deliver it, he may well do ſo without Writing. So if I by Parol deliver it to him as an Eſcrow, to be delivered as my Deed upon the Performance of a certain Condition, and he accordingly does ſo, this Delivery of A. by Force of my Words is good and effectual. So in the firſt Caſe my Words gave him Authority, and the Writing and Sealing is not material, but the Delivery, and that may well be done without any Writing to authoriſe it. But an Authority to an Attorney to make Livery of Seizin ought to be by Deed, and ſo the Wife ſhall not aver the Aſſent of the Father to Dower *ex aſſenſu patris*, * but it ought to be by Deed, and the Leſſor cannot authorize the Tenant for Life to do Waſt without Deed, for in theſe Caſes an Intereſt in the Land paſſes, but in the firſt Caſe there is nothing but an Aſſent to the Deed charging the Land.

* See Litt. § 40.

291. If there is Lord and Tenant by Fealty and 20*s.* and the Tenant makes a Gift in Frankmarriage to hold of him and his Heirs by Fealty only, until the fourth Degree be paſt, and after the fourth Degree is paſt, by 20*s.* and Chivalry, in this Caſe after the fourth Degree is paſt he ſhall not have 20*s.* nor Chivalry, becauſe although he reſerves only Fealty until the fourth Degree is paſt, yet it is an entire Reſervation preſently, and the Services are in him, although they are not feaſible until the fourth Degree is paſt, and Seizin of the Fealty ſhall be Seizin of the Reſidue, wherefore ſeeing that the Reſervation is entire, for this Cauſe it is void for the whole, becauſe the whole cannot be reſerved upon the Gift in Frankmarriage.

292. If a Woman Tenant in Tail general takes an Infant to Huſband, who aliens, and dies, and his Heir enters upon the Feoffee, and the Wife re-enters, ſhe is not remitted. Firſt, it ſeems that the Wife cannot enter upon the Feoffee, becauſe ſhe is not Privy in Blood to the Infant, and Privity in Eſtate is not ſufficient. For if two Jointenants, the one within Age, are diſſeized, and the Diſſeizor dies ſeized, and the Jointenant within Age dies, the other ſhall not enter into the Moiety, as the Infant might have done; and neither the Lord by Eſcheat, nor the Donor in Reverſion, ſhall take Advantage of Nonage, but the Iſſue well may. And if Land is given to an Infant and to the Heirs Females of his Body, and he aliens within Age, and dies, having a Son and a Daughter, the Daughter ſhall not enter, for although ſhe is Heir *ſecundum formam doni*, yet that is to the Land only, and ſhe is not Heir general, nor does the Eſtoppel run to her, 35 *H.* 6. *Note*, ſhe ſhall not take Benefit of the Nonage of her Father, *quære tamen*. Then in the principal Caſe if the Wife ſhall not enter, it is to be conſidered whether the Heir of the Infant ſhall enter. It ſeems that if the Wife had had a Fee-ſimple, the Heir of the Infant ſhould not have entered upon the Alienation, as *Littleton* ſays, becauſe the Right was in the Wife, and ſhould ſurvive to the Wife, and a Title of Entry, which was in Right of the Wife, cannot deſcend to the Heir of the Huſband, any more than if the Huſband and Wife had been diſſeized; but here inaſmuch as the Huſband has given a Fee-ſimple, and had but an Eſtate-tail in Right of the Wife, ſo he has given more than he had in Right of the Wife, and the whole of this cannot ſurvive to the Wife, becauſe ſhe had it not before, *ex quo ſequitur* that more Doubt ariſes here than in the Caſe in *Littleton*. Nevertheleſs it ſeems that the Heir may enter, becauſe he cannot have an Eſtate-tail, nor the ſame Eſtate which his Anceſtor had: Another Reaſon is, becauſe the Entry of the Heir ſhall not be in Reſpect of the Eſtate given, but of the Eſtate which his Anceſtor had at the Time of the Gift, which was a Fee-tail, the Right whereof ſurvives to the Wife. For if Land is given in Tail to an Infant, who makes a Feoffment, and dies without Iſſue, his collateral Heir cannot enter, becauſe the Eſtate, which the Infant had at the Time of the Gift, is determined. For if an Infant Tenant *pur auter vie* aliens in Fee, and *Ceſtuy que vie* dies, the Infant himſelf cannot re-enter, *contra* 5 *Ed.* 4. 5. where it is ſaid that if an Infant Tenant at Will aliens in Fee, and dies, his Heir ſhall have a *Dum fuit infra ætatem*, and nothing ſhall be traverſed but the Demiſe. But in the principal Caſe perhaps if the Infant had made a Gift in Tail, his Iſſue might have entered by Reaſon of the Reverſion in him, (contrary, as Heir to the Infant) which would have enabled him to have an Action or Entry, otherwiſe it is where no Eſtate deſcends from the Infant to him. And if a Dean within Age aliens in Fee, the Heir of the Dean cannot enter, becauſe at the Time of the Livery the Poſſeſſion was *in auter droit*, but it ſeems

an Action lies for the Heir of the Dean, and although the Dean had made but a Gift in Tail, yet the Dean ſhould have had the Reverſion in Succeſſion, otherwiſe it is in the Caſe of the Huſband ſeized in Right of his Wife, unleſs the Wife joins in the Gift. But if the Huſband had made a Feoffment upon Condition, his Heir ſhould have entered for the Condition broken, becauſe here it is not in Reſpect of the Right, as in the principal Caſe, but of a Title reſerved to him and his Heirs upon the Livery, which is a new Purchaſe, and ſhall enure to the Heirs on the Part of the Father of the Infant. And if Tenant in Tail to his Heirs Females makes a Feoffment, and dies within Age, having a Son and a Daughter, the Son ſhall not enter any more than the Daughter; and ſo if it was in Borough Engliſh, the youngeſt Son ſhould have a Writ of Error, becauſe the Right goes to him with the Land, but not the Infancy of the Perſon. And if Tenant in Tail makes a Feoffment within Age, and afterwards is attainted of Felony, his Iſſue ſhall not enter, for he is Privy in Eſtate by the Statute *de donis*, but he is diſabled in Blood to take Advantage of the Infancy, becauſe the Infant has no Heir.

293. A Man has Common without Number in Tail granted to him out of two Acres, and he purchaſes the one Acre, and has Iſſue, and dies, ſo that the Common and the one Acre deſcend to the ſame Iſſue, if the Common ſhall be revived in the other Acre is the Queſtion. If the Iſſue had recovered one Acre againſt the Grantor upon Title before the Grant, then the Common ſhould have remained in the other for the whole, for there was but one rightly charged at the Beginning. But upon the Deſcent there can be no Apportionment without Queſtion, for either it is gone and ſuſpended for the whole, or revived in the Reſidue for the whole, for Common without Number is a Thing entire which cannot be ſevered. But if it was Common certain, as for 10 Cattle, then upon the Deſcent it might well be apportioned, becauſe that is apportionable as Rent is, otherwiſe it is of a Thing incertain which cannot be apportioned. And if one has Eſtovers in certain in 10 Acres of Wood, and 5 of the Acres deſcend to him, now it ſeems againſt Reaſon that he ſhould have the whole Eſtovers in the 5 Acres, for then perhaps they would not be ſufficient to ſupply his Eſtovers, and ſo the Grantor would have nothing for his Eſtovers. So in the principal Caſe, but yet foraſmuch as each Acre was charged, &c. and Part remains, in which, before the Deſcent and the Purchaſe, he had Common without Number, it ſeems againſt Reaſon that the Act of the Tenant in Tail or of the Law ſhould diſcharge the Reſidue; but if Part of the Land was in the Hands of the King, the whole ſhould be diſcharged for the Time, as it ſeems by 29 *Aſſ. pl.* 10. Further, ſome think that inaſmuch as the Common is in Tail, it alters the Caſe, for if I have a Rent Charge in Tail, and Part of the Land deſcends to me, it cannot be apportioned, if it was not to endure for the whole Time, but here it is only ſuſpended in the Land deſcended, for if he aliens it, the Rent ſhall be revived to the Iſſue out of that Acre, wherefore upon a Suſpenſion there can be no Apportionment. *Vide* 29 *Aſſ. pl.* 21.

294. A Man dies ſeized of an Acre of Land in Borough Engliſh in Tail, having three Sons, the youngeſt enters, and leaſes to the ſecond for Years, who makes a Feoffment with Warranty, and dies without Iſſue, the youngeſt dies without Iſſue, the eldeſt brings a *Formedon*, if he ſhall be barred by the Warranty is the Queſtion. It ſeems that although the Warranty deſcends to the eldeſt, where it was a Diſſeizin to the youngeſt, yet when the Right of the Land comes to him, he ſhall ſay that the Warranty commenced by Diſſeizin, becauſe now he is Privy to the Warranty and to the Eſtate. For if the Father, being ſeized in Fee, makes a Leaſe for Years to the Grandfather, who makes a Feoffment with Warranty, and dies, and the Father dies, this Warranty ſhall be no Bar to the Son, becauſe it commenced by Diſſeizin to him whoſe Heir he is now. And if a Man has Iſſue two Sons, and the youngeſt leaſes for Years to the Father, who dies after a Feoffment with Warranty, and afterwards the eldeſt Son dies without Iſſue, and the Warranty deſcends to the youngeſt, this ſhall be no Bar, becauſe it commenced by Diſſeizin. And altho' the Land does not come immediately to him upon whom the Warranty deſcends, (as it was in the principal Caſe) or although the Warranty does not immediately deſcend upon the Tenant of the Land as Heir to him who made the Warranty, yet it is all one Warranty which commences by Diſſeizin, and in all Caſes where the Warranty commences by Diſſeizin, and at the ſame Time a Wrong is done to him upon whom the Warranty afterwards deſcends, although this Wrong was not a Diſſeizin to him, yet it is, as to him, a Warranty which commences by Diſſeizin. As if a collateral Anceſtor of the Donor diſſeizes the Donee, to the Intent to make a Feoffment with Warranty, and accordingly does ſo, and the Warranty deſcends upon the Donor, and afterwards the Tenant in Tail dies without Iſſue, in a *Formedon* in Reverter the Warranty ſhall be no Bar, becauſe it commenced by Diſſeizin to the Tenant in Tail, at which Time a Wrong was done to him in Reverſion, and therefore he ſhall ſay that the Warranty commenced by Diſſeizin, which ſee 31 *Ed.* 3. *Fitz. Garranty* 28. And if the Father, being Leſſee for Years of the Leaſe of the Son, aliens with Warranty, and dies, the Son ſhall not be vouched by this Warranty, no more than rebutt, *Vide tamen* 50 *Ed.* 3. 12. But if a Man makes a Feoffment with Warranty, which is a Diſſeizin to a Stranger, and dies, the Heir of the Feoffor (if he has not the Right of the Land deſcended to him afterwards) ſhall be vouched for this Warranty clearly, wherefore, &c. Then in the principal Caſe if the eldeſt cannot ſay that the Warranty commenced by Diſſeizin, yet it ſhall be lineal againſt him, for by Poſſibility he might have made himſelf Heir to him that made the Warranty, for the Land may deſcend to the youngeſt Heir, as well as it ſhall do to the youngeſt Son, and ſo to the youngeſt Uncle, for the Reaſon is all one, for the youngeſt Brother ſhall be in as youngeſt Son to the common Anceſtor, and then it deſcends to him to whom it ought to have deſcended if the youngeſt Son had not been born. But ſome ſay that the Reaſon of theſe two Caſes is not the ſame, for as to the Father, it is intended that a youngeſt Son is worſe

advanced, and for the moſt Part within Age at the Time of the Death of his Father, but the youngeſt Brother or youngeſt Uncle is preſumed to be more able than the deceaſed, and ſo more capable of helping himſelf than the youngeſt Son of any.

295. It ſeems that in Dower the Guardian in Deed ſhall not plead Detinue of the Body of the Heir, becauſe none ſhall plead this but he whoſe Title commences when the Dower commences; but the Guardian in Right may plead it. And if the Heir makes a Feoffment, the Feoffee ſhall not plead Detinue of Evidences, for his Title in the Land does not commence with the Title to Dower, but is younger than it. And if the Heir be once poſſeſſed of the Charters, or the Guardian of the Heir, and afterwards the Wife gets Poſſeſſion of the Charters, or of the Body of the Heir, Detinue of them ſhall not be pleaded in a Writ of Dower, for that the Cauſe ariſes after the Title of Dower. See 17 *Ed.* 3. 58. that Guardian in Deed ſhall plead Eloignment of the Heir in Dower againſt him. 6 *Eliz. Dyer* 230, Detinue of Evidences no Plea for any unleſs for the Heir being Tenant in Fee of the Land by Deſcent, and of the ſame Land concerning which the Demand is in the Writ of Dower.

296. If an Infant be diſſeized, and a Deſcent is caſt during his Nonage, and afterwards he comes of full Age, and then the Heir of the Diſſeizor dies before any Entry made by him, ſhall this Deſcent take away his Entry? It ſeems that it ſhall not, for he who laſt died ſeized had not Poſſeſſion in Deed, but Poſſeſſion in Law only; and although his Wife ſhall have Dower, and the Land is liable to a Statute, yet to take away Entry there ought to be a Poſſeſſion in Fee in him who died ſeized, for otherwiſe he ſhall be in immediately as Heir to him who was laſt ſeized in Deed, and he ſhall not render in Value this Land by Reaſon of any Warranty made by him who had the Poſſeſſion in Law, as 24 *Ed.* 3. 47. is. So if the Grandfather be a Diſſeizor, who dies ſeized within the Year after continual Claim made, and after the Year and before Entry the Father dies, and the Son enters, the Diſſeizee may enter upon him. *Quære*, for others are of a contrary Opinion.

297. If the Lord diſſeizes the Tenant, and is diſſeized, he cannot diſtrain for his Seigniory, becauſe he has Title in the Land againſt him, but if the Diſſeizee re-enters, the Seigniory ſhall be revived, for now the Seigniory and Tenancy are lawfully disjoined, but if the Diſſeizee releaſes to the Diſſeizor of the Lord, the Seigniory is extinct, becauſe this does not countervail an Entry and Feoffment, with Reſpect to the Lord, but it extinguiſhes the Right of the Lord to the Land, in which Right to the Land the Right which he had to the Seigniory was ſuſpended. But if the Lord and a Stranger diſſeize the Tenant, and the Tenant releaſes to the Stranger, the Seigniory is revived; becauſe there the Releaſe enures to an Entry and Feoffment, with Reſpect to the Lord, and the Lord has not the Right to the Land; ſo if the Lord dies, and the other has it by Survivorſhip. But if the Lord diſſeizes the Tenant, and is diſſeized by two, and the Diſſeizee releaſes to one of them, *quære*.

298. If A. gives to B. 20 Acres in Exchange for 10 Acres, each Acre of equal Value, and B. being impleaded vouches A. and loſes 10 Acres of the ſaid 20, and recovers in Value, he ſhall have back again all the 10 Acres which he gave to A. and he ſhall retain the other 10 Acres for the Folly of A. without Warranty. So if the eldeſt Parcener has two Acres, and the youngeſt but one Acre, and the eldeſt loſes one of the Acres which ſhe has, ſhe ſhall have the whole Acre of the youngeſt, by Reaſon of the Folly of the youngeſt; *Contra* * *Littleton*, who ſays that ſhe ſhall enter with the other, and compel her to make Partition *de novo*.

* Vide Litt. § 263.

299. The Lord has the Wardſhip of the Meſne, and enters into the Tenancy for Mortmain, if the Ward ſhall be out of Ward? for he does not enter in Reſpect of the Seigniory, but in Reſpect of the Meſnalty. Yet many think that he ſhall have the Fee, becauſe the Statute is, *quod retinebit in feodo*, and then the Seigniory and Meſnalty alſo ſhall be determined, and conſequently he ſhall be out of Ward.

300. The Conuſor of a Statute-merchant is in Execution, and his Land alſo, the Conuſee releaſes to him all his Debts, and afterwards the Conuſor is let at large by the Goaler, if the Goaler ſhall be charged for this Eſcape? It ſeems that the Execution is diſchargeable by this Releaſe, becauſe, until the Profits are entirely levied, the Debt remains in *eſſe*, otherwiſe the Execution ſhould not remain, as the Heir continues in Ward until he is able to do the Services, but if the Seigniory be releaſed to the Tenant, now he ſhall be out of Ward for the Body and Land, and if a Man leaſes for Years, upon Condition to retain for all that is in Arrear, there alſo if the Rent be in Arrear, the Pledge is gone, ſee 30 *Ed.* 3. 7. that he ſhall have the Duty over and above the Profits. Then as to the principal Matter, although the Execution be by this Releaſe diſchargeable by the Party by *Scire facias ad cognoſcendum finem vel audiendum querelam*, yet before it is diſcharged in Deed, he ſhall be adjudged in Execution, for which Reaſon the Goaler cannot ſay but that he is in Execution. And therefore if an Obligation be delivered *en owel main* to J. who breaks the Seal, in Detinue if he does not plead a Releaſe to the Obligor, he ſhall be at great Miſchief. *Vide tamen* 9 *H.* 6. 19. *b. Per Paſton*, the Keeper ſhall not plead a Releaſe made to him that eſcapes.

301. If the Lord of a Villain gives Land by Fine to the Villain, which is Land in Ancient Demeſn, and the Lord of Ancient Demeſn reverſes the Fine by Diſceit, ſome think that the Manumiſſion is deſtroyed, becauſe it does not appear of Record; otherwiſe it is if he enfeoffs his Villain upon Condition, and enters for the Breach of it. And if a Villain confeſſes an Action brought by Baron and Feme, this is no Manumiſſion againſt the Feme, becauſe it is but a Manumiſſion in Law, upon which ſhe ſhall not be examined.

302. If

302. If a Man makes a Leaſe for Life, rendering the four firſt Years a Roſe, and afterwards an annual Rent of 20 s. and the Leſſor grants the Rent of 20 *s.* to commence after the End of the four Years, it ſeems that this is a void Grant, becauſe the Rent of the Roſe and the 20 *s.* is all [a] one Rent, and then if the Grant was good, the Grantor would have a Term in the Roſe for four Years, where before it was a Freehold; and it is like the Caſe [b] where a Man has a Rent in Fee, and grants it after four Years, this is a void Grant, otherwiſe it is of a Rent created *de novo*, 8 *H.* 7. 3.

[a] Plowd. 154 (l). Vide Ante § 126.

[b] S. P. Plowd. 152 (b). 155 (m). 1 6 (c) and (d). 197 (d) and (e), and ſee the other Books there cited in the Margin.

303. If Land is given to two, to the one for Life, and to the other for Years, they are Tenants in common, and not Jointenants; but if a Gift is made to Huſband and Wife and a third Perſon, viz. to the third for Life, to the Huſband in Tail, and to the Wife for Years, there the third Perſon ſhall take a Moiety, and *quære* how the Huſband and Wife ſhall take, viz. jointly, or ſeverally, or how much ſeverally.

304. If A. deviſes 20 *s.* annually to B. for 20 Years, and dies, it ſeems that the Deviſee has no Remedy for it, becauſe it is not iſſuing out of any Land, for he cannot take it as a Legacy and a Sum in groſs, and an Annuity will not lie for it againſt the Executors, although they have Aſſets, becauſe their Perſon ſhall not be charged where the Teſtator was never charged, any more than the Heir ſhall be charged upon a Warranty [c] by Deviſe.

[c] Litt. § 734. Ante § 38.

305. * If a Man covenants for Money and Marriage to ſtand ſeized to the Uſe of Huſband and Wife in Tail. and the Deed is not inrolled, yet the Uſe ſhall riſe, becauſe it is not only a Bargain and Sale, otherwiſe it is if Money be the only Conſideration. And if one covenants with me to ſtand ſeized to the Uſe of my Daughter after Marriage, and I before the Time, &c. releaſe all Covenants, yet if the Marriage is had, the Uſe is changed, for it is not ſuch a Thing or Covenant upon which a Writ of Covenant lies, nor ſhall the Uſe be performed in Reſpect of the Continuance of the Covenant, for if, after the Covenant, he with whom the Covenant was made be attainted of Felony and executed, yet upon the Marriage the Uſe and Poſſeſſion ſhall be changed; and if the Covenant was, that he and all thoſe who were ſeized of the Land ſhall be ſeized to the Uſe, and before the Marriage he bargains the Land by Deed inrolled for Money to one who has Notice of the Uſe, and then the Marriage is had, the Uſe ſhall riſe well enough out of the Poſſeſſion, and yet if he had been ſeized of the Land to Uſe, the Uſe ſhould have been extinguiſhed thereby, but yet the Title of the Uſe ſhall not be extinguiſhed, but ſhall commence, becauſe the Land is charged with the Agreement real, [d] as in Caſe of a Leaſe for Life with Condition to encreaſe, and afterwards the Leſſor is attainted, and then the Condition is performed, the Eſtate ſhall be enlarged. So there is a great Diverſity between a Confidence in Perſon, and a Truſt in the Land paramount.

* S. P. Plowd. *Manxel's* Caſe 4. Crompt. J.C. 60. a.

[d] S. P. held Plowd. 486. 8 Co. 76. a. Vin. Abr. tit. Condition T. pl. 26. in Margine. T. d. pl. 4. in Margine.

306. If the Tenant enfeoffs the Villain of the Lord and a Stranger upon Colluſion, the Queſtion is how the Lord can come at the Ward without Damage, for if he brings a Writ of Ward, the Villain ſhall be manumiſed, and if he enters upon the Villain, he annuls the Colluſion for ever, and ſhall retain the Land, but then he ſhall be Tenant in common with the other, and ſo he ſhall have no Writ of Ward for the other Moiety.

307. Lord, Meſne, and Tenant by Equality of Services, the Tenant forejudges the Meſne, the Lord dies, having Baſtard *eigne* and *Mulier puiſne*, the Baſtard has Iſſue, and dies ſeized after having intermarried with the Tenant, the Wife dies, the Meſne reverſes the Forejudger by Error, the Queſtion is, if the *Mulier* ſhall have the Rent of the Seigniory. It ſeems that the Maxim holds Place of Rent as well as of Land, as it is held 14 *Ed.* 2. *Fitz. Baſtardy* 26. and it ſeems that although the Rent was ſuſpended by the Marriage, yet the Maxim holds Place, for there was a dying ſeized of the Rent without Interruption. For if a Man has a Rent in Fee, and becomes Tenant by the Curteſy of the Land, and dies, his Heir ſhall have a *Mortdanceſtor* of the Rent, which he ſhould not have had, if his Anceſtor had not died ſeized. So if an Aſſize be brought againſt the Pernor of Rent, and afterwards the Plaintiff is non-ſuited, the Diſſeizee of the Rent is driven to his Action for the Rent, (viz. where firſt the Pernor has an Eſtate for Life in the Tenancy) becauſe the dying ſeized took away his Entry. Then as to the other Point, the Writ of Error does not lie, becauſe the Right of the Meſnalty is extinct by the Unity of the Poſſeſſion of the Seigniory in the Iſſue of the Baſtard, as in 5 *H.* 7. 31. *b.* upon a Releaſe made by the Lord to the Tenant after the Forejudger, a Writ of Error cannot revive the Meſnalty.

308. Three Siſters make Partition, the eldeſt has one Acre in Fee, the ſecond has another Acre in Fee, and the youngeſt has an Acre in Tail, all being of full Age, the eldeſt dies, her Iſſue enters upon the youngeſt, as ſhe may, it ſeems that the ſecond may alſo enter, and the whole Partition is defeated, for when the youngeſt is ouſted, the ſecond ſhall have Part of that to which the Iſſue of the eldeſt is remitted, as ſhe ſhould have had if ſhe had recovered in a *Formedon*; and if the ſecond does not enter, it will be a Miſchief to her, for ſhe cannot have Aid becauſe the other holds *pro indiviſo*. As if two Jointenants, the one within Age, the other of full Age, make Exchange, and after Execution the Infant re enters, the whole Exchange is avoided, for when it is annulled againſt one, it is annulled againſt all, otherwiſe it is when it is annulled for Parcel of the Land not being entire, as it is agreed 14 *Ed.* 4. 3. and it is not all one Perſon.

309. If a Man diſſeizes Tenant for Life to the Uſe of him in Reverſion, and he agrees to the Diſſeizin, the Queſtion is, if he ſhall have a new Fee, or the ancient one, for now he is a Diſſeizor [e] *ab initio*, and if he had been the immediate Diſſeizor, he had only gained a Freehold by Wrong, but now he agrees to that which the other has done, and this makes him to have the Fee by Wrong.

[e] See Plowd. 8 (h).

310. If

310. If he in Reverſion of the Seigniory releaſes to his Grantee for Years and to the Tenant of the Land, and to their Heirs, *quære* how this Releaſe ſhall enure? But if the Releaſe had been to them without more ſaying, it ſeems clearly that the Eſtate for Years and the whole Seigniory had been extinct, for although it enlarges his Eſtate for Life, and no more, yet without the Word *(Heirs)* the whole Reverſion is extinct, and conſequently the Eſtate for Years, *quod negatur* 8 *H.* 6. 24. But if it had been of a Rent-Charge, and the Releaſe had been to them, the Grantee ſhould have taken the whole for his Life, becauſe it is nearer to him, and the other the Fee, and ſo it ſhould have enured to both.

311. Leſſee for 20 Years leaſes for 10 Years, rendering Rent, and afterwards makes a Leaſe to the ſame Leſſee for 10 Years, to commence after his firſt Eſtate ended, it ſeems that the firſt Leſſee ſhall have, during the firſt 10 Years, the Rent reſerved, as a Rent-Service, and ſhall diſtrain for it, for the laſt 10 Years are not out of the firſt Leſſee, nor ſhall they be diveſted out of him and veſted in the other until the Commencement of the Term, and in the mean Time he has but a Right or Title to the Term. [a] And therefore *Littleton* ſays that a Releaſe to the Termor before Entry is void, becauſe he has not Poſſeſſion, but only a Right, and this Word *(only)* is excluſive, and proves that he has not the Chattle in him. [b] And in 4 *H.* 7. 10. it is agreed that the Leſſee cannot ſurrender before Entry, and *Keble* ſaid that he has not the Eſtate, but a Right to the Term, which none contradicted; and in 22 *Ed.* 4. 36, *Suliard*, *Neal*, and *Brian* held the Surrender void, becauſe nothing was in him at the Time of the Surrender, which proves that the Term is not out of the Leſſor before Entry. And therefore in the firſt Caſe the laſt 10 Years were never out of the firſt Leſſee, nor veſted in the ſecond, and then it follows that he cannot ſurrender to the firſt Leſſor, *viz.* to him who has the Fee, and a Releaſe made to the ſame Leſſor during the firſt 10 Years is void for want of Intereſt and Privity. And if a Diſſeizor makes a Leaſe for 10 Years to commence at *Michaelmas*, before which the Diſſeizee confirms his Eſtate, and afterwards enters, the Leaſe is avoided. [c] And altho' the Leſſee for Years may forfeit or grant the Term before it is in him, yet this does not prove that the Eſtate is in him, for ſometimes a Man may grant a Right and Title real, as if a Man has a Rent-Charge for 20 Years with a Penalty, as in 39 *H.* 6. 35. *b.* with Warranty annexed to the Land, he may grant it over, and it is a diſtinct Thing. And if a Leaſe be made for Years, Remainder for Years, Remainder to the firſt Leſſee in Fee, he in Remainder may ſurrender to him, and yet he has nothing in Poſſeſſion. So if a Leaſe is made for Years, Remainder for Years, and the Fee deſcends to the firſt Termor, he in Remainder may ſurrender.

[a] Litt. § 459. Plowd. 423 (c), and ſee the Books there cited in the Margin.

[b] S. P. Ante § 122.

[c] Plowd. 142 (k). 423 (f). Ante § 95. and ſee the Books there cited in the Margin.

312. A. makes a Gift in Tail to B. who makes a Gift in Tail to C. who makes a Feoffment in Fee, and dies without Iſſue, it ſeems that the Iſſue of B. may enter, for nothing was a Diſcontinuance to the Iſſue of B. but the Livery of B. whereby the Reverſion of the Donor was diſcontinued, but when C. dies without Iſſue, now the Livery is determined, and therefore the Diſcontinuance is purged, and the Feoffment of C. who is a Stranger to the firſt Tail, cannot diſcontinue it, eſpecially when there was but a Right of the Tail diſcontinued by the Livery of B. and a Right cannot be diſcontinued by Feoffment, *quod Nota*.

313. Huſband has Land for Life, Remainder to the Wife for Life, Remainder to the Heirs of the Body of the Huſband, the Queſtion was, how the Huſband might diſcontinue this Eſtate-Tail, without barring the Tail; and the Device was, that the Huſband and Wife ſhould make a Leaſe to A. for the Life of the Huſband and Wife, and of the Survivor of them, which A. ſhould grant his Eſtate to the Huſband, and then he ſhould make a Feoffment, which would prove a Diſcontinuance. For upon the Grant of the Huſband and Wife A. ſhall have two Eſtates, *viz.* firſt for the Life of the Huſband, and then for the Life of the Wife, ſo that if he recovers in Aſſize during the Life of the Huſband, who dies, he ſhall not have a Re-diſſeizin during the Life of the Wife, becauſe it is another Eſtate, and the Execution of the firſt Eſtate is not an Execution of the ſecond, but he may have again a *Scire facias* to execute the ſecond Eſtate. Then, if the Law be ſo, when both the Eſtates come to the Huſband, the latter is extinct, for when he hath it for his own Life, he cannot have a Remainder over for the Life of another, becauſe the firſt Eſtate is the greater, and conſequently when he is Tenant for his own Life, Remainder to the Heirs of his Body, he is Tenant in Tail preſently *(Aſſumptio falſa)*, and ſo may diſcontinue by Feoffment. And if the Remainder in Tail be diſcontinued, becauſe by the Grant of the Fee it paſſed as an Eſtate determinable upon their two Lives, and foraſmuch as they could not lawfully grant any ſuch Eſtate, the Remainder ſhall be thereby altered, and thereby they ſhall have the Fee now; then that cannot endure longer than the Eſtate which was the Cauſe of it, and when the Huſband purchaſed the Eſtate, then was that extinct, and ſo the Huſband was Tenant in Tail. *Quære tamen*, ſeeing that the Wife was in Remainder alſo, but if the Eſtate of the Wife had been for the Life of the Huſband, Remainder for the Life of the Wife, then the Matter had been clear.

314. A. bargains and ſells Land to B. by Indenture, and afterwards both of them grant a Rent-Charge to C. and then the Indenture is inrolled, it ſeems that the Rent is gone, for it was the Grant of A. and the Inrollment has Relation to the Delivery, which avoids the Grant, notwithſtanding the Confirmation of the other, who had nothing at the Time of the Grant and Confirmation.

315. Tenant for Life and he in Reverſion grant a Rent-Charge, the Grantee releaſes all his Right to the Reverſioner, the Queſtion is, if the Rent ſhall be extinct. [d] And if two Tenants in common or ſeveral Tenants grant a Rent of 20*s.* to A. this ſhall be a ſeveral Grant of 20*s.* by each of them, and therefore by a Releaſe to the one the Rent ſhall not be extinct as to the other. And ſo ſome think it ſhall be in the principal Caſe, for, their Eſtates being ſeveral, the Grant

[d] S. P. Plowd. 140 (i), and ſee the Books there cited in the Margin.

ſhall enure ſeverally, and then the Releaſe of the Grantee to him in Reverſion ſhall not extinguiſh the Rent of him in Poſſeſſion, becauſe the Poſſeſſion is not charged with the Rent releaſed. And if it ſhould be taken as the Grant of the Tenant for Life, and the Confirmation of him in Reverſion, yet it ſeems that the Releaſe to the Reverſioner ſhall not extinguiſh the Rent, as to him in Poſſeſſion, becauſe altho' he purchaſes the Reverſion, he ſhall have the Rent during the Life of the Tenant for Life. And if they be ſeveral Grants, a Releaſe to the Tenant for Life will not extinguiſh the Rent iſſuing out of the Reverſion, becauſe as to that Charge the Tenant needs not to attorn.

316. If there are two Iſſues of Coparceners, or Heirs in Gavelkind, and one of them has a Wife, and dies without Iſſue, and the other endows the Widow of the third Part of the Moiety, and afterwards re-infeoffs her of all the Reſidue in Fee, and ſhe takes a ſecond Huſband, who makes a Leaſe according to the Statute of 32 *H.* 8. and afterwards the other Parcener releaſes to the Wife, and the Huſband dies, ſhe ſhall be bound for two Parts of the whole Land divided into ſix Parts, and for the Reſidue ſhe ſhall avoid the Leaſe. For when the Wife was endowed, yet a *Præcipe* ſhould have been maintenable againſt the Tenant in Dower, and the Heir of the Huſband (if he had had Iſſue), and the other Parcener, as in 9 *Ed.* 4. 14, againſt Tenant by the Curteſy and the other Parcener, and by the ſame Reaſon againſt Tenant in Dower, ſo in 21 *Ed.* 3. a *Scire facias* brought againſt Tenant by the Curteſy and the other Parcener was held maintenable. Then it ſeems that the other could not enfeoff the Tenant by the Curteſy, no more could ſhe the Tenant in Dower, in Reſpect of the Unity of the Eſtate as to her Moiety, but ſhe might releaſe, and that for the whole Moiety, altho' ſhe had not the whole. As if the one Parcener has Iſſue 20 Daughters, and dies, the other may releaſe her entire Part to each of them. But if there are two Jointenants of 20 Acres, and the one makes a Feoffment of all his Part in 18 Acres, there perhaps the other cannot releaſe all his Right in the 18 Acres, but only in the two Acres. But if Huſband and Wife and a Stranger are Jointenants, the Stranger may releaſe all his Right to the Wife only, and it ſhall enure accordingly. Then further, it ſeems that, as to the Heir of the Huſband, for the two Parts ſhe is Tenant in common, altho' ſhe continues in Parcenary with the other as to the Moiety of the other, for that is divided, becauſe ſhe has the Freehold only, and the other the Reverſion of the third Part of the Moiety, and the two Parts of this Moiety are as it were ſevered in the Right of that Part. *Quære tamen* if ſeveral Actions ſhall be brought againſt the Huſband, as there ſhould if the Huſband had been Tenant in common with the other.

317. A. gives *White-Acre* and *Black-Acre* to B. and C. *viz.* the one Acre in Fee, the other in Tail, B. aliens *White-Acre* in Fee, C. aliens *Black-Acre* in Fee, they die, the Queſtion is, what Remedy their Iſſue has. It ſeems that the Iſſue of B. ſhall have a *Formedon* for the Moiety of *Black-Acre*, and the Iſſue of C. ſhall have an Entry in the *Quibus* for the Moiety of *White-Acre*, and a *Formedon* for the Moiety of *Black-Acre*. For, firſt, the one Acre ought to be entirely in Fee, and the other entirely in Tail, and not by Moieties of each Acre, becauſe the one Acre was given in Tail, the other in Fee. Then the Feoffment of B. was an Election for both to have a Fee in *White-Acre*, as if a Rent-Charge be granted to two, and the one diſtrains and avows for himſelf, and makes Cognizance for his Companion, this is a peremptory Election for both never to have an Annuity, altho' he ſurvives, ſo here. Then the Feoffment of B. was a Diſſeizin to C. for the one Moiety, whereof an Entry in the *Quibus* is given to the Iſſue, and conſequently the entire Tail is in *Black-Acre*, whereof the Feoffment of C. for the one Moiety is a Diſcontinuance to his Iſſue, and for the other Moiety being a Diſſeizin to B. the Iſſue can have no Action anceſtrel but a *Formedon*. Others think that the Election of the one for the Inheritance is not peremptory to the other, as it ſhall be for Chattles, as if I give one of my Horſes to two, and one of them makes Election, this is peremptory to the other.

318. If Land is given to A. and to his Heirs Males, *&c.* as long as he has Iſſue Female of his Body, and A. dies, leaving Iſſue a Female, his Wife is endowed, and afterwards the Daughter of A. dies without Iſſue, the Wife ſhall loſe her Dower, for there is a Diverſity between a Condition in Deed and a Condition in Law, for if Tenant in Tail dies without Iſſue, his Wife ſhall have Dower, becauſe this is a Condition in Law by which the Eſtate is ended; but here it is a Condition in Deed, for if the Gift had been made upon Condition that if A. had died without Iſſue Male, *&c.* it had been a clear Caſe that the Wife ſhould have loſt her Dower, and when he ſays, "as long as he has Iſſue Female," this is all one Sentence, and pronounced in divers Parts. But if Land be given to A. in Tail, upon Condition that if he dies without Iſſue the Donor ſhall re-enter, there the Wife of A. ſhall not loſe her Dower, for the Condition does not take Effect until the Eſtate is firſt determined by the Condition in Law, upon which Determination ſhe is dowable.

319. If a Man has Land by Deſcent on the Part of the Mother, and makes a Feoffment to his Father in Fee, upon Condition to be performed on the Part of him or his Heirs, and the Father dies, ſo that the Land deſcends to him in Fee, now the Condition is extinct, altho' he dies without Iſſue, becauſe altho' he had the Land on the Part of the Mother, yet the Condition, being a new Thing, goes to the Heirs on the Part of the Father, as in Caſe of a Feoffment of Land in Borough-Engliſh in Fee upon Condition, the eldeſt Son ſhall enter for the Condition broken, as the Heir Male ſhall do upon a Condition to the Female. And foraſmuch as the Condition in the firſt Caſe is now deſcendible to the Heirs on the Part of the Father, and they have not the Land by Deſcent, therefore this is an Extinguiſhment of the Condition. But on the other Hand, if Land deſcends to the Son from his Father, and he makes a Feoffment thereof to his Mother in Fee upon Condition, and the Mother dies, and afterwards the Son dies without Iſſue, the Heir on the Part of the Father ſhall perform the Condition, and the Heir on the Part of the Mother ſhall have

have the Land in the mean Time, as if a Man has a Seigniory on the Part of his Father, and a Tenancy on the Part of his Mother, and dies without Iſſue, the Seigniory ſhall go one Way, and the Tenancy another, and if the Condition had been broken in the Life of the Mother, it had been all one, *viz.* the Heir on the Part of the Father might have entered, for the Son is not remitted by the Deſcent. The Caſe was, that after ſuch Entry the Son granted a Rent-Charge, and died without Iſſue, if the Heir on the Part of the Father ſhould hold it diſcharged? And it ſeems that he ſhall, by *Catlin* Reader.

320. If Land be given for Life, upon Condition that if the Leſſee has no Iſſue during his Life, then it ſhall remain to J. S. in Fee, and he dies without Iſſue, the Remainder is void, for altho' the Remainder might commence upon Condition, yet the Condition ought to be performed in the Life of the Tenant for Life, and that it could not be here. But if the Condition was, that if he has Iſſue during his Life, that then it ſhould remain over, there the Remainder ſhould be good, if he has Iſſue, ſo there is a Diverſity. See 7 *H.* 4. 6. a Rent granted to one for the Life of A. Remainder to the right Heirs of A. this cannot be during the Life of A. and yet the Remainder was awarded good, becauſe it veſted at the ſame Inſtant when the firſt Eſtate was determined.

321. If Tenant in Tail is diſſeized, and releaſes to the Diſſeizor with Warranty, and afterwards is attainted of Felony, and has a Charter of Pardon, and dies, it ſeems that this is a Diſcontinuance, for if he had purchaſed the Land after his Pardon, it ſhould have deſcended to his Heir, which proves that the Blood between him and his Heir is not corrupted, as it is between him and his Anceſtor, and then inaſmuch as the Warranty was in *eſſe* at the Time of his Death, there is no Impediment to its deſcending. But if Tenant in Tail, who has a Warranty annexed to his Eſtate, be attainted of Felony, and executed, many think that his Iſſue ſhall not inherit the Voucher for the Warranty, altho' he has the Land, for the Warranty is out of the Statute *de donis conditionalibus*, which ſpeaks of Lands and Tenements given upon Condition; * but *Plowden* thinks otherwiſe, and that by the Equity of the Statute this is preſerved as well as † Charters, 21 *H.* 6. 2. *a. Per Markham. et* 9 *H.* 6. 60. *b. Cott.* as to Charters.

322. A Man makes a Feoffment to a Feme-Sole, with a Letter of Attorney to make Livery of Seizin, and afterwards the Feoffor intermarries with the Feoffee, and they are divorced, the Queſtion is, if the Attorney may make Livery; it is countermanded.

323. Tenant for Life with Remainder over in Fee makes a Gift in Tail, Remainder in Fee, he who had the firſt Remainder releaſes all his Right to the Donee in Tail, not ſaying *and to his Heirs*, and afterwards grants a Rent-Charge to a Stranger out of the Remainder in Fee, and dies, the Donee dies without Iſſue, the Heir of him in Remainder enters, if he ſhall hold it charged is the Queſtion, for if he be remitted to the ancient Right, then the Land is diſcharged againſt him. And ſome think that the Releaſe cannot give to the Releaſee the Right in Fee which the Releaſor had, for then in a Manner he might releaſe to himſelf; and if the Releaſe enures but as a Confirmation, then without Queſtion the Heir ſhall be remitted, and ſhall hold it diſcharged. But if the Remainder had been limited in Tail to him who had the firſt Remainder in Fee, Remainder over in Fee, then the Releaſe ſhould have enured to the firſt Eſtate-Tail, and to the Fee, and then if the laſt Fee be forfeited, the mean Remainder is eſtabliſhed, and ſo the Releaſe enures to himſelf. But as to the other Point which may be moved, *viz.* if the Remainder be good to him who had the Remainder before, ſeeing that it is out of him and in him all at one Inſtant, it is good enough without Queſtion.

324. If a Man leaſes two Acres for Years, rendring Rent, upon Condition performable by the Leſſee to have Fee in one Acre, not naming in which Acre, and he makes Livery in both, as he ought, and afterwards the Leſſee performs the Condition, the Queſtion is, what Rent the Leſſor ſhall have, for it is conſiderable whether it ſhall be apportioned, ſeeing that Part of the Reverſion, to which the Rent is united, is now in the Leſſee by an Act which hath Relation, ſo that it may now be ſaid that no Rent was ever reſerved for that Acre, but for the other Acre only, which ſeems to be of the ſame Effect as if the Gift had been of two Acres, the one in Fee, the other for Years, rendring Rent, in which Caſe the Rent ſhall be only of the one Acre, becauſe he may diſtrain of common Right, and out of the other Acre there is no Remedy but after Seizin. Alſo in the firſt Caſe if the Leſſor will diſtrain in the one Acre, the Leſſee may take his Election, and ſay that he has a Fee in it, and ſo exclude the Leſſor. But if the Leſſor had appointed the Acre in certain, then the Matter in Queſtion ſhould only have been upon the firſt Point.

325. If one diſſeizes another to the Uſe of J. S. and the Diſſeizee releaſes to the Diſſeizor, yet J. S. may agree to the Diſſeizin, for the Title is not taken away by the Releaſe, any more than a Condition ſhould be, or a Rent-Charge granted by him, or if he had covenanted to be ſeized to a Uſe executory upon Marriage, ſuch Uſe ſhould not have been taken away by the Releaſe. But if there had been two Diſſeizors to the Uſe of J. S. and the Diſſeizee had releaſed to one of them, this had taken away the whole Title to the Uſe, *cauſa patet*. So if Tenant for Life releaſes to his Diſſeizor, this does not reſtore the Reverſion, but if he releaſes to one of the Diſſeizors, it is otherwiſe.

326. The Son leaſes to the Father for Life, who leaſes to A. for Life, Remainder in Fee to the Son, the Son grants a Rent-Charge out of the Remainder, and then releaſes all his Right in the Land to A. and his Heirs, the Father and A. die, the Queſtion is, if his Iſſue ſhall hold it charged. Firſt, it ſeems clearly that the rightful Fee is diveſted, and the wrongful Fee veſted, in the Son all at one Inſtant. As if Tenant in Tail leaſes for Life, the Inheritance of the Tail is diveſted, and the Fee-Simple veſted, all at one Inſtant. So if the Huſband makes a Leaſe for Life of the Land of the Wife, the Fee, which the Huſband had in Right of his Wife, is diveſted, and the new Fee in himſelf in his own Right is veſted, at the ſame Time. So is it in the principal Caſe.

Then

* With the Opinion of *Plowden* here agrees Plowd. *Manxel's* Caſe 2 (a). Co. Litt. 20. a. 392. b. Sed Contra Ante § 185.

† S. P. Plowd. *Manxel's* Caſe 2 (c).

Then when the Rent was granted out of the Reverſion, it was all one as if it had been granted out of the Remainder, becauſe the Reverſion and Remainder are but one Thing in Subſtance, *viz. terra revertens*, and when the Son releaſed his Right to A. and his Heirs, this did not enure as an Entry and Feoffment, becauſe A. was in by Title without Diſſeizin, and then that did not give him the Remainder as if he had releaſed to him all his Eſtate in the Land, or as if he had releaſed all his Right, *habendum* the Land in Fee, for there the Fee paſſes, but here he had both a Right and Eſtate, and then a Releaſe of the Right ſhall not enure to the Eſtate. Further, ſome think that the Right in Fee could not merge in the Eſtate for Life, and in the Remainder it could not merge, for then he releaſed in Fact to himſelf. But if a Woman Diſſeizoreſs leaſes for Life, and afterwards marries with the Diſſeizee, who releaſes in Fee to the Tenant for Life, there it ſeems that the Fee merges *in auter droit*, for the Benefit of the Eſtate in Fee, in the Reverſion. Then, if the Releaſe does not perfect the Remainder, does the Grant of the Rent, which is an Aſſent of the Remainder, ſo inſeperably conjoin the Remainder, and the Rent, and the Right, that the Right ſhall be merged in the Eſtate for the Preſervation of the Rent? And it ſeems that it does not, for if the Diſſeizee takes an Eſtate in Fee from him who has the Land by Deſcent, he agrees to it, and yet if he dies ſeized, his Heir ſhall be remitted, and ſo the Rent-Charge avoided. But ſome think that inaſmuch as by the Grant of the Rent-Charge he has agreed to the Remainder, and ſo to the Livery, he can never enter upon the Tenant for Life, nor do any Wrong to him, and then the Releaſe gives the Remainder, and ſo the Land is charged.

327. If the Tenant holds of the Lord as of his Manor of *Dale* by Fealty and 20*s.* and the Lord leaſes the Manor for Years, rendering 40*s.* with Attornment, and afterwards the Leſſor releaſes all his Right to the Tenant, the Queſtion is, if the Rent of 40*s.* ſhall be apportioned. For firſt it ſeems that by the Releaſe the Tenant is diſcharged of 20*s.* as well againſt the Leſſee as againſt the Leſſor, becauſe now the Tenant holds of the Lord Paramount, *ergo* he does not hold of the Leſſee, for he cannot enter and hold one and the ſame Land of two ſeveral Lords. Alſo it ſeems that the Rent of 40*s.* was payable as well for the Services as for the Demeſns, altho' no Diſtreſs could be taken in the Demeſns for it, as in the Caſe of 12 *H.* 13. of Sheep. But the laſt Point is, inaſmuch as the 20*s.* are loſt not by Title paramount, but by an Act of late Time, and that by the Leſſor, if now it ſhall be apportioned or not? See the Caſe of the Dean of *Windſor* in an Action of Debt 21 *H.* 7. 6. *b.*

328. The Lord in Gavelkind has Iſſue two Sons, the Tenant aliens in Mortmain, the Lord dies, the eldeſt Son enters into both Parts, firſt, it ſeems that the Seigniory ſhall deſcend as the Tenancy, and alſo that the Title of Entry ſhall deſcend within the Year. But it ſeems that when the Land (admitting a Licenſe had been obtained) is aliened in Mortmain, now the Cuſtom is extinct, and the Land remains at the Common Law, and by the ſame Reaſon the Seigniory ſhall deſcend to the eldeſt Son; and it is not like as if the Alienation had been upon Condition, or as if the Corporation had been the Diſſeizors of it, for there upon the defeating of the Eſtate, the Cuſtom is revived, but here the Eſtate is not defeaſible, and therefore the Cuſtom is extinct. Further, it ſeems that the Livery here is not diſproved, for if the Alienees in Mortmain had had a Rent Charge before, and the Lord had entered, yet the Rent had been extinct, otherwiſe upon a Diſſeizin and Re-entry by the Diſſeizee. And if Tenant for Life aliens in Fee to the Grantee of Rent in Fee by his Leſſor, and the Leſſor enters for the Forfeiture, the Rent is revived, the Diverſity is apparent. And in the firſt Caſe the Lord claims under, which proves that in that Caſe the Alienation is affirmed, and then it had extinguiſhed the Cuſtom, and ſo made the eldeſt Son inheritable to the Seigniory.

329. If one Jointenant leaſes his Part for Years, and a Stranger enters, claiming the Moiety of the other, who waives the Poſſeſſion, it ſeems that this is a Diſſeizin to him, notwithſtanding that the Termor continues in, becauſe they were Tenants in common, and notwithſtanding that he in Reverſion, who had a joint Freehold with him, continues in Poſſeſſion thereof by Force of the Poſſeſſion of the Leſſee. But on the other Hand, if the Termor had waived the Poſſeſſion, and the other had continued in, it ſeems that he in Reverſion could not have been out of Poſſeſſion, becauſe his joint Companion held himſelf in.

330. If the Tenant vouches the eldeſt Son as Heir to the Warranty, and the youngeſt as Heir to Land in Borough-Engliſh, and the eldeſt vouches over, the Queſtion is, how the Recovery ſhall be againſt the Vouchee, *viz.* if the eldeſt or the youngeſt ſhall have the Recompence in Value. For the youngeſt loſes the Land, rendering in Value to the whole, and if the eldeſt ſhould have the Recompence, it would be very unreaſonable, becauſe he loſt nothing, * for by the Law the Tenant ſhall never ſue Execution in Value againſt the Vouchee, until the Demandant has ſued Execution againſt him, and here Execution was never ſued againſt the eldeſt, for he has not the Land by Deſcent, and the youngeſt has not the Warranty by Deſcent, altho' he has the Land, and therefore he cannot vouch by Reaſon of the Warranty, and then to ſay that he ſhall recover in Value by Reaſon of a Warranty to which he is not privy, and which he cannot deraign, would be very hard. *Quære* how the Recovery in Value ſhall be, and *quære* if an Action of Debt ſhall be maintenable againſt the Heir and his younger Brother in Borough-Engliſh, where the eldeſt has nothing by Deſcent, as it ſhall be againſt the Heir in Gavelkind: And it ſeems that it ſhall not, for in Gavelkind he may have a joint Judgment againſt all, and not againſt the eldeſt in the other Caſe, becauſe he has nothing whereof it may be levied, *quod Nota.*

* S. P. Plowd. *Manxel's* Caſe 11. Co. Litt. 376. b. 1 Co. 96. a. Pig on Recov. 31.

331. If a Donee in Tail to him and the Heirs Males of his Body, and for Default of ſuch Iſſue, to him and the Heirs Females of his Body, makes a Leaſe for Years, rendering Rent, and dies without Iſſue Male, and the Female accepts the Rent, ſhe ſhall be bound thereby, inaſmuch as the Leaſe was derived out of both the Eſtates, and ſhe came by Deſcent to the Eſtate, *&c.* But

if

if the Heir Male had made the Leaſe, and had died without Iſſue, the Heir Female could not have made it good by Acceptance.

332. If the one Acre is given to the eldeſt Daughter in Frank-Marriage, and the other in Fee deſcends to the other Daughter, *viz.* to the youngeſt, the Queſtion is, how ſhe ſhall deraign the Warranty for it, or if ſhe ſhall have Aid.

333. If the Tenant enfeoffs the Lord to the Uſe of J. S. or if the Lord of a Manor enfeoffs the Tenant of the Manor to the Uſe of J. S. in Fee, the Queſtion is, if the Seigniory remains. *Note* the Cauſe.

334. If a Man leaſes for 40 Years upon collateral Condition, and the Leſſee makes a Leaſe for 20 Years, and afterwards ſurrenders to the Leſſor, ſome think that the Condition is extinct for the Reſidue, becauſe he has Part of the Eſtate by his own Act, ſo that if he re-enters, he ſhall not be in the ſame Plight as he was before, inaſmuch as he ſhall not avoid the whole Eſtate. For if the Leſſee for 40 Years had granted a Rent-Charge, now for the 20 Years ſurrender'd, he ſhould never have avoided it. For if Feoffee upon Condition makes a Leaſe for Life, and afterwards the Feoffor releaſes the Condition to him in Reverſion, the Eſtate for Life is diſcharged of the Condition, and it ſeems to them to be all one, and that the Eſtate for Life is diſcharged, whether it be a Releaſe in Deed of the Condition, or a Releaſe in Law, *viz.* if he had had the Reverſion by Grant. As if the Iſſue in Tail, who has a Cauſe of *Formedon* upon a Diſcontinuance in Fee, accepts from the Diſcontinuee the Reverſion upon an Eſtate for Life made by the Diſcontinuee, now he ſhall not have a *Formedon*, for ſuch Action is to recover the Inheritance, and the Tenant for Life has not the Inheritance, but the Iſſue in Tail himſelf has it by his own Acceptance, and then inaſmuch as he cannot recover the whole Eſtate which was diſcontinued, his Action is gone. So ſhall it be of a Condition, if he cannot have the whole Eſtate again; but ſome put a Difference between a Condition and a Right, as to this Purpoſe. And *Note*, if the Feoffee in Fee upon Condition leaſes for Life, a Releaſe of the Condition to the Tenant for Life extends to the whole Condition againſt the Feoffee in Fee, as it ſhall do of a Right, or a Rent. And it ſeems clearly that if there be Feoffee of two Acres upon Condition, and the Feoffor releaſes the Condition in the one Acre, this being collateral, it ſhall remain in the other Acre, as it ſhall be in Caſe of a Warranty annexed to two Acres, which, tho' releaſed in the one, yet remains in the other, for the Condition is ſeveral for each Acre as the Right is, and therefore it ſhall remain in Part of the Land as the Right ſhall do, notwithſtanding the Releaſe. But if the Condition be made by two, or to two, there a Releaſe made by the one or to the one ſhall extinguiſh the whole Condition, as it ſhould a Warranty. But if one has two Acres, the one to him and Heirs Males, *&c.* the other to him and his Heirs Females, *&c.* and he leaſes them for Years, rendring Rent upon Condition, and dies, leaving a Son and a Daughter, there the Condition remains to the Son for the one Acre; and is extinguiſhed for the other Acre; and if the Leſſee for Years rendring Rent with Re-entry ſurrenders the one Acre, the Condition remains for the other Acre. *Nota.*

335. If A. leaſes for Years to B. to commence at *Michaelmas*, and before the Day he enfeoffs B. in Fee, and B. dies before the Day, and his Heir enters, the Queſtion is, if the Executor may enter upon the Heir.

336. Feoffee with Warranty is diſſeized by the Feoffor, who dies ſeized, the Feoffee ouſts the Iſſue, who brings a Writ of Right, and the Miſe is joined upon the mere Right, and the Demandant is bar'd, the Queſtion is, if the Feoffee, being impleaded by a Stranger, ſhall deraign the Warranty againſt the Iſſue.

337. There are two Jointenants for Life of two Acres, and the Land is confirmed to them in Fee to Uſe, *viz.* the one Acre to the Uſe of one, and the other Acre to the Uſe of another, in Fee, now it ſeems that they are ſeveral Tenants of the Freehold of the ſeveral Acres, for the Freehold is merged by the Confirmation in Fee to Uſe, and is become according to the Uſe, as if it had been before the Statute of 27 *H.* 8. for at that Time if Tenant for Life to his own Uſe had accepted a Confirmation in Fee to the Uſe of another, thereby he had the Freehold to the Uſe of the other, as a Condition or Rent annexed to the Reverſion charges the Freehold alſo, when the Freehold and Reverſion are conjoined by the Act of the Party.

338. If after the dying ſeized of the Diſſeizor the Diſſeizee abates, or diſſeizes the Heir of the Diſſeizor, againſt whom the Wife of the Diſſeizor brings a Writ of Dower, and recovers by Confeſſion, as ſhe ſhall do of Right in both Caſes, the Queſtion is, if the Diſſeizee may enter upon her, as he might if ſhe had recovered againſt the Heir of the Diſſeizor.

339. A. diſſeizes B. of 20 Acres in C. B. brings a Writ of Entry upon a Diſſeizin in 10 Acres, and recovers againſt A. and afterwards comes upon the Land, and enters into one Acre in the Name of all recovered, and thereof preſently enfeoffs D. who enters into the other 9 Acres, and for thoſe 9 Acres A brings an Aſſize, it ſeems to be maintenable, becauſe by the Entry of B. into one Acre, in the Name of all that were recovered, nothing was veſted in him but that Acre only, for it was not a Determination of his Election which 9 Acres he would have, becauſe it was not certain, and then nothing paſſed by the Feoffment but the one Acre only, for the Feoffee being a Stranger ſhall not make Election, which always goes in Privity.

340. A. leaſes for 20 Years to commence preſently, and afterwards leaſes for 40 Years to C. to commence after the End and Determination of the firſt Leaſe by whatever Manner, and then leaſes to the firſt Leſſee for 30 Years, it ſeems that the Leaſe of C. ſhall not commence preſently, becauſe there is nothing which extinguiſhes or avoids the Leaſe but only the taking of the ſecond Eſtate, and here the Leaſe of C. is an Impediment to the Commencement of the ſecond

Eſtate, becauſe his Leaſe is to commence before it, for which Reaſon it ſeems that the firſt Leaſe continues and is not determined.

341. [a] A Parſon leaſes for 20 Years to A. and the Patron and Ordinary confirm it for 10 Years, it ſeems that inaſmuch as it is one entire Thing, it cannot be confirmed in Part only, but the Confirmation ſhall go to the whole, as the Confirmation of the Diſſeizee to the Diſſeizor; *tamen quære*, for the Aſſent of the Patron cannot be reſembled to that.

[a] Vide et Nota *Foord*'s Caſe 5 Co. 81. which ſeems contrary to this Section, in the Latitude it is here laid down.

342. Tenant for Life leaſes for Life, Remainder to his Leſſor and a Stranger in Fee, are they Jointenants, or how ſhall it enure? It ſeems that the Stranger ſhall take the whole, for he cannot give a Fee in any Part to him who had the Fee before, [b] as if the Tenant in Tail enfeoffs the Donor, he does not give him the Fee, and then foraſmuch as the Leſſor ſhall take nothing, the other ſhall take the whole. As if one Jointenant enfeoffs his Companion and a Stranger, the Stranger ſhall take the whole. And if in the principal Caſe he had made a Leaſe *pur auter vie*, Remainder *ut ſupra*, there perhaps it would have enured jointly; but here the Limitation of the Fee made the Wrong, and it cannot be a Wrong where it was limited to him that had it before, and here it is for the Benefit of the Leſſor, if the other ſhould take the whole, for then his Action remains, yet if he brings his Action for the whole, it is a Diſagreement to the whole.

[b] Dy. 10. pl. 32. 12. pl. 54. Mich. 33 Geo. 2. B. R. *Hurſt v. the Earl of Winchelſea, Per Lord Mansfield* C. J. 9 Ed. 4. 24. b. *Per Littleton.* Fitz. Diſcontinuance 28. Bro. 24. Litt. § 625. Plowd. 560 (b).

343. Feoffee upon Condition, after the Condition broken, is diſſeized by two, and the Feoffor releaſes to one of them, *quære* how it ſhall enure, whether to purge the mean Diſſeizin, or to enure by Way of Entry and Feoffment for the whole, or otherwiſe.

344. A Legacy is bequeathed to J. S. and the Executor delivers it upon Condition, the Queſtion is, if it be good; it ſeems not.

345. Tenant in Tail of a Seigniory purchaſes the Tenancy, and thereof, before the Statute of *Quia emptores terrarum*, makes a Feoffment, rendering a new Rent, and dies, having Iſſue, it ſeems that the Iſſue ſhall not have Election to have the one Seigniory or the other, but muſt of Neceſſity have the latter Seigniory, for that ſuſpends the former. As if the Lord in Tail purchaſes the Meſnalty in Fee, the Iſſue of him in whom both are ſuſpended cannot diſtrain for the Rent of the Seigniory, and chuſe to have it by Deſcent, for the Meſnalty by Deſcent caſt upon him is not waivable, for, notwithſtanding any Act which he may do to waive it, yet the Freehold and the Fee remain in him before any other has it by Pernancy, but it ſeems that if any one takes it before the Iſſue does any Act to ſhew that he will diſſent to it, then he may diſtrain for the Seigniory, but not after. As if Tenant in Tail of a Seigniory purchaſes the Tenancy, and dies, the Iſſue may diſtrain, if any other enters into the Land before him, but if he enters, and then another ouſts him, he cannot afterwards diſtrain for the Seigniory. So in the other Caſe the Seigniory newly reſerved is as a Meſnalty, and therefore the Election of the Seigniory cannot be waived of that Meſnalty. But if the new Seigniory had deſcended to the eldeſt Son, and the Seigniory in Tail to the ſecond Son as Heir in Tail to his Father and Mother, there the eldeſt Son ſhould have been Meſne, and the youngeſt might have diſtrained; but if the ſecond Son was Tenant in Tail of the Seigniory, as aforeſaid, (and for Default of ſuch Iſſue begotten on the Body of the Huſband and Wife, the Remainder to the right Heirs of the Body of the Father) and afterwards the Father makes the new Seigniory, there the Seigniory in Tail is utterly extinct, and the Tenant is diſcharged of it for ever, *Cauſa patet*. And this is a good Caſe for Argument.

346. If Tenant in Tail of a Manor, to which a Villain is regardant, leaſes to the Villain for 21 Years, rendering Rent, according to the Statute of 32 *H.* 8. and dies within the Term, the Queſtion is, if the Iſſue being remitted to the Freehold of his Villain may enter into the Manor, and ouſt the Villain. And herein it is to be conſidered that if the Statute ſhall be intended to reach to the Eſtate demiſed, he ſhall not avoid it, but if there be any other Imperfection in any Reſpect or Title, then he well may.

347. If A. dies, having two Daughters, and the eldeſt gives Land to the youngeſt, and to the Heirs of the Body of the Father begotten, it ſeems that an Eſtate for Life only paſſes, becauſe the Donor is one of the Heirs, and it cannot be an Intail in her of her own making, and it cannot enure to the other, becauſe ſhe is not Heir, but half Heir only, and therefore foraſmuch as the Name is entire, ſhe cannot take the Eſtate; but if it had been given to the youngeſt Son, the eldeſt being born out of the Realm, ſuch Gift ſhould have gone to him.

348. The Iſſue in Tail within Age, having Cauſe of *Formedon*, accepts of the Diſcontinuee a Bargain and Sale by Deed inrolled, it ſeems that he ſhall not be remitted, as he ſhould upon a Feoffment, becauſe he is in by Reaſon of the Poſſeſſion conveyed to Uſe, which he ſhall have in the ſame Degree as he had the Uſe. So, it ſeems, if he be within Age at the Time of the Bargain and Sale, and the other dies, and afterwards the Deed is inrolled, he ſhall never be remitted.

349. The Debtee and another are made Executors to the Debtor, the Debtee recovers againſt the other, and afterwards adminiſters with the other who proved the Teſtament, and afterwards ſues Execution by *Scire facias*, if the other ſhall have an *Audita querela*, and if it ſhall be ſued in his Name only, or if the Property ſhall be altered in the Recoveror, or if the Execution be diſcharged, or how it ſhall enure? And it ſeems that nothing can ſtay the Execution, but by the Execution the Property ſhall not be changed, but he ſhall have it to the Uſe of the Teſtator.

350. [a] A. ſeized in Fee takes a Wife, and grants a Rent-Charge, and afterwards aliens, and takes back an Eſtate in Fee or in Tail, and dies ſeized, and his Wife recovers in Dower by Reddition,

[a] S. P. Co. Litt. 33. a.

dition, and afterwards ſhe ſurmiſes that the Huſband died ſeized, and prays a Writ to enquire of the Damages, as appears in 14 *H.* 8. 6. in a Writ of Dower, it ſeems that ſhe ſhall hold the the Land charged, for by her Prayer ſhe has admitted herſelf dowable of the ſecond Eſtate, becauſe of the firſt Eſtate preceding the Grant whereof ſhe was dowable her Huſband did not die ſeized, ſo that ſhe has eſtopped herſelf.

351. Land is given to a Man and a Feme-ſole, and to the Heirs of the Body of the Woman begotten by the Man, they intermarry, and have Iſſue, and afterwards the Huſband aliens the Moiety, and dies, and then the Iſſue dies without Iſſue, the Queſtion is, if the Wife may enter into the Moiety for a Forfeiture, or not, ſince ſhe could not enter at the Time of the Alienation, and alſo ſhe is now Tenant in Tail after Poſſibility, in which Caſe ſhe has but a Freehold in Remainder, as ſhe had before; but otherwiſe if her Eſtate had been in Tail in Remainder after the Eſtate, 45 *Aſſ. pl.* 6.

352. If the Son be Tenant in Tail, Remainder to the Father in Fee, and the Father is bound in a Statute-merchant, and dies, ſo that the Remainder deſcends upon the Son, and he aliens in Fee, or ſuffers a common Recovery, the Land ſhall be bound to Execution preſently. As if the Lord recovers in a *Ceſſavit* againſt ſuch Tenant in Tail, the Remainder over being charged, the Lord ſhall hold it charged preſently to the Execution of a Statute acknowledged by him in Remainder, as it ſhall be to the Grant of a Rent by him, although it was not liable as a Remainder.

353. The Caſe between * *Auſtin* and *Baker* had this Point, viz. ‡ Tenant in Tail leaſed for 36 Years, and died, the King, being Donor, had reſerved Chivalry, and this was found by Office, and that the Heir was of full Age, whereby he ſued Livery, and afterwards the Heir accepted the Rent, and the Queſtion was, if the Leaſe was avoided, or not, ſo that the Acceptance of the Rent ſhould not bind the Iſſue. And it was ſaid not, becauſe the *Primer-Seizin* of the King ſhall not take away the Election of the Iſſue, who perhaps had more Benefit by the Rent than by the Land, which might be greater, in which Caſe the Leſſee could not waive the Land after the Land deſcended to the Iſſue. And if Tenant in Tail takes a Wife, and afterwards makes a Leaſe *ut ſupra*, and the Wife is endowed of the third Part, now ſhe ſhall avoid the Leaſe for her Time, but if ſhe dies during the Term, the Leſſee ſhall have the Term againſt the Heir, if the Leſſee enters, and pays the Rent to the Iſſue, and he accepts it. And if Tenant in Tail leaſes for Years, and afterwards takes a Wife, and dies without Iſſue, and the Donor enters, now the Leaſe is avoided, but if the Wife recovers in Dower, the Leſſee ſhall re-enter, and retain the third Part againſt the Wife being Tenant in Dower, for ſince ſhe claims the Eſtate as upon the Continuance of the Tail, ſhe ſhall not be received to ſay againſt the Leſſee that the Tail is determined, becauſe her Dower maintains Parcel of the Eſtate-Tail, and her Dower is younger than the Leaſe, and therefore the Leaſe ſhall be preferred. But if the Patron grants the next Avoidance, and afterwards he and the Parſon and Ordinary make a Leaſe for Years, and the Incumbent dies, he who comes in by the Grantee ſhall avoid the Leaſe, and it ſhall not be good againſt the third Incumbent, becauſe the whole Inheritance in the Thing is void by the Entry of the ſecond Incumbent; ſo that this is like the Caſe in 17 *Ed.* 3. 52. where the Huſband entered into the Land whereof the Wife levied a Fine as a Feme-ſole, and there the whole Inheritance was revoked, ſo here, although the King ſhall avoid it, it is not determined againſt the Heir. Another Point in the ſaid Caſe of *Auſtin* and *Baker* was this, viz. * if the King ſhall avoid it, where the Iſſue in Tail who accepts the Rent is attainted of Treaſon. And this was reſembled to the Caſe where the Iſſue levies a Fine with Proclamations to the King, thereby the Iſſues are barred, but the King ſhall be in as a Purchaſer, and not as in his Reverter. For if the Grandfather is Tenant in Tail, and the Father is attainted of Treaſon, and executed, the Son ſhall inherit the Tail as Heir to the Grandfather, and the Iſſues are not diſabled as if the Father had been a Baſtard. And it was ſaid that if the Tenant in Tail had entered into Religion, the King ſhould not have avoided the Leaſe before made, although it is now become as a Reverter, if he who enters has not Iſſue. But as to this Point, *Note* that the Caſe was ruled for the King, and againſt the Leſſee, as appears in † *Walſingham*'s Caſe.

* S. C. Dy. 115. pl. 65. Plowd. 560.

‡ S. P. Co. Litt. 46. a.

* Vide Plowd. 560.

† Plowd. *ubi ſupra.*

354. Tenant for Life leaſes for Years, upon Condition to have the Land for the Life of the Tenant for Life, the Leſſee dies, his Executors perform the Condition, yet the Freehold ſhall not accrue to them, for when the Leſſee for Years died, the Condition was gone, for the Executors are not able to perform a Condition to encreaſe a Freehold, as they may a Condition to encreaſe a Term, becauſe the one is teſtamentary, and the other not, and therefore the Executors are privy to the one, and not to the other.

355. Tenant for Life of a Seigniory purchaſes the Tenancy *pur auter vie*, if the Lord releaſes to him and his Heirs all his Right in the Tenancy, this ſeems to enure by Way of Extinguiſhment, but if he releaſes to him and his Heirs all his Right in the Seigniory, this ſhall enure as an Enlargement of the Seigniory. So if the Meſne being a Woman intermarries with the Tenant, and the Lord releaſes to the Wife and her Heirs all his Right in the Seigniory, this ſhall enure as an Extinguiſhment of the Seigniory only, and not of the Meſnalty; but if he had releaſed to the Huſband all the Right which he had in the Seigniory, or in the Tenancy, both the Meſnalty and Seigniory had been extinct; but a Releaſe to the Wife of all his Right in the Tenancy had been void; but if the Lord had releaſed to the Huſband and Wife all his Right in the Seigniory, *quære* thereof, and it ſeems that it would have extinguiſhed only the Seigniory, and not the Meſnalty.

356. If the Lord brings an Aſſize of the Seigniory againſt the Diſſeizor of the Tenancy, as againſt a Deforceor, as before, and pending the ſame the Diſſeizee enters, &c.

357. Tenant in Tail, Remainder to his right Heirs, leaſes to the Iſſue within Age; upon Condition to have Fee, and at full Age during the Term he performs the Condition, and afterwards grants a Rent-Charge, and the Grantee is ſeized and diſſeized, and brings an Aſſize, and pending the ſame the Tenant in Tail dies, it ſeems that the Aſſize, which was well purchaſed, is now abated by the Remitter, although the Performance of the Condition was at full Age, becauſe the Contract, which was the Ground of the Matter, was during the Minority. As if an Infant delivers a Deed as an Eſcrow to be delivered as his Deed when he comes to his full Age, and receives the Money of the Party to whom, &c. yet he ſhall avoid the Deed. And Debt by Executors ſhall be in the *Detinet* only; although it be for Arrearages after the Death of the Teſtator; ſo ſhall it be againſt Auditors aſſigned to Executors for an Account due to the Teſtator. The other Matter in the principal Caſe is, that inaſmuch as he himſelf has charged the Reverſion, and ſo has agreed to the Livery upon the Diſcontinuance of the Tail, yet it ſeems that he ſhall avoid the Charge, as well as in the Caſe where he himſelf, upon a Purchaſe during the Minority, takes the Iſſues at full Age in the Life of the Father, which is an Agreement in Law to the firſt Livery.

358. [a] A Rent is granted in Fee out of Land upon Condition to ceaſe during the Nonage of every Heir within Age, the Grantee dies, his Heir within Age, it is adjudged in 24 *Ed.* 3. and 5 *Ed.* 2. *Fitz. Dower* 143. that the Wife of the Grantee ſhall recover Dower, but Execution ſhall be ſtayed; and ſee the Caſes of 12 *Ed.* 3. and 22 *Ed.* 3. *Fitz. Condition* 11, 12. But *Note*, in all the Books the Writ of Dower was brought againſt the Tenant of the Land, and therefore it ſeems that if ſhe recovers againſt the Heir within Age, and the Heir afterwards dies without Heir, the Tenant of the Land ſhall falſify the Recovery, becauſe it is not duly recovered. Alſo from hence it ſeems that the Wife of the Heir who dies within Age ſhall not have Dower, any more than the Wife of a Grantee of Rent to commence *Anno domini* 1560. ſhall, where the Grantee dies before the Day, and yet his Heir ſhall inherit after the Day. So if the Condition is, that, during the Eſpowſals of every Heir, the Rent ſhall ceaſe, there no Wife ſhall be endowed, and the Reaſon is, becauſe the levying of the Rent is not ſuſpended, but the Fee is ſuſpended during that Time, for if it was not, the Wife in the firſt Caſe ſhould have Dower againſt the Heir, and not againſt the Tenant of the Land, but the Fee ſhall ceaſe during the Time. As if a Man makes a Feoffment upon Condition that, if the Rent be behind, he ſhall enter and retain the Land, there no Wife of the Feoffee taken after ſuch Retainer ſhall ever have Dower, becauſe the Fee is defeated for the Time, and the Land deſcends to the Heir of the Feoffor, and his Executors ſhall not have it; *Quære* if the Rent be not gone, and note the Caſe of 30 *Ed.* 3. 7. where Debt upon ſuch Retainer lies againſt Leſſee for Life, which proves, *ut ſupra*, and there if he dies, the Land ſhall deſcend to his Heir, and an Occupant ſhall not have it. Notwithſtanding all this, the Wife in the firſt Caſe ſhall be endowed, for the Condition determines the Rent, as if the Grantee had died without Heir, and it is not as if the Condition had taken it away with Relation, for there is no Relation here, *quod nota*, for it is a fine Point. And it is put in the Caſes before, that if the Grantee grants over his Rent, and the Tenant attorns, the Rent ſhall not ceaſe during the Minority of the Aſſignee, and it is the Folly of the Tenant that he would attorn.

[a] S. P. Plowd. 156 (a). Ante § 29. And ſee the Books there cited in the Margin.

359. If a Recovery is had againſt Tenant for Life upon a falſe Oath, and he in Reverſion dies without Heir, and then the Tenant for Life brings Attaint, and reverſes the Oath and the Judgment, the Queſtion is, to whom the Reverſion is recovered.

360. If the *Mulier* Daughter and Baſtard Daughter make Partition, and the Baſtard dies ſeized without Iſſue, the Lord ſhall have no Eſcheat, for if the Lord would ſay that, becauſe ſhe was a Baſtard, he ſhall have the Eſcheat, the *Mulier* ſhould ſay againſt him that ſhe herſelf is a *Mulier*, and therefore entire Tenant in Law; and if the Lord would ſay that they made Partition, whereby the *Mulier* had admitted her to be inheritable, and ſo would take benefit of the Concluſion, then the *Mulier* ſhould ſay again, "'tis true I admitted her to be my Siſter, and "conſequently ſhe did not die without Heir, for I, being her Siſter, ſhall be her Heir," and ſo the Lord is clearly eſtopped every Way.

361. [b] A Man leaſes for Years, Remainder in Fee, and makes Livery to the Leſſee within the View, this Livery is not good to him in Remainder, becauſe it ſhall never ſerve but for him who takes it. [c] And if there are two Leſſees for Years, Remainder over in Fee, and Livery is made to the one only, many think that this is not good to the Remainder over in Fee. [d] So if it is made to one Attorney, where there are two jointly. And if a Leaſe be made to A. and B. upon Condition that, if A. does ſuch an Act, he ſhall have Fee, and Livery is made to B. only, this will not enlarge the Eſtate of A. for he that took the Livery has no Privity with the other, as to that.

[b] S. P. Co. Litt. 49. b.

[c] Contra Co. Litt. 49. b. ſays that if it is made to the one Leſſee in the Name of both, it ſhall be good to veſt the Remainder; and it differs from the Caſe of two joint Attornies to receive Livery for another, and Livery is made to one of them only.

[d] S. P. Co. Litt. 49. b.

362. A. being ſeized of Rent in Fee grants it to B. for 20 Years from the Time of the Attornment, and dies, and afterwards the Tenant attorns, the Queſtion is, if it is a good Grant.

363. A Man deviſes certain Rent out of the Manor of *Dale* to his Wife for Life, in Conſideration that ſhe ſhall have no Jointure, and dies, and the Wife recovers by Default in Dower the third Part of the Land, ſhe ſhall have the entire Rent out of the two Parts, becauſe the Recovery is upon good Title, for a Deviſe cannot be averred to be for a Jointure within the Statute of 27 *H.* 8. becauſe at that Time neither Land nor Rent were deviſeable, and foraſmuch as ſhe was diſcovert when the Deviſe took Effect, therefore it is out of the Words and Equity of the Act,

Act, *cauſa qua ſupra*, and then ſeeing that the Title to the Land has a Relation higher than the Title to the Rent, the whole Rent ſhall remain.

364. If two Jointenants make a Feoffment, with a Letter of Attorney to make Livery, and one of them makes a Feoffment and Livery in Perſon, it ſeems that this is a Countermand of the entire Livery, becauſe the Letter of Attorney was not ſeveral for each of them, but joint for them both, and therefore being countermanded by the one it ſhall be void as to the other.

365. A. deviſes Land to one for Life, Remainder to him who ſhall be his firſt Son, Remainder in Fee, and dies, and the Tenant for Life aliens in Fee, if he in Remainder in Fee may enter for the Forfeiture, becauſe the mean Remainder ſeems clearly to be good.

366. The Donor diſſeizes the Tenant in Tail, and dies, the Tenant in Tail and the Heir who is in by Deſcent leaſe to the Iſſue within Age for Life, Remainder in Fee, the Tenant in Tail dies, although the Iſſue is remitted, yet it ſeems that the Remainder in Fee ſhall be good, becauſe Livery was once made, and the Remitter came ſubſequent to it. As if the Leſſor diſſeizes his Tenant for Life, and leaſes to a Stranger for the Life of the Diſſeizee, Remainder in Fee, and the Diſſeizee enters, yet he to whom the Fee was limited ſhall hold it, but in both Caſes it is a Reverſion, and no Remainder, *Quære* the firſt Caſe.

367. There are two Jointenants in Fee of a Rent-Charge, a Stranger takes it to the Uſe of J. S. one of them releaſes to the Pernor, and the other releaſes to the Tenant, now if by the laſt Releaſe he ſhall be deemed in Poſſeſſion *ab initio*, then the firſt Releaſe to the Pernor is void, becauſe the Poſſeſſion of one is the Poſſeſſion of both, and many think that here ſhall be an Election afterwards, as if he had granted his Part to a Stranger. And ſo if two Diſſeizors grant a Rent-Charge, and the Diſſeizee releaſes to one of them, he ſhall hold the whole diſcharged, for, as to the Grant of the other, by this Releaſe it is diſcharged, and the Grant being but one ſhall be void in all or good in all, and then the Pernor ſhall hold it ſubject to the Agreement of J. S.

368. Grandfather, Father, and Son Jointenants, the Grandfather grants a Rent-Charge in Fee to the Father upon Condition, who grants it to the Son and his Wife, the Grandfather releaſes to the Father and Son, and the Son dies, the Condition is broken, and the Grandfather claims the Rent, it ſeems that the Wife ſhall hold it diſcharged of the Condition, if the Poſſeſſion of the Son (her Huſband) ſhall be an Attornment in Law; but it ſeems that it ſhall not, for his Attornment alone without the Attornment of the Father, who was a Jointenant, is not ſufficient, becauſe both ought to attorn: But if the Grandfather ſhould have the Rent again for the Breach of the Condition, then he ſhould be in of his own Grant, and ſhould be both Grantor and Grantee. But if the Father had died in the Life of the Son, it ſeems that it would have been a good Attornment in Law.

369. A Man has three Daughters, viz. two by one Venter, and the third by another Venter, the youngeſt, being ſeized of three Acres, each of equal Value, grants a Rent of 3*s.* to the Father in Fee, and afterwards enfeoffs the ſecond Daughter of one Acre, who dies without Iſſue, ſo that it deſcends to the eldeſt, and afterwards the Father dies, now the eldeſt ſhall have the Rent, but if the ſecond Daughter had enfeoffed the eldeſt of the Acre, then ſhe ſhould have had nothing; for in the firſt Caſe ſhe has the Land by Deſcent and the Rent alſo, in which Caſe by the Deſcent of the Land the Rent ſhall be apportioned, but in the other Caſe ſhe has the Land by Purchaſe, in which Caſe the Rent-Charge ſhall be extinct, whether ſhe has the Rent by Deſcent, or not, and whether the Purchaſe was before the Deſcent, or after. And if a Man has a Rent-Charge of 20*s.* out of 20 Acres, each of equal Value, and one of the Acres deſcends to his Wife, it ſeems that the whole Rent is ſuſpended, for it cannot be apportioned when he is ſeized of Part of the Land *in auter droit*, but if ſhe dies, and he is Tenant by the Curteſy, it ſhall be apportioned, becauſe the Land continues in him by the Act of the Law, which is equal to a Deſcent. And if the Rent be in Tail, and Part of the Land deſcends to him in Fee, or if the Rent be in Fee, and Part of the Land deſcends to him in Tail, there ſhall be no Apportionment.

370. If Land be given to four, *habendum* the one Moiety to the firſt two in Fee, and the other Moiety to the ſecond two in Fee, with a Letter of Attorney to make Livery to the firſt, to make Livery to the other according to the Form of the Deed, who makes Livery to the other, if the Livery be good to receive it thereby, then it ſeems that they ſhall be Jointenants of the Freehold, and the one ſhall have the Moiety, viz. the fourth Part of the whole, in Jointure with the one, and the other the fourth Part with the other. But if he ſays, *habendum* the third Part to each, they ſhall be Tenants in common of the Freehold, becauſe there each has the whole Inheritance, as he hath in the Poſſeſſion. And this is like the Caſe in *Littleton*, and as if a Man leaſes to four, *habendum* the one Moiety to the firſt two, and the other Moiety to the other two in Fee, there the firſt two are Tenants in common with the other two, and yet between themſelves they are not Tenants in common, and ſo are the laſt two: As if two Tenants in common die, leaving each two Daughters, the Siſters. as to themſelves, are Parceners of the Moieties, but they are Tenants in common of the Entirety. And in the laſt Caſe but one two *Præcipes quod reddat* ſhall be ſued againſt the four, and for the four, but for the two, a joint *Præcipe* ſhall be ſued againſt them and for them. And if the Father has Iſſue two Daughters his Heirs, and leaſes Land to them two for their Lives, and dies, ſo that the Reverſion deſcends to them, and one of them dies, the other ſhall not have the whole by Survivorſhip, becauſe the joint Inheritance merged the joint Freehold, but in theſe Caſes each has his

Part, that is, the Inheritance is equal to his Part of the Freehold; but in the firſt Caſe the joint Gift gives to each the third Part of the whole, and when he limits the Moiety to the firſt two, the firſt of that Moiety has but the fourth Part of the whole, which is leſs than the Part limited before the *habendum*, and therefore it cannot, for the Repugnancy, take away the Jointure of the Freehold, but the Inheritance is ſeveral, viz. the one Moiety is in Jointure to the firſt two, and the other to the other two, ſo that if the firſt dies, the others are in Jointure of the entire Freehold, the Moiety being to the one, and the other to him and the other in Fee not executed, and if the ſecond dies firſt, the other two ſhall be Tenants in common of the Fee and Freehold, for their ſeveral Fees in common merge the joint Freehold, as if it had been firſt ſo appointed, as in Caſe of a Deſcent to two Tenants in common of the Freehold, they are entire Parceners of the Poſſeſſion. *Quære tamen*, for *Littleton* * ſays that if Land is given to two, and to their Heirs of their two Bodies, they are Jointenants of the Freehold, and have ſeveral Inheritances.

* See Litt. § 283.

371. [a] If a Man leaſes a Houſe for Years to an Alien, upon Condition to have Fee, and afterwards he is made a Denizen, and has a Licenſe to purchaſe, and then performs the Condition, it ſeems that the King ſhall not have the Fee, becauſe it has not Relation, as to the deveſting of the Fee, further than the Performance of the Condition, although for avoiding of Charges and Incumbrances it has a higher Retroſpect. For if the Land is held of the King, and the Party has no Licenſe in ſuch Caſe, and between the Leaſe and the Performance of the Condition he has a Pardon for Alienation, yet he ſhall pay a Fine. [b] And if, in the mean Time between the Grant of a Reverſion to an Alien and Attornment, he is made a Denizen, the King ſhall not have the Land. And if an Alien Diſſeizor be made a Denizen, the King ſhall not have the Land, if the Diſſeizee afterwards releaſes to him; but if the Alien be the Feoffee of the Diſſeizor, it ſhall be otherwiſe, the Reaſon whereof is, it is a new Purchaſe in the one Caſe, and but an Extinguiſhment of a Right in the other. And it ſeems that the Iſſue of ſuch Alien, born within the Realm, ſhall be in Ward, during the Life of the Alien, for Land deſcended to him on the Part of his Mother, if he be not Heir apparent. And a Man born in *England* cannot make himſelf Heir in ſpecial Tail to a Huſband and Wife, whereof the one is an Alien, nor ſhall he have an Appeal of the Death of ſuch Father or Mother Alien. But if a Man deviſes Land to an Alien, and he is made a Denizen, and afterwards the Deviſor dies, there he ſhall take it clearly, for the whole takes Effect after the Death of the Deviſor. But in the principal Caſe, if upon Office finding the whole Matter, the Leaſe ſhould be adjudged in the King from the Beginning by Relation, the Condition would be taken away, and then he could not acquire a Fee by his Performance of it. [c] But many think that an Alien has Capacity to purchaſe a Leaſe for Years of a Houſe for the Neceſſity of Habitation, but not a Leaſe for Years of Land, nor the Freehold of a Houſe. [d] And if a Man being ſeized in Fee takes an Alien to Wife, and afterwards makes a Feoffment, and then ſhe is made a Denizen, and after that the Huſband dies, ſhe ſhall never have any Dower.

a With this Opinion agrees Plowd. 482, by the Reporter. 2 Leon. 139 *Per Drew*, arguendo.

b Contra Ante § 185.

c Co. Litt. 2. b.

d Co. Litt. 33. 2. Ante § 204.

372. If A. grants a Rent-ſeck to B. and afterwards grants to him by Deed that he may diſtrain in the ſame Land, and then B. brings a Writ of Annuity, the Queſtion is, if he may afterwards diſtrain for it. And herein it is to be ſeen whether it be one Rent, or two Rents.

373. The King is ſeized of a Manor, A. intrudes into an Acre Parcel of it, and builds a Houſe, the King alienes the Manor, A. continues, and dies ſeized, the Queſtion is, what Remedy the Alienee has. It ſeems that by the Intruſion and Building A. has not gained any [e] Eſtate or Poſſeſſion, for he is not able to have an [f] Action of Treſpaſs againſt a Stranger, [g] and an Intruſion does not lie with Continuance, *ex quo ſequitur* that the Continuance after the Patent ſealed and delivered gained an Eſtate in Fee, and conſequently a Deſcent to the Heir, and the Patentee cannot have a *Scire facias* upon the Patent, nor a Writ of Right, nor any other Action, inaſmuch as he had not Eſplees nor Poſſeſſion, ſo that peradventure it will be a Title, in which Caſe the Deſcent ſhall not take away his Entry; as if Land be deviſed to J. S. and a Stranger abates, and dies, the Deviſee may enter, becauſe he has no Action.

e Plowd. 546 (d).

f Plowd. 546 (a), Hardr. 422.

g Plowd. 546 (e). 1 Finch 241.

374. If a Biſhop makes a Grant in Fee to the King by Deed, which is confirmed by Dean and Chapter, and the Deed of the Biſhop is inrolled, and the other not, it ſeems that it ſhall bind the Succeſſor, for the Aſſent is to the Deed of the Biſhop, not as a Confirmation, as an Abbot may make Livery, where it is the Deed of the Abbot and Convent, ſo in this Caſe of the Aſſent, the Biſhop may deliver the Deed of him and the Dean and Chapter.

375. A. leaſes for 40 Years, provided that if J. S. dies within the Term, then the Term ſhall only be for 20 Years, J. S. dies at the End of 24 Years, the Leſſor brings a Writ of Waſt in the *tenuit* for Waſt done between the 22d and 23d Years, it ſeems to be maintainable, becauſe he was Leſſee for Years at the Time of the Waſt done, for the Leaſe not being determined until the Death of J. S. in the mean Time it is a Term. And ſome think that if a Rent be granted for 40 Years with ſuch Condition *ut ſupra*, and he dies *ut ſupra*, the Tenant of the Land may have a Writ of Account for the Rent received after the 20 Years, for now upon the Matter the Grant ended after 20 Years.

376. If a Man commits Felony, and the Lord grants his Seigniory, and afterwards the Man makes a Feoffment upon Condition, and is attainted, and has a Charter of Pardon, and then re-enters for the Condition broken, and dies, the Queſtion is, if the Occupant, or the Iſſue, or the Lord, ſhall have the Land.

F I N I S.

A

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Dedit Deus his quoque finem.

ERRATA.

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18. Line 28. after *usual* add *in*, and dele *past*.
29. at Catch-word, for *continues* r. *construes*.
36. in the Margin at Letter (h) for 168. r. 178.
55. l. 66. for J. M. r. J. S.
56. l. 56. after *should* add *hold*.
79. l. 29. dele *it*.
88. l. 62. for *no* r. *any*.
91. l. 33. dele *not*.
94. l. 14, 15, 36. for *Tenants* r. *Tenements*.
96. l. 19. for *Propriety* r. *Property*.
103. l. 33. for *a* r. *the*.
108. l. 37. after *was* add *not*.

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121. l. 56. for 8. r. 6.
122. l. 10. dele *not*.
126. l. 1. for *as* r. *is*.
ibid. in the Margin at Letter (g), for *Escheat* r. *Escuage*.
167. in the Margin at the Head of the Case, l. 19. for *Letter* r. *Equity*.
176. l. 30. dele *but*.
203. l. 23. for *this* r. *it*.
239. l. 16. for *Feoffee* r. *Feoffor*.
278. l. 63. after *is* add *not*.
524. l. 49. for *are* r. *in*.
528. l. 20. for *Induction* r. *Institution*.

FH
MVSEVM
BRITANNICVM